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BANGALORE · INDIA

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INTELLECTUALIS

Toils & Turmoil: Where IP, Media and
Entertainment Converge



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EDITORS' NOTE

Dear Readers,

We proudly present Volume 3, Edition 2 of *Intellectualis* with the theme of 'Toils & Turmoil: Where IP, Media & Entertainment Converge'. This issue aims to enumerate as well as analyze the intersection of the dynamic field of Intellectual Property with the Media and Entertainment Sectors.

The pandemic has boosted the demand for outputs of the aforementioned sectors, wherein consumption of entertainment has seen a sharp rise. The issue however has broadened its scope from not just a point of view affected by the pandemic but also a more holistic intersection of diverse fields. The current volume of the e-newsletter has been opened university-wide in order to gather inputs which would add new dimensions to the themes chosen for each issue. The newsletter has also incorporated elemental changes in its design as well as structure, with the introduction of a feature piece garnering pragmatic knowledge from the practitioners in the field. In the current issue, our eminent guest was Mr. Sanjeeth Hegde, Senior Partner, Banana IP Counsels who completed his Juris Doctorate & Masters in IP, Commerce & Technology from the Franklin Pierce Law Centre, University of New Hampshire.

We hope that you take the time to read what our e-newsletter has to offer. We would like to extend our gratitude to the student body of School of Law, CHRIST (Deemed to be University) for their overwhelming response to the newsletter. We would also like to thank our Chairpersons, Dr. Avishek Chakraborty and Dr. Aradhana Satish Nair for constantly supporting us and guiding us through the drafting of this newsletter.

We hope you enjoy reading this Edition!

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FACULTY CONVENER

Dr. Aradhana Satish Nair & Dr. Avishek Chakraborty

WEBINAR ON CREATION & COMMERCIALIZATION: PROTECTION OF IP ASSETS

Report by *Nidhi Rachel Kurian & Sanjana Rebecca*

The Intellectual Property Rights Committee commenced its Guest Lecture series with an online Webinar on the Creation and Commercialization: Protection of IP assets on 17th October from 2:30 to 4:30, attended by a total of 397 students. The speaker for the same was Mr. Sanjeeth Hegde, one of the most distinguished IP lawyers of the country.

Mr. Sanjeeth Hegde who graduated with a Juris Doctorate from the University of New Hampshire School of Law in 2004 went on to also secure a Masters in Intellectual Property, Commerce and Technology from the same institute. Currently, he is a senior partner at BananaIP Counsels, one of India's leading IP consultancies, leading the Trademarks/Copyrights, Media & Entertainment and IP Licensing and Transactions practices of the firm. He is also the creator of "Hegde Simplifies", a popular online IP and legal education initiative, helpful to students and professionals alike. His research areas include changing the legal landscape in digital media and effective methods for IP portfolio creation and management in the entertainment industry.

BUSINESS & INNOVATION

IPRC

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INTELLECTUAL PROPERTY RIGHTS COMMITTEE
2020-2021

GUEST LECTURE SERIES
SESSION-1

Creation & Commercialization:
Protection of IP assets

 **Mr. Sanjeeth Hegde**
Senior Partner at BananaIP (BIP)
Counsels and specializes in IP strategy,
licensing, and entertainment law

17th October, 2020
Saturday
2:30pm-4:30pm IST

Student Convenors:
Anjita Malik
Maria Grisha Borges

The Management:
Dr. Fr. Benny Thomas, Director
Dr. Jayadevan S Nair, Dean
Dr. Sapna S, HOD

Faculty Coordinators:
Dr. Aradhana Satish Nair
Dr. Avishek Chakraborty

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The speaker explained how businesses are the epicenter of innovation as Peter Drucker rightly says, the purpose of businesses is to create customers and hence they have only two functions- marketing and innovation. Neither the Business nor its IP assets are in isolation of each other, they go hand in hand. Approximately 60 years ago the longevity of the largest companies in the market was about 68 years but now with the rapid changes in technology, it has been reduced to 18 years leaving companies with the choice of innovating or moving out. Mr. Hegde illustrated this by showing

us a list of top IP applicants consisting of fortune 500 companies like Apple, Alphabet, Samsung, etc. at the top. It was highlighted that these companies invest a significant amount of their profits in research and development to keep innovating and remain at the forefront. However, a lack of Indian companies can be attributed to the work that is underway in terms of technological transfers, FDI and more innovation-oriented business. This creates a hierarchy in terms of innovation and a consumer base with the United States in the lead followed by countries like Japan and China. However, Mr. Hegde opined that China's political war with India and other countries may prove advantageous for India as it gives Indian businesses a chance to thrive in the domestic as well as global market, thanks to nationalism.

STRATEGIZING YOUR IP PORTFOLIO

The Speaker highlighted that identifying and creating an IP inventory is useful for companies to gain competitive advantage, significant market share and a large consumer base. Consumer loyalty to the brand can be increased by bringing out constant innovations that give them value for their money and an IP right protecting that innovation would give the owner of the asset an advantage by preventing similar brands entering the market. IP

assets can be used in different ways like selling them, licensing them and transferring them. Using the example of Qualcomm, the speaker explained how licensing out their innovations can also prove as a good IP strategy. Qualcomm being a manufacturer dealing in microchips that make up the hardware for a lot of devices, it licenses its designs to manufacturers of electronic items, gaining royalty every time a device using their microchips is used.

Mr. Hegde also highlighted the importance of competitive intelligence and undertaking a landscape analysis of IP portfolios to ensure that

“Approximately 60 years ago the longevity of the largest companies in the market was about 68 years but now with the rapid changes in technology, it has been reduced to 18 years leaving companies with the choice of innovating or moving out.”

companies are not treading into domains that are not dominated by their competitors for example a patent search.

INFLUENCE OF IP & VALUATION

The influence of IP on enterprises are divided into 3 categories- dedicated R& D, Product Development and Technology Status Quo. Companies in a lot of various industries, primarily the automobile or IT industry, invest their profits to engage in research and innovation which would ultimately build their IP portfolios. Often these companies do not use all of their research and patents rather they keep patent fillers. Enterprises in the product development categories continually invest in the efficient development of their products for bigger market

share. Other companies invest in continually developing their products or methods to obtain a better market share and yet others can stay with old models and technology and still find consumers. Mr. Hegde concluded the presentation by illustrating the different methods, namely income method, cost method and market method for determining the valuation of a company.

Q&A SESSION

Q. The Copyright (Amendment) Rules 2019 had the motive of ensuring that copyright law can address the rapid technological advances taking place in the digital age. Do you think the Rules achieve this objective, keeping in mind problems such as licensing issues of online streaming platforms?

A. Mr. Hegde started his answer by highlighting the recent Bombay HC judgement which held that online streaming platforms cannot be characterized as broadcasting organizations.

According to him, the streaming platforms had gotten together as a collective and decided to self-regulate to minimize government intervention. Netflix and other streaming platforms to some degree have reached some consensus on the content that is being streamed especially regarding explicit content. The speaker also pointed out that it would be unlikely for the government to intervene in the next few years and come up with

regulations or restrictions that might drastically change the current system.

Q. What would be your advice to entrepreneurs in this session as not much is known to them about the commercialization of IP assets? Especially as they have limited funds how do they make the most out of their IP assets.

A. Mr. Hegde stated that the Startup India Scheme is an initiative where eligible startups can get a variety of benefits. However, the speaker pointed out that the startups have not been able to enjoy the benefits of the scheme. The speaker also stressed the importance of raising IP awareness in order to identify the intellectual property and leverage it as most entrepreneurs are unaware that their unique innovations can be protected as intellectual property. For instance, Mr. Hegde made references to the role of incubation program run by the IPR cells of universities to raise awareness as a step forward in educating startups on IP.

Q. What is the extent of liability of internet service providers in digital piracy and copyright infringement in India?

A. Prof. Avishek Chakraborty was invited by Mr. Hegde to give an overview on the liability of internet service providers and Dr. Avishek draws the attention of the audience to the Myspace v Super Cassettes, a decision by the division bench of Delhi HC that clarified the current legal position on the

liability of ISPs being that of secondary liability. The issue of internet service providers being the scapegoats when ascertaining liability when primary infringers could not be identified was dealt with by the instant case and it delivered a judgement that was very positive and beneficial to the internet service providers. Dr. Avishek also highlighted the differentiation that was made by the Delhi HC between actual knowledge and constructive knowledge read with the Copyright Act. To further elaborate on the practicality of intermediary liability, Mr. Hegde gives an example of the film industry and makes a mention of a website known as Tamil Rockers that retains a monopoly in finding exclusive copies of films and releasing it before the film has been officially released. Big film production companies not wanting to lose out on money can approach the Court and take down orders known as Ashok Kumar orders by noting all the major intermediaries that are going to grant internet access by mobile or other devices to immediately block any content being uploaded concerning the film and if the intermediaries fail to do so, they can be held liable for the losses incurred by the film producers. Mr. Hegde goes on to mention that this practice has been adopted from the US where it is common for those in the film industry to obtain John Doe orders before their big release.

Q Apple has lost an enormous amount of money in first to file countries despite having

innovation and brand value over other companies that use the same trademark. Do you think first to use; regime is far better than first to file regime? And how can companies protect their IPs if different countries have different positions with respect to innovation?

A. Mr. Hegde states that the question is a cross-over between patent and trademark filing. According to the speaker, with respect to patent filing, most countries around the world operate with the first to file system. Interestingly, Mr. Hegde gives an example of the United States which has transitioned from a first to use system to a first to file system and the applicability can be attributed to innovation/patents. With reference to the different positions on patent innovation in different countries, Mr. Hegde elaborates on patent filing by stating that notification and publicization of an innovation, when done in one country, is also carried over to other countries. For instance, if Apple is to file an application in California where the innovation has taken place, publicization of the same would restrict other competitors from filing the same anywhere else in the world and prevent them from infringing or capitalizing on Apple's innovation. According to the speaker, when Apple files a patent, it would simultaneously file in all the different countries where there is a business operation. However, in trademark filing, there is leeway with respect to the first to file/use and in light of this, Mr. Hegde refers to the Mountain Dew case where the trademark

Mountain Dew was applied in Hyderabad for packaged drinking water where due to a prior application of this trademark for packaged drinking water, they were able to obtain a temporary injunction against PepsiCo because of prior use by the packaged drinking water company for many years before Mountain Dew entered the Indian markets. Mr. Hegde also points out a loophole where this first to file can be overrode in case of a well-known trademark, for instance, Apple which can dominate any market and enjoy the benefits of multiple legislations due to their established trademark so they can ultimately prevent other businesses from entering their market space.

Q Could you please give an insight on the effects of producers and production houses

taking over the OTT Platforms during Covid-19?

How is it affecting competition law?

A. According to Mr. Hegde, the OTT platforms have not intersected with competition law yet. The speaker also feels that the big production houses are not dominating the OTT platforms but they do certainly have an advantage when it comes to piercing or moving into the OTT platforms. However, from what Mr. Hegde has observed it is the small production houses, startups or individuals that have been pitching into digital series or shows on platforms like Netflix and the typical Bollywood Production Houses have not taken over the space yet and therefore he does not see the role of competition law in OTT platforms as of now.

DOUBLE TROUBLE: RESOLVING THE SAFE HARBOUR DISCREPANCIES BETWEEN THE I.T. ACT AND THE COPYRIGHT ACT

-Amala G

INTRODUCTION

The copyright assigned to a particular work empowers the copyright holder to exercise full control over its distribution and reproduction. Without this exclusive right, the copyright would be of little economic value to the holder. Intermediaries are those parties that facilitate the reproduction and distribution of copyrighted works. The most significant modern-day intermediary is the internet,

which enables the transfer of copyrighted material across the world in a negligible amount of time. While the internet has been greatly advantageous for the production of new creative works, it has been detrimental to the rights of copyright holders. This is because it is easier to infringe upon copyrights of digital works than it is in the case of a tangible creative work. The internet also enables users to

make unauthorized copies of works which can be shared with a large audience instantaneously.

It is not feasible for a copyright owner to keep track of every individual who has violated their copyright on the internet and ensure that the infringing material is removed. Therefore, the law makes intermediaries such as Internet Service Providers', hosts and search engines among others, liable. However, even intermediaries cannot be held absolutely liable for the copyright infringement that has been committed by its users due to the sheer volume of data. Therefore, jurisdictions around the world provide immunity for intermediaries provided that they have acted in accordance with their statutory obligations. This is called as 'safe harbor'. It is pertinent that the safe harbor provision should not be ambiguous and unclear. This has been in the case with India where different statutes prescribe different conditions to be fulfilled by intermediaries to receive the safe harbor protection. Varied approaches of Indian courts has also contributed to such ambiguity. Such confusion is detrimental to protecting the rights of copyright holders' online spaces such as social media websites.

INTERPLAY OF STATUTES

In India, there are two main statutes which deal with intermediary liability vis-à-vis copyright infringement – the Information Technology Act,

2000 (IT Act) and the Copyright Act, 1957. Initially, the IT Act provided a very narrow scope for the term 'intermediary', restricted only to ISPs. However, after the 2008 Amendment, 'intermediary' refers to any person who on behalf of another person receives, stores or transmits an electronic record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

NOTICE AND TAKEDOWN MECHANISM

“This requirement is contrary to the actual knowledge through notice requirement in the IT Act.”

The most common method employed across the world to tackle copyright infringement online is the notice and

takedown mechanism. This mechanism is provided for both by the IT Act and the Copyright Act.

Section 79(b) of the IT Act and Rule 3(4) of the Intermediaries Guidelines deal with safe harbor. Section 79(b) requires the intermediary to remove infringing content upon receiving actual knowledge in order to be eligible for the safe harbor protection. Rule 3(4) lays down that the intermediary should have received “actual knowledge by itself or a notification in writing” to act “within 36 hours” to disable access to the content. By a notification in 2013, it was clarified that the intermediary only has to acknowledge the receipt of the notice within 36

hours. However, neither the IT Act nor the Intermediaries Guidelines prescribes a particular format to be followed in the notices.

The Copyright Act contains its own safe harbor provision under Section 52(1) (c) by requiring that an intermediary who has “reasonable grounds” to believe that the transient or incidental storage of infringing material will have to takedown such material in order to be eligible for the safe harbor protection. This requirement is contrary to the actual knowledge through notice requirement in the IT Act. This is a major discrepancy between the two statutes. Further, unlike the IT Act, the Copyright Act prescribes a particular format to be used if the copyright holder is issuing a notice. Rule 75(2) of the Copyright Rules, 2013 lays down the conditions to be met in a valid notice. However, even these requirements are lacking in key aspects when compared with global standards like the absence of contact details of infringing party, signature of the complainant and a statement saying the infringement complaint is legitimate and bona fide.

ABSENCE OF COUNTER NOTICE AND RESTORATION MECHANISM

Globally, there is a standard of intermediaries to provide for a counter notice mechanism. This means that the alleged infringer can challenge the takedown request by stating that he/she has not infringed any copyright. If this counter claim is proven, the intermediary will be required to restore access to the

content. However, neither the IT Act nor the Copyright Act provide for any such mechanism. This is detrimental to the fair dealing rights and free speech rights of internet users.

MYSPEACE V. SUPER CASSETTES INDUSTRIES LTD.

In this landmark judgment, the question of whether there should be a harmonious reading of the two statutes was deliberated upon by the Delhi High Court. This question arose as both parties to the dispute contended under the provisions of different Acts. The Court stated that the intermediary would not qualify for safe harbor protection only if the intermediary has failed to take action even after acquiring actual knowledge. This is contrary to the position in the Copyright Act. In order to resolve this issue, the Court held that there needs to be a harmonious reading Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act.

CONCLUSION

It is clear that the safe harbor framework in India is lacking many provisions which are necessary to protect the interests of copyright owners on the internet, especially on social media websites like Facebook and YouTube where a large amount of user generated content is uploaded every day. This content is also re-shared and monetized on several occasions. This infringes both the economic and moral rights of the copyright owners. The

harmonious reading stipulated in the Myspace judgment is a temporary fix at best. There is a need to amend the provisions of the Acts so that a uniform standard can be established. Further, it is essential that a uniform counter notice and restoration procedure is established to protect the rights of users of the internet at large. This will be in line with global standards as well.

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- Information Technology (Intermediaries Guidelines) Rules, 2011 Rule 3(4), Gazette of India, pt. II sec. 3(i) (Apr. 11, 2011).
- Copyright Act, No. 14 of 1957 §52(1)(c), Gazette of India (1957), pt. II sec. 1, <http://egazette.nic.in>
- Althaf Marsoof & Indranath Gupta, *Shielding internet intermediaries from copyright liability—A comparative discourse on safe harbours in Singapore and India*, J. WORLD. INTELL. PROP. (July 2, 2019), <https://onlinelibrary.wiley.com/doi/abs/10.1111/jwi.p.12126>.
- Myspace Inc. v. Super Cassettes Industries Ltd., MIPR 2017 (1) 274.

CASE INGOTS

P.M. Diesels Private Limited v. Thukral Mechanical Works and Others (MANU/DE/1851/2020)

The writ petition was filed based on the rejection to implead a party to the rectification petition. An application for the rectification of trademark for non-use cannot be maintained if there has been a bonafide assignment of the trademark prior to the filing of the application. The court reiterated that Section 46(1)(b) is a special remedy. A mistake committed by the previous user cannot be read to affect the non-use of the present registered owner. Further, an assignment of the mark does not frustrate Section 46(1)(b). Lastly, for the previous user to be impleaded, the present owner must show grounds of fraudulent transfer.

Sunilkumar Amrutlal Jain V M/S Mysore Deep Perfumery House (MANU/MH/1531/2020)

In this case, the Court gave the judgement after relying upon Section 33 of the Trade Marks Act and Section 33 states that “the proprietor of an earlier trademark has acquiescence for a continuous period of five years in the use of registered trademark, being aware of that use, he shall no longer be entitled on the basis of earlier trademark.” The Court further observed that this is a clear case of acquiescence that has been made against the plaintiff and there is enough reliance cited by the plaintiff to prove that they are not guilty of acquiescence. Such a decision was taken based on the parameters laid down by the Court in Wander Ltd. and another vs. Antox India Pvt. Ltd.

Bennet Coleman & Co. Ltd V Arg Outlier Media Pvt Ltd & Ors (MANU/DE/1918/2020)

In this case, the Delhi High Court observed that prima facie, it is difficult to conclude that the principle of Res Sub Judice cannot be applied in the present suit since it deals with infringement of trademark and the facts of this suit is different from the facts of the previous suit. The court observed that the trademark that has been used is merely done so while exercising the right of freedom of speech and expression and further stated that the defendant is free to exercise their fundamental right of speech that has been guaranteed under Article 19(1)(a) of the Constitution but at the same time the Court also reasoned that it is the duty of the defendant to maintain records of the usage of the same trademark for any other product or service and such records should be duly submitted through an affidavit which must be filed before the court every six months.

TO 'DOE' OR NOT TO 'DOE'?

- Ishwarya Singh

With a swanky new office in the heart of Dubai, broadcasting agreements being finalized with big organization like FIFA, and the Football World Cup 2002 around the corner, Ten Sports was gearing up for a grand commencement of its functions in India.

However, few months into its operations, Taj Television the owner of the brand-new sports broadcasting channel, was faced with what could be called every broadcaster's night terror, cable piracy. The popularity of the channel attracted the attention of many cable operators and soon

Ten Sports had 1377 licensed cable operators and innumerable other unlicensed cable operators transmitting their shows. With the looming threat of incurring losses in the prime sports season of the year, Taj Television knocked the doors of the Delhi High Court to seek a remedy against the unauthorized transmission of their shows. And what came out of that suit was the case of the first-ever John Doe order being issued in India.

Since 2002, John Doe orders, or Ashok Kumar orders as they are named in India, have come to the rescue of many broadcasters and film production houses who have pre-empted the threat of having their work or broadcasting, distribution or

reproduction rights fall prey to any form of piracy. But how far do courts go to ensure that there is a balance of interests when issuing a John Doe order?

WHAT ARE JOHN DOE ORDERS?

“The recent trend of having major ISPs or search-engines as the immediate defendants in a suit of copyright infringement or applications to issue a John Doe order, explains why such blanket-bans of the websites in the name of preventing piracy of movies.”

In 1975, in a case involving disclosure of the trade secret of the plaintiff, the Court of Appeal of the United Kingdom, ordered the defendant to permit the plaintiff to enter its premises and search and seize it. The effect of this order was akin

to that of a civil search order or a discovery order, which was issued on an *ex-parte* application. Such orders came to be known as Anton Piller orders. While these orders were effective to stop an infringer to continue infringing upon the intellectual property of the proprietor of such IP, they were not enforceable against unknown or unidentifiable infringers. Soon after, John Doe orders were adopted by the Courts. Often referred to as 'rolling' Anton Piller orders, John Doe orders were issued against unknown infringers.

In India, John Doe or Ashok Kumar orders, are issued under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908.

Section 151 the Code gives the court the inherent power to “make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court.” As the powers of the court under Section 151 are complementary to the powers specifically conferred under the Code, the court is free to exercise them for the purposes mentioned in Section 151 of the Code. The courts discharge this discretion by issuing an order of injunction or stay.

HOW ARE JOHN DOE ORDERS USED IN THE ENTERTAINMENT INDUSTRY?

By their nature, John Doe orders are issued against unidentifiable infringers or possible infringers. Thus, they cover a wide range of parties or players that may even be remotely related to any form of infringement. Many film-production houses, broadcasting channels have filed suits to prevent websites and social-media pages from publishing or hosting any infringing content.

For instance, before the release of the Bollywood movie *Singham*, an interim application was filed to obtain an injunction to prevent any person from making copies of the movie and distributing or selling them as DVDs or CDs or preventing unlicensed cable operators from broadcasting the movie on television. In deciding this matter, the Delhi High Court laid down a three-pronged test to determine whether a John Doe order could be issued in favor of the plaintiff. To obtain a John Doe, the plaintiff has to show the court that (i) that there is a

prima facie case, (ii) imminent danger, and (iii) balance of convenience. Ultimately, the Court passed the Order thereby restraining the defendants and other unknown parties from “distributing, displaying, duplicating, uploading, downloading or exhibiting the movie in any manner.” It further ordered various Internet Service Providers (ISPs) to block the access to file-sharing websites.

Similar to the *Taj Television* case, in *ESPN Software India Pvt. Ltd. v. Tudu Enterprises* too, the plaintiff who had exclusive distribution rights of three sports channels, ESPN, STAR Sports and STAR Cricket, apprehending the unauthorized cable transmission of its channel and loss of revenue and profit, filed an application for a John Doe order to restrain such cable operators from indulging in cable piracy of his channel.

ARE JOHN DOE ORDERS A TILTED BALANCE?

As witnessed in the *Singham* case, the Court ordered ISPs to completely block the public’s access to various file-sharing websites. The recent trend of having major ISPs or search-engines as the immediate defendants in a suit of copyright infringement or applications to issue a John Doe order, explains why such blanket-bans of the websites in the name of preventing piracy of movies. Instead of temporarily blocking access to certain URLs within a website that contain pirated copies of movies or links to unauthorized

broadcasting of shows or movies, it is observed that the courts have not given due regard to the right to freedom of speech, expression and profession of the users of such websites. Further, many John Doe orders do not specify a time-frame for which a website, cable operator or any other intermediary may be restrained from functioning, thus imposing an indefinite injunction on the named or unnamed parties.

CONCLUSION

It must be noted that the purpose of issuing a John Doe order is to restrain an act of piracy or infringement. Thus, unless a website or any other medium of publishing or broadcasting media work does not host infringing material, imposing restraints on it using a John Doe order would amount to preventing the website or medium from carrying on its operations without any due cause, thus making it an arbitrary decision. This further impacts the right of fair use of the innocent consumers of these websites and channels. While mechanisms such as the John Doe order are meant to protect the interests of the copyright-owners, courts must be pro-active in ensuring that the legitimate balance be maintained between protection of copyright and the fair consumption and distribution of content by innocent consumer and distributors.

References:

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- Anton Piller v. Manufacturing Processes Ltd. CA 8 Dec 1975
- Code of Civil Procedure 1908, s 151
- Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal 1962 AIR 527
- Code of Civil Procedure 1908, O. XXXIX R. 1, R. 2
- Reliance Big Entertainment v. Jyoti Cable Network I.A. No. 11242/2011 in CS(OS) No. 1724/2011
- CS (OS) 384/2011
- *Supra* note [vi]
- Copyright Act 1957, s 52

CASE INGOTS

Delhivery Private Limited v. Treasure Vase ventures Private Limited (MANU/DE1862/2020)

The trademark 'Delhivery' and usage of the word 'Deliver-E' was the point of contention between infringement of trademarks and suggestive trademarks.

On the issue of phonetics and generic words, the court noted that 'Delhivery', when pronounced in a routine manner, meant 'delivery', therefore 'Delhivery' was phonetically a generic word.

Marks which are phonetically similar, do not require much thought and imagination. The plea that it was a suggestive mark required the court to look into its interpretation of suggestive marks- those which are neither descriptive nor fancy in nature. It is suggestive if it requires thought, imagination and perception.

Lastly, the court held that 'Delhivery' is a phonetically generic word, and thus cannot be registered. In the absence of statutory benefits of registration, there can be no claims of passing off.

Lifesaver IP v. Assistant Controller of Patents and Designs (MANU/IC/0047/2020)

On the issue of denial of application, the contention before the board was the violation of principle of natural justice- audi alteram partem. Rule 129A of the Patent Rules, 2003 provides that applicants cannot seek for more than 2 infringements. While the discretionary power of the controller exists, it does not allow him to adjourn matters without affording fair opportunity of being heard. Arbitrary denial of applications, not affording sufficient opportunity of being heard; and lack of merits in the decision constituted violation of principles of natural justice.

Hawar Technologies v. Assistant Controller of Patents and Designs (MANU/IC/0048/2020)

In the First Information Report issued, the invention was found to be novel, But objections were raised for the invention to be 'inventive step', unity of invention etc. On the issue of obviousness, the authority held that the Controller erred in his decision of basing judgement on the objections and not on his independent evaluation of the product. The matter of obviousness includes fact and law; and the reasons for rejection must satisfy the minimum assessment and enquiry required under law. The lack of procedural fairness has been held to be a violation of principles of natural justice.

TCEs AND TECHNOLOGICAL INTERVENTIONS: A CURIOUS RELATIONSHIP

-Lian Cicily Joseph

The pandemic has forced many to take up various hobbies to effectively channel their creative energy. Undeniably, the lockdowns have had drastic effects on the arts with many having to close up their theatres and other places of performance. Technological interventions have thankfully allowed some artists to stay afloat with many finding an eager and enthusiastic audience online. Platforms such as Zoom, Shalee.com etc. have provided artists and performers who are mostly in the informal sector with the means to be able to earn their livelihood and also preserve their culture. The Indian subcontinent undoubtedly has rich cultural heritage but the laws surrounding traditional cultural expression have apparently failed to protect the intended persons. The purpose of this article will be to explore in brief the current regulatory framework around traditional cultural expression and possible solutions to address some of the incidental issues. Traditional cultural expressions (abbreviated as TCEs) can be understood as the form in which culture is expressed. Although this may be a slightly

vague understanding, TECs form “part of the identity and heritage of a traditional or indigenous community and are passed down from generation to generation. They include dances, songs, handicrafts, designs, ceremonies, tales, and many other artistic and cultural expressions that are considered traditional.” Traditional knowledge and traditional cultural expressions are often clubbed together and is commonly referred to as “intangible cultural heritage” and defined as: “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their

cultural heritage” The protection around TCEs are limited and often depends on the application of other intellectual property protections to the same. Internationally as well there is no commonly agreed definition of TCEs. WIPO’s Draft Provisions on TCEs offer a broad description of what constitutes TCE but leaves the choice of the terms denoting the

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protected subject matter to the individual nations/parties concerned.

Currently India lacks a sui generis legislation that protects TCE and reliance is placed on allied legislations and neighboring rights afforded in the Indian Copyright Act 1957 and the Trademarks Act 1999. Perhaps the most important right is the right accorded to performers. A performer is defined under section 2(qq) to “*include an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.*” The Rome Convention which precipitated the need for the 1994 amendment that accommodated performers rights does not limit a performer to one who makes a performance but the Indian law requires performance. Chapter VIII deals specifically with performers rights and while the expression of TCEs aren’t explicitly protected, it could be argued that performers rights could be extended to include these artists. Perhaps one of the biggest hurdles in granting copyright protection is the fact that the nature of the work under consideration is something that exists within a community and does not vest with a single person or entity per se. This would pose a considerable hurdle while determining who the authors of such works are incidentally causing confusion regarding the kinds of protection that can be accorded.

The current model of IP protection focuses on granting exclusivity based on originality and

authorship. Such a model seemingly cannot include within its scope non-Western, collaborative, or folkloric modes of production and this discord is only made more complicated with the rise of modern media and entertainment means. Specifically, with regards to Copyright law issues surrounding originality, authorship, limitations and exceptions and derivative works

The Indian Government has formulated a National List for Intangible Cultural Heritage pursuant to the 2003 UNESCO ‘*Convention for the Safeguarding of the Intangible Cultural Heritage.*’ This list is an attempt to recognize, raise awareness about, and protect India’s cultural diversity. While the law on copyright protection may not be that clear, tribes and other indigenous communities in India have attempted to use other legislations to gain protection. Perhaps the most popular example would be the case of the Warli tribe of Maharashtra. They were granted a geographical indicator for their art with the hopes that such exclusivity would prevent appropriation by large commercial entities with little benefit to the community. Despite providing such protection some have argued that while these drawings are popular and used in a lot of items including clothing etc. the economic and monetary benefit has not gone to the Warli tribe themselves.

Some have perceived technological advancements as an impediment to TCE primarily since it makes transmission of such expressions much simpler and easier. Another understanding however is that they

aid in instantaneous access to information without real location constraints, data transport at the speed of light, and effortless reproduction of the original without any loss of quality. As mentioned above, the reliance on modern advances would provide artists and performers access to a medium that could host and telecast their performances. The digital setting may have reduced in some cases significant entrepreneurial risk which comes inherently while launching new cultural goods and services and makes their visibility and engagement greater.

Given the reliance on online spaces for entertainment purposes, many consumers prefer a more customized array of content and one that suits their personal tastes and preferences. The use of such technologies would ensure that the production cost in comparison to physical shows are reduced and it also exposes the artist to a wider audience not barred by physical distances and would therefore assist in promoting cultural diversity. Such initiatives when encouraged will ensure that there is not only a steady supply of income but that artists are encouraged to be self-reliant and would ensure that members of the specific community are benefited. In addition to promotion of such

initiatives it is also imperative that artists are made aware of existing rights and that adequate control mechanisms exist which would ensure that unauthorized publication/reproduction and appropriation is avoided.

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#CAN #I #REGISTER #MY #HASHTAG #AS #A #TRADEMARK

-Pemmaraju Lakshmi Sravanti

Social media has become an important tool for marketing, especially popularizing a product or service with a hashtag. This requires an evaluation of their eligibility to be trademarked. Trademarks are used for the sole purpose of distinguishing goods/services of one company from another, #hashtags employ a similar function when used to promote a campaign. Hashtags are used to reference or organize keywords to facilitate searching of information.

Robert Sherwin opines that hashtags should not be included under trademark law because of their character as a grouping tool. This encourages use by others, but not to protect their status as intellectual property. An express caution with reference to freedom of speech and abusive litigation has also been raised.

United States provides for registration of #hashtags such as Nike's #makeitcount and Coca Cola's #smilewithcola. This represents a significant improvement in the practice of USPTO, as prior to 2013, #hashtag application for trademark has not been approved or stood to be abandoned. This practice is inconsistent with the dicta of courts that

#hashtags constitute as descriptive devices and not trademarks. In determination of hashtags and infringement issues, it has been opined that they merely operate as tolls to facilitate categorization. However, in TWTB, Inc. v. Rampick, the court employed hashtags in the confusion analysis and as evidence to prove intent to pass-off. Another instance illustrates the refusal by a court to dismiss a claim of false advertising by using the hashtag of the competitor. Lastly, using a registered trademark as a hashtag does not amount to infringement of the mark.

The above cited cases are preliminary considerations by the judiciary and have not stopped the USPTO, from registering

hashtags, employs the following factors to evaluate the hashtags (which is similar to the requirement for a domain to be trademarked)-

- a) Overall context of the mark
- b) Placement of hash symbol in the mark - Placement of #hashtags before numbers such as #Twelve or #29 need not necessarily amount to a #hashtag eligible to be trademarked.
- c) goods/services identified - Given the fluidity of social media, the office has accepted screenshots

of social media pages citing the hashtags as sufficient evidence of their commercial purpose in distinguishing the product or service.

The United States, Canada and United Kingdom have consistently registered hashtags if it has complied with their requirements; but they operate under differing opinions by the courts. The primary purpose of trademark law is to avoid consumer confusion, and thus allowing for lawsuits claiming trademark infringement. Despite the registration, trademark infringement and judicial relief pose as an obstacle to ensure protection of your rights.

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THE CONUNDRUM OF COPYRIGHT IN CINEMATOGRAPH FILM: RIGHTS OF MUSIC COMPOSERS VERSUS FILM PRODUCERS

-Sanjana Rebecca

INTRODUCTION

Musical numbers and songs can be construed to be included as part of cinematograph films because of the unique intersection of music and film that has existed in India since the inception of cinema. This

complex construction has created a series of issues in understanding the implications of copyright ownership as contained in the Copyright Act 1957. Undoubtedly, in the realm of cinematographic film, what is popularly known as a “song” is a subject

matter consisting of several copyrights embedded within it. This essay is an attempt to realistically decipher the broader implications of these copyrights and more importantly the collective and individual ownership of these rights subject to exploitation, reproduction and further from protection as against infringement.

To put it simply, as mentioned above, a song is a mixture of several copyrights. Firstly, the lyrics can be attributed to literary work. The work is unique to the author and makes use of his creativity to compose a lyrical literary work within the parameters and constraints of a musical meter and the author owns a copyright. Secondly, the tune, rhythms and instrumentalization can be classified as musical work which belongs to the composer who creates the tune and the accompaniment. Thirdly, the actors and actresses hold a performing right which also falls within the ambit of copyright. Thereafter, a larger composite right emerges in cinematographic films after all the sounds are recorded and a sound recording is born from the combination. It can be stated with surety that even in a single song, the rights under copyright are several and varied. The Copyright Act 1957 is an elaborate code which states that unless established by the Act that there is no right vested in anybody which means that copyright is a creation of statute as dealt with by *Section 16 of the Copyright Act, 1957*. The Act further defines what is protected as copyright under

Section 13 which lists the broad headings and then proceeds to define each and every right mentioned therein. The four original works include literary, dramatic, musical and artistic works and the others without the prefix 'original' are cinematograph films and sound recordings essentially because they contain the original works in some combination or the other and can be defined as derivative works. It is to be noted that in terms of copyright protection, there is no difference between original and derivative works. A derivative work is not inferior to the original work and the rights under original work can also be exploited in the same manner as original work. Furthermore, *Section 13(4)* specifically states that a 'cinematograph film' or a 'sound recording' contain separate copyrights in themselves, not militating against the independent and unique copyrights held by constituents of such film or recording, each of which is entitled to, and holds a copyright of its own. This recognizes the position that a cinematograph film comprises of various unique components, being derivative rights, and as stated by the Supreme Court in the celebrated judgment of *IPRS*, is a 'felicitous blend', 'beautiful totality' and 'a constellation of stars' and it is the coming together of these unique components that make it what it is.

MUSICAL WORK & SOUND RECORDING UNDER THE COPYRIGHT ACT

In light of what has been discussed above, it is pertinent to distinguish between a musical work and sound recording. According to Section 2(d) of the Copyright Act of 1957, the author of the musical work is the composer/music director whereas the author of the sound recordings are the producers. It is imperative to understand the definition of author through the lens of copyright ownership under Section 17 of the Act. Any author of a work is the first owner therein. As regards “sound recording”, the author and the first owner being the producer, the question of the composer having any right over the “sound recording” does not arise. Only when “musical work” comes into question does the proviso apply. Proviso b read with proviso c states that with reference to a cinematograph film, employment under a contract of service or apprenticeship, to the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. This was further reiterated by the Supreme Court of India in *IPRS Vs Eastern Motion Pictures Association* specifically dealt with this section and has stated that when a work is commissioned for hire by a person, he shall be treated as the first owner and in the context of film music composition, the owner would be the producer. Therefore, the inevitable conclusion upon reading Sec. 17 (1) proviso (c) is that with regard to musical work, though the “composer” is the author, the “first owner” will be the “producer”.

ILAYARAJA V AGI MUSIC PVT LTD & ORS

In furtherance, the rights of the music composer and the producer of a cinematograph film was further discussed in detail in the case of *Ilayaraja v AGI Music Pvt Ltd & Ors* in 2019. The brief facts of the case would reveal that Mr. Ilayaraja, a popular music composer, had assigned the right of reproduction, exploitation and use over his musical works in favour of his wife through an assignment agreement who then assigned the same to AGI Music. Mr. Ilayaraja prayed for a permanent injunction against the defendants stating that he had absolute right over his compositions in an artistic and musical manner and that the defendants were to be restrained from selling or distributing his work and were also entitled to pay royalties to Mr. Ilayaraja as the owner of the musical work. However, this was contended by another defendant Echo Recordings by mentioning that the music composer had no right of assignment over his work as his work was part and parcel of the cinematograph films of which the rights ultimately rested with the producers as owners. The producer of the film assigned the entire rights in the musical work and songs in the cinematograph film to Echo. The producer could not have passed on a better right to Echo than what he had had himself to begin with (*nemo dat quod non habet*), which brings us to the legal issue of what the right is, that vested in the producer in the first instance. According to Mr. Ilayaraja, Echo proceeded on the fallacy that the

producer is the owner of the ‘sound recording’/‘musical work’ composed in the films. However, since Mr. Ilayaraja has, at no point of time, assigned or transferred such rights to the producer, he retains the right in his music compositions as the first owner of the copyright in these works. Interestingly, the High Court of Madras clarified a very interesting question on the rights possessed by the music composer and producer of the film. The Court clarified that there would be two sources of “sound recording” and this cannot be right as one would always be prejudiced by the act of the other. It could be said that this would not have been the intention of the legislation as regards Section 14 of the Copyright Act. Thus it cannot hence be that further ‘sound recordings’ be made based on the same ‘musical works’. The Madras High Court noted that it would defeat the purpose of vesting the ‘sound recording’ right in a producer, in the first place. To sum up, what has been assigned is the ‘musical work’ qua the ‘sound recording’ and the author continues to retain the right in the ‘musical work’ for all other intents and purposes, both moral as well as economic.

CONCLUSION

The rights of a music composer and the producer of a cinematograph film under Copyright Act has been

a subject of controversy and confusion for many years. Although the rights of the film producer has been discussed in multiple cases, the distinguishable rights between a composer and producer had not been thoroughly discussed. The judgement delivered by the Madras High Court in the *Ilayaraja* case has in the definite sense created a sense of clarity in terms of broad classification of the rights and copyright implications involved. Therefore, to conclude, the music composer for a cinematograph film is entitled to special as well as moral rights with regard to the ‘musical works’ composed by him in line with Section 57 of the Copyright Act and can exercise this right over his musical works in any manner he desires, only barring in the form of the connected sound recordings that are an integral part of the cinematograph films, for which the copyright is to ultimately be held by the respective producers of the films.

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THE MASTER OF THE MEME: WHO OWNS AND WHO INFRINGES?

-Nidhi Rachel Kurian

Whether you're bored from a long lecture or have had a day in the dumps the ever relatable and laughable memes have always got your back but have you ever wondered who owns them? The original meaning of the word meme had nothing to do with the internet at all. Infact the word was first used in a book, "The Selfish Gene" by Richard Dawkins, an evolutionary biologist. While originally memes referred to a unit of cultural meaning such as a value or an idea, which is passed from one generation to another in today's times they have come to represent jokes/humorous content on the internet.

A typical meme would either involve an original image or screen grabs of popular cultural references like movies, series, etc. with superimposed text in humorous veins. The Copyright Act of 1957 protects original literary, dramatic, musical and artistic works and technically memes would fall under the category of artistic works. However the question that arises is when a meme would be protected under the defence of fair use and when it would constitute an infringement. Section 52(1) (a) of the Copyright

Act includes criticism, review, private and personal use under the ambit of fair use. In the case of *Blackwood & Sons Ltd. v. A.N Parasuraman* it was held that in order to obtain the defence of fair use, the alleged infringer must have no intention to compete with the rights of the owner of the copyright. The case also held that the use of the work by the alleged infringer must not be improper. While this term has a wide connotation and doesn't have a specific formula to determine what actually constitutes an improper use, and memes are intended

"While this term has a wide connotation and doesn't have a specific formula to determine what actually constitutes an improper use, and memes are intended for light humor, it may not come under the purview of improper use unless it is blatantly offensive to the right holder."

for light humor, it may not come under the purview of improper use unless it is blatantly offensive to the right holder.

Since the main purpose of the meme is to bring about some laughs or disseminate an idea, it doesn't intend to interfere with the commercial gains of the copyright holder or their rights with respect to that work. Further it was held in *Cunniah & Co. v. Balraj and Co.* and further upheld in *Hanfstaengl v. Baines & Co.* that only when a 'substantial part' of the copyrighted work is used without permission it would amount to a

copyright infringement. Though the term ‘substantial’ hasn’t been defined in the Act, it can be understood through precedents like *Orient Longman Limited V. Inderjeet Anand* and *Macmillan & Co. Ltd. v. K. and J. Cooper* to mean the essential features of the work or such an imitation that merely evades what is an infringement. Therefore, as long as only a small portion of the entire copyrighted work is used it would amount to fair use, which is the case with memes as they use only specific parts or scenes of copyrighted work like movies, series, etc. Moreover, the purpose of the copyrighted work in memes is only to assist the final product prepared, which involves the skill and labor of the meme creator. This however is limited to the fact that the purpose of the meme is only the entertainment of its readers and not a competition in commercial interests.

Therefore, if the content is used without consent or authorized licensing by its owner for purposes such as advertising, the user will be liable for infringement. This can be seen in the case of the Warner Brothers, who faced a federal lawsuit from the owners of the viral memes- Keyboard Cat and Nyan Cat, for using their work in their game ‘Scribblenauts’, without permission. The court in this case decided in favour of the creators of the memes as Warner Brothers had used the work for their own commercial gain and not for mere entertainment from seemingly extraordinary cats.

However there is yet another problem in the world of memes. In this era of social media where memes become viral in seconds, whose copyright is infringed when a meme is shared? Does it affect the owner of the content used in the meme or the creator of the meme? Referring to the Warner Brothers case, the creators were considered the owners of the memes by the court while deciding the case when in fact these creators themselves used parts of a YouTube video and a game to create their memes. In this case itself while on one hand the copyright of the Nyan Cat itself lies with the Japanese game that launched it, the copyright of the meme lies with its creator.

This was the case with the Game of Throne memes created by the popular comic group, AIB. While the images or cinematographic stills used in the memes itself belong to the producers of the series, since they constitute only one part of the entire product which itself is given a different meaning due to the superimposed text and the out of context stills, the memes should belong to AIB. Therefore, if another person were to use their meme without their logo and trademark, passing it off as their personal creation, then AIB would be able to sustain action against such persons. However the question that still remains is whether AIB themselves would be guilty of infringement provided that they have used these memes for their own commercial gains in the form of merchandise and promotion. Would these memes then still obtain the protection of fair use?

Unfortunately this dilemma would still be a subject of debate unless and until the Indian Courts decide on the matter thereby setting a precedent for such cases.

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IPR REWIND: October 2020

- **NLUJ-CIPS Webinar on Brand Management Trademark Protection in Digital Age (Oct 11)**- The aim of the Webinar is to highlight and bring forth the issues and challenges faced in the digital age in protecting brands and their trademarks.
- **National E-Conference on Changing Contours of Copyright Regime in Digital Era (Oct 17)**- The E-conference was hosted by Faculty of Law, ICFAI, Ranchi and it mainly revolved around the protection of the original work of authors in India in the digital times under the Copyright Act,1957.
- **International Webinar on Copyright Law and The Feminist Gaze by University of Delhi (Oct 22)**- Through this Webinar they hope to draw the attention of law students and practitioners to the feminist perspective on Copyright Law.
- **NLUO's Webinar on Discrimination as the Ground for Refusal of Trademark Registration (Oct 23)** -The aim of the webinar is to understand the practice and the requirements behind the extensive depth of trademark intricacies.
- **Webinar on Cyber Security, Cyber laws Legal Profession (Oct 27)**- The Advanced Center on Research Development and Training in Cyber Laws, NLSIU organized this webinar in collaboration with the Karnataka State Bar Council as part of the Cyber Security Awareness Month.
- **Round Table on IPR as Security Asset Organized by Chair on IPR & CIPRA-NLSIU (Oct 28)**- A round table open to all those interested, with over 5 resource persons from various fields dealing with themes relating to the challenges and prospects of IP Asset security-based financing.

INTELLECTUAL PROPERTY IMPLICATIONS OF 'GAME MODDING' IN E-SPORTS

-Aleena Anabelly A

The general but conventional meaning of the term 'sports' is being altered and modified to incorporate the transitional demands of the people. Hence, in this 'Digital age' which is characterized with the boundary-less, supranational flow of information, tech companies, and sporting giants are trying to add a multidimensional

connotation to the *“Instances where the mod games with exemplarily good player-made content attaining more reach and user base than the parent game has arisen in the recent past.”* entertainment driven from sports. Now, we can play any virtual sport of our choice without even getting

up from our cozy sofas. As a consequence of the global upsurge in the number of eSport agencies, coupled with the evident lack of regulatory mechanisms, the policymakers are facing a common dilemma. This paper will actively try to explain this dilemma by analyzing the legal ramifications of mod game creation in the eSports industry.

Spacewar Championship conducted among the students of Stanford University in October 1972 is regarded as the first-ever eSports Tournament in the world. The enthusiastic students who readily participated in this competition wouldn't have anticipated that they were creating history.

Subsequently, the eSports industry was subjected to an impressive transition from the restricted access available in a small analog screen to the best audiovisual elements and game characters. The core mechanisms and software codes employed in virtual games are traditionally protected under Copyright laws in many countries.

Then the question becomes this – Do the existing IP ownership protection mechanisms effectively regulate the eSports

industry and its transactions? The creation of eSports involves the application of innovative ideas for the development of the game environment, and the creators append pre-determined game rules as object codes and software programs. Celebrated game developers are voluntarily permitting its users to alter or modify the game set-up, without changing the above-mentioned core mechanisms. This has led to various legal complications and IP disputes. Hence, well-founded Intellectual property protection systems should be established to safeguard the rights of eSports agencies, gamers, and game developers who market and sell virtual games like any other 'literary work'.

GAME MODIFICATIONS

The infamous Gen Z word ‘Game modding’ accurately captures the newest trend of players modifying the content of video games for flexible and dynamic gaming experience. This trend has expanded to the eSports world also, as competitors/players are naturally becoming comfortable with using their own original elements. The audio or graphics used to revise the game characters, weapons, or user interface, known as ‘skins’ is a popular example of such original elements created by players. However, the player-contributions are provided with copyright protection only if they qualify as ‘original work’. The standard threshold imposed on such qualification makes the copyright acquirement process laborious for player-made modifications. Additionally, the players are permitted to use skins only if they have attained usage rights from the copyright owners. Instances where the mod games with exemplarily good player-made content attaining more reach and user base than the parent game has arisen in the recent past. Then, does copyright infringement arise out of crowdsourced content? This issue was given a legal analogy in the case - *Blizzard Entertainment, Inc. et al v. Lilith Games (Shanghai) Co. Ltd. et al*, No. 3:2015cv04084 - Document 35 (N.D. Cal. 2015)

BLIZZARD ENTERTAINMENT V LILITH GAMES COMPANY

Warcraft III was Blizzard’s award-winning online, multiplayer game that allowed players to create and modify maps, characters, game environment, rules, and storylines using the ‘World Editor’ option. The end-user license agreement (EULA) of this game did not exercise IP control over the content created using ‘World Editor’. Two highly talented gamers, ‘Eul’ and ‘Guinsoo’ effectuated major changes to the base game setup by introducing new characters, battle maps, and spells and created a mod for Warcraft III. They were known as “Defense of the Ancients” (DotA) and “DotA Allstars” respectively. This exceptional improvisations and alterations made these games sensational in no time. Millions of avid fans visited the page every day and they were able to make their own modifications to the game. Similarly, Valve Corporations, a Washington-based game developer, published a standalone game – DotA2 by gaining inspiration from DotA and DotA Allstars. Meanwhile, Blizzard entertainments, an American game developer and publisher acquired the rights over DotA Allstars from Riot Games.

A joint Intellectual property infringement suit was filed by Blizzard and Valve against uCool and Lilith games for creating games with conspicuously similar core mechanisms and characters. The fundamental argument advanced by the defendant was the inability to associate Valve as the copyright

owner of characters created by millions of players around the world. The court, while responding to this contention, opined that DotA and DotA Allstars should be perceived as a unitary work with interdependent parts. Further, the court categorically said that the ultimate control of creative works is available only to the *authors*. The characters created by modders are copyrightable in their capacities, but the ultimate creative rights over the body of the game is vested only with the copyright owners.

The ratio set by this landmark judgment deters the creation of games using characters and features adapted from the collective body of crowdsourced games. But, intellectual property infringement of copyrighted mod games is rampant in this information age. These concerns call for the

incorporation of better systems that are capable of protecting the rights of developers without jeopardizing the creative content manufactured by individual players.

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INTELLECTUAL PROPERTY RIGHTS: STRIKING THE CHORDS OF REALITY T.V. SHOWS

Reality shows form a large chunk of content for both television and OTT platforms today. There is a wide array of reality shows that range from cooking, to activities like quizzes, singing and so on. Most viewers are familiar with popular shows like *the X-factor*, *MasterChef*, *The Voice*, *Who wants to be a millionaire*, *Deal or no Deal* and the like. These are some examples of most viewed reality shows. These

-Shefali Fernandes

programmes are based on a concept that is created by the producers. They have themes/ format/ elements that are incorporated in the show to make it distinct and interesting. This genre of shows has a large viewership and therefore, it is an industry which is in high demand. Conceptualizing these shows and executing them involves big expenditures, which requires protection from

infringement. There are many overlaps of intellectual property in prime-time reality television shows. This may primarily be with the names associated to these shows, or the format or copyright issues in the programme.

A question that arises here with regard to the Intellectual property domain is what rights vest with the creators of these shows. The doubt here exists as it is a well-known fact that there can be no copyright in a mere idea or a concept. Additionally, copyright is also generally granted for fixed expressions and since reality shows are a domain which works almost entirely unscripted.

While copyright only protects an original expression of a person, ideas are not given the same protection. Furthermore, with the merger doctrine when there are only a limited number of ways to express a particular idea, it does not give the author copyright over the material that he or she has created. Copyright issues with reality shows have been discussed at length with various cases. These cases have solidified the fact that copyright does not exist in ideas but in the way it is expressed. For a copyright infringement of a reality show, it is essential for it to be proven that the format that is copied by another is not only a generic idea or that which comes under the ambit of the doctrine of *Scènes à faire*. Common elements/themes that are used by others for expressing a particular idea cannot be granted copyright as this would lead to a

monopoly which will not be correct and fair to other creators of similar ideas. There must be a certain level of originality to gain copyright protection for such television shows.

Trademark issues also persist in reality television. This may be in cases where the name of the show is in question of infringement. A Trademark is a logo, phrase, symbol, device etc., that must be capable of being represented graphically, and must be capable of being distinguishable in nature.ⁱ It is essential for these programmes to get the names registered as if not done, there can be possibilities of trademark dilution which is not desirable. Trade dress problems may also ensue as in the case of *RDF Media Ltd. v. Fox. Broad. Co.*

While there may be problems that could arise in IP domains other than copyright it is still the most essential in this context. With the steady demand and large viewer numbers for reality shows, there is an increasing need for stronger protection of certain elements, or the format that are the very essence of it. There is therefore, a foreseeable requirement in the near future for this.

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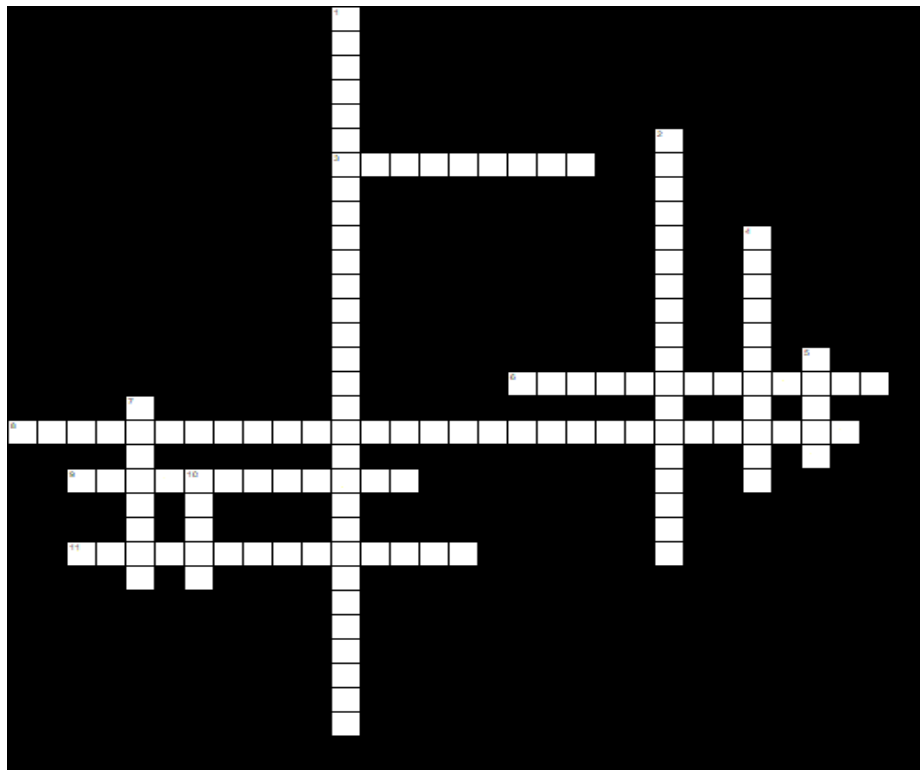
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CROSSWORD

- Anjali Baskar



ACROSS:

3. payment made to the legal owner for the use of property.
6. refers to when a piece of music is recreated in a new recording and meant to sound exactly the same as the original recording.
8. handles the rights for lyricists and composers in India.
9. Act which govern musical works in India.
11. copyright is established from the moment an original piece of work is created in a _____.

DOWN:

1. an Indian organisation you need a permit from to play the recording of any song in a public space.

2. an arrangement and combination of musical notes, chords, rhythm, harmonies, and song lyrics.
4. a defence under Indian copyright law for specific acts that would not be deemed as infringement for the four specified categories of copyrighted works: literary, dramatic, musical and artistic works.
5. the number of years that the performance or music cannot be recorded or published without the assent of the performer if performance rights are recognized by the Copyright Act.
7. taking a snippet of an original recording and adding it into a new recording.
10. a term which means new work based upon an original work.

ROGUE WEBSITES: A CATALYST TO DIGITAL PIRACY

Digital piracy has been increasing at an alarming rate in India due to the advent of new technologies which have affected the entertainment industry. According to the Cambridge dictionary, Digital Piracy can be defined as the practice of illegally copying and selling digital music, video, computer software, etc. Flagrantly Infringing Online Locations (FIOLs) and Rogue Websites primarily facilitate music and film piracy on the internet.

These websites allow content to be streamed or have a searchable index of third-party FIOL references. The specifics of these websites are unknown to the registrant

and any or all contact data is masked / blocked. Even the ad networks used on these websites, with similarly anonymized credentials, are not run-of-the-mill popular networks, but obscure ad networks.

“Draft National E-Commerce Policy 2019 states that a body will be created that shall identify rogue websites and the owners of these websites would be criminally liable.”

- **Sahana R**

Due to the increase in content creation and viewing, the number of rogue websites has also increased, which is a threat to the entertainment industry as well as the economy.

HOW TO DETERMINE A ROGUE WEBSITE?

Rogue websites share copyrighted content on their website which includes movies, songs, short films etc. without the copyright holder's permission. This

is prohibited under Section 14(d) of the Copyright Act 1957. As such the term 'Rogue Website' is hard to define and interpret as there exists no universal definition.

In order to interpret the law and ascertain what a rogue website is, the Delhi High Court put forth certain guidelines to determine Rogue Websites in the landmark judgement *UTV Software*

Communication Ltd. and Ors. V. 1337X to and Ors.

The factors to determine whether a website is rogue is as follows: the primary purpose of the website, flagrancy of the infringement, details of registrant, action of the website against such material and whether the owner of the website disregards copyright infringement. Furthermore, the Draft National E-Commerce Policy 2019 states that a body will be created that shall identify rogue websites and the owners of these websites would be criminally liable. The online distribution of copyrighted material is punishable under Section 66 of the Information Technology Act, 2000. Article 61 of the TRIPS agreement states that all members shall provide for criminal procedures and penalties to be applied in copyright piracy. Therefore, once a rogue website is determined, the owners of such websites may face criminal proceedings.

IMPACT OF ROGUE WEBSITES ON THE ENTERTAINMENT INDUSTRY

Rogue websites are one of the main reasons that affect the revenue and business of other lawful streaming platforms and websites such as Netflix, iTunes, Amazon Prime etc. as they are an inexpensive means of entertainment. The demand for entertainment from websites such as Hotstar, Netflix, Voot etc. has significantly increased during the pandemic and the lockdown as people are in need of a change. However, the supply of entertainment in such cases, comes with the price of

rogue websites brazenly engaging in infringement activities. The layman finds these rogue websites cost effective as it is an inexpensive and easy mode of entertainment which further encourages these websites to bring in new material. The number of visits made to pirated websites in India in 2018 amounted to 9.59 billion and in the United States it was 17.38 billion. Due to the COVID-19 situation worldwide, there has been a surge in pirated content on the internet with an increase of about 41% in the United States and more than 62% just in India.

A pirated website named Tamilrockers.com has been leaking infringed content on the internet from leading websites such as Amazon Prime. The website recently leaked 'Putham Pudhu Kaalai' a Tamil movie for download within hours of its release on Amazon Prime on October 16th, 2020. Various movies such as 'Ponmagal Vandhal' which was the first South Indian film to have released on a digital platform amid the COVID-19 lockdown. The first Tamil-produced direct-to-digital release, Baahubali 2, Dangal etc. have also been put up on this rogue website in the past. The URL of this website had been blocked by the government on the direction of the Delhi High Court in the case *Warner Bros. Entertainment Inc. v. <http://tamilrockers.ws> and Ors.* as it is a rogue website known for digital piracy and copyright infringement. However, the website still continues to leak copyrighted content. These rogue websites not only infringe on the

copyrights but also affect the economy of the country. The Indian Film industry is estimated at a value of Rs 19,000 Cr. but has suffered losses to a great extent due to these rogue websites. The Telugu film industry lost about ₹360 crore in the first nine months of 2015 due to online piracy of movies such as Baahubali 2, Srithanthudu, Rudramadevi and Bruce Lee.

CONCLUSION

With the global combat against digital piracy, there have been several ups and downs. On one hand, businesses, public and policymakers are taking initiatives to fight against online piracy, however, at the same time online pirates are increasing due to the increased demand for entertainment. One such initiative, to combat online piracy, was taken in the United States in 2013 known as the *Copyright Alert System (CAS)*, which was a “six-strikes” scheme to fight digital piracy in which the Internet service providers would electronic warnings six times to the consumer that the website allegedly has infringed material.ⁱⁱ The United Kingdom set up an anti-piracy educational campaign in 2014 to ensure legal means to watch movies and listen to music by contributing £3.5 million.

Furthermore, certain initiatives and changes can be made in the industry. Firstly, a system of trust and complaint must be invoked by all the copyright holders and the government, where consumers may have a forum to address and complain against

infringement or piracy issues they have come across. This kind of system will not only empower the copyright holder by bringing the infringement to their notice but also will increase awareness among consumers regarding IPR violations. Further, the government must encourage coordinated industry action to take steps to fight digital piracy. The government and its subsidiaries must also take initiatives to educate the public about the importance of IPR and its infringement. In order to achieve objective 1 of the National Intellectual Property Right Policy 2016, these initiatives are imperative for establishing an efficient system of protection. This fight against online piracy can be curtailed only by collective efforts taken by corporations, policymakers and the consumers.

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PARODIES AND TRADEMARKS: INFRINGEMENTS AND FAIR USE

-Khyati Kapoor

A parody is an exaggeration or imitation of an established and well known piece of content in comical or satirical efforts. This could be done through audio, visual as well as audio-visual methods. The movie '*Vampires Suck*' is the perfect example of a parody, made on the original '*The Twilight Saga*' movie series. However in order to create a parody, one must borrow to a maximum extent from the original creation, which raises the doubts of what constitutes an infringement and what does not. Although it does fall under the exception of fair usage in copyright law, the same is 'obscure' when it comes to trademark law.

The purpose a registered trademark serves is to prevent a third party from adopting a similar or deceptively similar symbol or logo or any differentiating mark, with the only exception being fair use given under Section 30(1) of the Trademarks Act, 1999 which provides 2 defences, the first being a *bona fide* use, and the second ensuring no unfair advantage while also not allowing it to be detrimental, either to the reputation or its distinctive character. However, the purpose of a parody is to tickle the funny bone, while also slightly demeaning the original content in some manner or another.

The first time a ‘defence of parody’ was used in the case of *Tata Sons Limited v Greenpeace International* 178(2011) DLT70 when the court took a stance on the status of parodies in India, with relation to trademark law. In the case an online game was created by Greenpeace International called ‘TATA vs. Turtle’. The intention was to raise awareness towards the danger that Olive Ridley Turtles would be exposed to, in case the Dhamra Port would be constructed. The game was similar to a Pac-Man game, with the only difference observed in the replacement of the ghosts with Tata symbols in different colours. They were named Ratty, Natty, Matty and Tinku, while the Pac-man was replaced with turtles. The judgment was however in favour of Greenpeace International, and the court stated that ‘...reasonable comment, ridicule or parody of a registered trademark can be made if the intention of the maker is to draw focus on some activity of the proprietor of the trademark..’. The Court took this decision keeping in mind the fact that Section 29(4) and (5) of the Trademarks Act, 1999 were not being violated, which state that the use of the infringing mark must be commercialised.

Earlier, in some cases the courts of India have rejected this defence. In the case of *People for Ethical Treatment of Animals v Doughney* (263 F.3d 359, No. 00-1918 (4th Cir., August 23, 2001)) the defendant was sued for the creation of a website which was hosted at the domain peta.org which

displayed the petitioner’s registered trademark ‘PETA’. The defendant argued his defence of parody, stating that PETA stood for ‘People Eating Tasty Animals’, which is a parody of ‘People for the Ethical Treatment of Animals’. However, the claim was rejected by the court, and the defendant was held liable for trademark infringement.

Although the facts and circumstances may differ in each case in future, what must be noted is that stealing in the name of creating a parody must not be condoned. In the age of rising social media usage and increasing use of parody, brands and individuals need to respect and understand the value of intellectual property, especially when they result in or are likely to result in misrepresentation and cause confusion amongst the common public. The commercialisation of such ideas also holds equal importance when it comes to influencing the decision of any Court. The bottom line being that the extent of humour in the parody and extent of incorporation of original work must be clearly demarcated.

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Watch out for these events!

Call for Papers: NUALS, CIPR's Sustainability and Intellectual Property Law Edited Book: Submit by November 15

The publication calls for papers and articles on the broad theme **“Innovate for a Green Future: Role of IP Rights in Encouraging Innovation and Creativity.”** 4 sub-themes are also available which can be found at the link below. The last date for submission is November 15, while the word limit is 5000 words. The journal is accepting papers from academicians, teachers, practitioners as well as students. The submissions can be made at [ciprpublications\[at\]nuals.ac.in](mailto:ciprpublications[at]nuals.ac.in).

Texas A&M School of Law Invites Your Contributions to its New Blog, TradeRxReport: Rolling Submissions

The Texas A&M School of Law is ranked 10th in the United States in matters of IP, Technology and Innovation. It is inviting articles, essays and research papers for its newly launched blog www.TradeRxReport.com which explores questions of access to affordable medicines and health care that arise at the intersection of intellectual property law and international trade.

Call for Papers: NUALS Intellectual Property Review (Vol. 3): Submit by Dec 15

The NUALS Intellectual Property Law Review, a peer-review journal is inviting contributions to its third volume. The deadline for submissions is December 15, 2020. Articles, Essays and Notes can be submitted by academicians, students, teachers and practitioners. For further details visit here: <https://spicyip.com/2020/09/call-for-papers-nuals-intellectual-property-review-vol-3-submit-by-dec-15-2020.html>

Call for Papers: NUALS CIPR's Sports and Intellectual Property Rights Edited Book, Submit by Nov 15

The publication aims to call for and gather papers primarily from teachers, academicians, researchers, practitioners and other stakeholders. The submissions must be made keeping in mind the broad themes i.e. **Sports, E-Sports and their interplay with IPR**. The papers can be submitted on 10 broad themes to [ciprpublications\[at\]nuals.ac.in](mailto:ciprpublications[at]nuals.ac.in). You can find the link here: <https://www.lawctopus.com/nuals-ciprs-sports-and-intellectual-property-rights-edited-book/>

INNOVATIVE IP STRATEGIES USED BY OTTS AND PIRACY ISSUES

- *Abhisvara K*

INTRODUCTION

Over the top (OTT) is a streaming media service that is offered to the viewers directly through the internet. It does not need satellite television, cable or broadcast platform. OTT, in general, means subscription-based video-on-demand service offering access to film as well as television content. The major OTT providers are Netflix, Amazon Prime, Apple TV+ etc. Along with the rise in the OTT market in recent years, piracy too has increased. These threats include credential stuffing, distributed denial of service attack and breach of customer data. As per an estimate, the OTT industry lost over 9 billion USD in 2019 due to the illegal redistribution of video content. Hence, the prevention of piracy is a major concern for the OTT services.

DIGITAL RIGHTS MANAGEMENT

One of the widely utilized solutions to tackle piracy is Digital Rights Management (DRM). DRM is a licensing system that enables the content owners to define how and by whom their content can be accessed. Whenever the user wants to access the content, DRM system takes care with a series of permissions and security checks either allowing or denying the access to the content as well as the corresponding access keys. DRM ensures secure

delivery of the content and helps in avoiding piracy. However, DRM is not a foolproof method.

FORENSIC WATERMARKING

To identify the content stealers quickly and to block the content being hacked, another technology known as forensic watermarking is used. A unique watermark is added to the video content through this technique. OTT providers can read the watermark to retrieve actionable info when the content is stolen and distributed illegally. Information like the user ID, device ID, and IP can be obtained through watermarking technology. It helps the OTT providers to quickly block the account and contain the leakage of content.

The watermarking solution is shifting to the client-side for a better player performance to the OTT providers. However, without proper securing of a watermarking agent, it becomes easy for the hackers to tamper and also to bypass the forensic features leading to the failure of the tracing mechanism. A new technological solution in the form of “Jscrambler” is also very useful to minimize the piracy exposure of OTT content. It protects the source code of agents and can detect as well as block the modifications to the forensic watermarking. OTT providers take utmost care for

ensuring that their proprietary logic remains protected from their competitors. As the majority of modern OTT players rely on JavaScript and HTML5, the most suitable approach would be the protection of the JavaScript.

THE NETFLIX MODEL

OTT providers use a number of strategies as well as legal remedies for preserving their identities and market standing in addition to protecting their content. These companies operate in a dynamic, constantly changing,

and competitive market.

For preserving their position and brand power, the strategies

adopted as well as the modus operandi of intellectual properties of these top-notch service providers can literally make or break their success. To illustrate these points, a detailed example of a major OTT, Netflix is discussed below.

Netflix is a major player in the OTT industry. It has to its credit several innovative strategies related to IP issues. Its major priority is to safeguard its success and also, ensure its competitive advantage on a long-term basis. To achieve this objective, Netflix greatly relies on the protection of intellectual property. As a part of its overall strategy, it employs continuous innovation in order to secure its prime

position in the market. Instead of relying on only one intellectual property design, Netflix employs several intellectual properties for shielding its central services and to protect itself from potential infringement suits.

Starting from the time of its mail DVD subscription service, Netflix has taken several patents for various innovations like its *rental management system, the rental processing system including the kind of envelopes used by it, etc.*ⁱⁱⁱNetflix patented its unique

methods and processes, such as its computer-implemented strategy toward renting, besides its service of maintaining the

“Instead of relying on only one intellectual property design, Netflix employs several intellectual properties for shielding its central services and to protect itself from potential infringement suits.”

provision of services to its viewers without levying them late fees. Another significant patent possessed by Netflix relates to employing a text-containing image into a digital image and identifying previously streamed chunks of a media title for avoiding a repetitive playback. In the intellectual property world, Netflix safeguards its copyrights through creative methods. In addition to providing the original content of its major hits like *Narcos* and *Stranger things*, it also makes use of the content created and distributed by other studios or media houses. Netflix secures written authorization from other entities for telecasting their content. For example, Netflix shows *Rogue One*, which is from a

Disney production. Authorization is obtained either in the form of a contract or through a license for allowing the exhibition of copyrighted productions. Such permissions are obtained after numerous restrictions as well as the payment of requisite fees to the original creators of the content. Netflix uses very creative methods to protect its original content. For example, in 2017, a ‘Stranger Things’ themed bar commenced its operations in the US devoid of consent (Netflix had a popular series entitled “Stranger things”) from Netflix. The popular streaming service provided used a funny and effective way as its response. Instead of shooting the bar a common reactive way of the cease-and-desist letter, the OTT provider wrote an affectionate and precise letter mimicking the tone of Stranger Things itself. Netflix politely informed the bar ceasing its operation. The bar obliged and closed it! Netflix’s smart and benevolent letter coupled with gentle pursuance of this particular case was hailed by one and all of the IP worlds as a legal and marketing victory for the popular streaming giant.

CONCLUSION

Thus, video piracy is a major menace to the rising fortunes of the OTT platform throughout the World. The market experts have clearly flagged the issue of cyber threats to OTT and cautioned that it will be a continuous battle for OTT providers to be a step ahead of the hackers. They suggested the service providers to constantly innovate for creating

innovative methods through more research and development in the field of cybersecurity platforms. Such technological advancements will make it difficult for hackers to breach the security of OTT systems. The constant innovations will ensure the combined growth of cybersecurity of OTT as well as OTT platform in this decade. It will result in a greater number of patents related to cybersecurity platform of OTT industry. For example, in 2019, the patent filing rate in OTT technology and platforms was over 65% higher compared to the average of previous years. Hence, OTT security providers will be the significant players in the field of OTT platform in the coming years.

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FASHION & TRADITIONAL CULTURE

-Pawan SS

The fashion industry is fast changing and more globalized. Fashion designers have to be truly mindful when they are approaching and borrowing from other cultures and creating an enormous platform to offer other products that are respectful of their emerging traditions. There is huge propaganda of cultural appropriation which is mainly shrouded in uncertainty caused by the main role that intellectual property plays in the curbing this harmful practice vis-à-vis associated traditional knowledge.

The term cultural appropriation can be mainly described as the main act by a member of a prominent relative dominant culture taking another culture in a different context without the authorization, acknowledgement and mainly compensation in a way that causes huge harm to the traditional cultural expression holders. It is very important to understand that the designers, sometimes take the prominent traditional cultural expressions and mainly reuse them out of context in the ways that disregard or interpret their cultural significance and mainly cause harm to holders of these cultural expressions. In the year May 2019

Nike's announcement to sell the special prominent edition which was of Force 1 Puerto originating in the world-famous culture of Guna community's 'Mola' (which was wrongly appropriated by Nike of the Guna community and wrongly credited the same to the Puerto Rican culture), was fiercely opposed by the representatives of the Guna people. The traditional aspect of the clothing is not mainly on the functional or the ornamental feature but it is the true essence or meaning of the part of the identity of the special indigenous community that own it. This is mainly why copying designs without giving acknowledgement or consideration for the underlying cultural significance can erode the identity of the whole community. The main source of the income for the indigenous people and local communities is their way of life which finds a deep-rooted connection with their culture thus, it is very important to understand that the cultural appropriation can lead to a significant amount of the blow in the economy. In the year 2015 UK world-famous fashion brand KTZ copied a traditional Inuit parka design onto a men's sweater with a price tag worth 700 pounds. After the huge protest, the KTZ

removed the sweater from sale and apologized for the unintended offences but did not offer any monetary compensation to the Inuit community that had in actuality developed the traditional Parka design.

It is significant to know that the existing IP laws exclude traditional cultural expression from the protection and relegate them to the public domain making it vulnerable to appropriation and undermining the customary rules and laws that regulate the access of the customary context. The World Intellectual Property Rights Organization document of “The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis provides a detailed examination of the main shortcomings of the IP law, particularly copyright’s role in the effectively preventing the appropriation of the traditional cultural expressions.

It is very significantly important to end the cultural appropriation in the fashion sector and therefore requires a thorough examination of how the IP law can be improved to better respond towards the needs of holders of traditional cultural expressions in terms of how their culture is represented by the fashion designers. In the United Nations Declaration on the Rights of Indigenous People (Article 31), international IP could be modeled reshaped to afford the Indigenous peoples the legal means to execute the effective control over their traditional cultural expression. The WIPO IGC is negotiating an

international legal instrument to provide balanced and effective IP protection to traditional cultural expression. Working within the present legal framework, fashion designers can engage with other cultures and use traditional cultural expressions without falling into the cultural appropriation trap by following four principles:

1. Understanding and respect for the holders of traditional cultural expressions.
2. Respectful transformation and reinterpretation of traditional cultural expressions.
3. Acknowledgement and recognition of the holders of traditional cultural expressions.
4. Engagement with the holders of traditional cultural expressions through requests for authorization and collaborative partnerships.

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OVERVIEW OF IP, MEDIA, AND ENTERTAINMENT LAW

- Anjali Saran

INTRODUCTION

Media is commonly known as ‘the **Fourth Pillar of Democracy**’ and quite rightly so as also for the right reasons because amongst the various facets that accompanies this important limb of democracy, the most important facet, in my opinion, is, its role as the *chowkidar*, the watchman who maintains an eagle eye over the activities and functioning of the other three recognized pillars i.e the executive, the legislature and the judiciary and to step in, whenever needed, to keep them informed about the common man’s expectations and aspirations and whether they were falling short of their constitutional obligations. It is this important facet of discharge by the Media which empowers the common man with updated information on old facts and figures as well as the current ones. In fact, such is the importance of this industry that in the case of *Express Newspapers (p) Ltd. V. Union of India*(AIR 1958 SC 578), the Supreme Court held that “*Laws which single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instrument for its exercise or to seek an alternative media, prevent newspapers from being started and ultimately drive the press to seek Government aid in order to*

survive, would therefore be struck down as unconstitutional”. However, in the present technosavvy scenario, where every bit of information is available online and there is rampant use of the Internet, many legal issues have arisen and the prominent one amongst them, in my opinion, is, the protection of the Intellectual Property Rights and the laws governing it in India and the world.

ABOUT MEDIA AND ENTERTAINMENT INDUSTRY

The Media and Entertainment (hereinafter referred to as ‘M&E’) industry is growing at a fast pace, making it a humungous industry. In India, in the fiscal year 2019-20, the M&E Industry grew at a 9% growth rate to earn revenue of INR 1.82 Trillion. In such a situation, where this industry is soon emerging as a major part of GDP and providing employment to many, many users are making unethical use of this technology at their disposal to fulfil their own materialistic wishes. Piracy, plagiarism, etc., have become common today, which leads to huge losses to the M&E industry. The film industry loses around ₹22,000 crores and around 60,000 jobs every year because of piracy. Book publishers face a loss of ₹400 crores a year

because of plagiarism. There is no data yet for the biggest M&E sector, the TV Broadcasts. It is estimated that 20-25% of books sold (in number) are pirated in India. Showing movies within a day of their release on pirated platforms or using a particular book's content without giving due credit to the author has become common today.

LAWS GOVERNING INTELLECTUAL PROPERTY RIGHTS IN INDIA

Various laws have been enacted in India & across to counter piracy, plagiarism etc. over the period primarily for effectively regulating the field of Intellectual Property and the rights flowing therefrom with the sole object of rendering protection against any invasion on such rights. As the name 'Intellectual Property' suggests, it quite literally means the property reserved in the intellect of the 'Creator' of such works, be it a piece of art or a book or a musical creation of a trademark, a patent or a design, etc. It is this branch of legislation which is the topic of discussion, that is, the M&E industry.

The earliest law regulating the field of 'Copyrights' in India, was passed during the British rule and was called the Indian Copyright Act, 1847, which simply confirmed to the English Copyright laws and affirmed its applicability in India. The law on Copyrights after undergoing changes is replaced by the Copyright Act, 1957 which was amended in 2012, and continues to be in force presently.

The earliest legislation on Industrial Design which was enforced in India was the Patterns and Designs Protection Act, 1872 which after being superseded by subsequent legislation, stands replaced by the present legislation i.e. the Designs Act, 2000. Similarly, the field of trademarks is regulated by the Trademarks Act, 1999 and the field of Patents, is presently governed by The Patents Act, 1970. There is also a new concept of Geographical Indication which indicates the origin of particular goods. In India, The Geographical Indications of Goods (Registration and Protection) Act, 1999 governs the rules to apply for and avail the benefits of GI. All these laws together work in tandem to protect the works and interest of the various creators. But still, there have been cases of IPR violations in India and it is primarily this Toil & Turmoil which forms the topic presently.

NEED FOR IPR LAWS IN INDIA

Today, it is common to see everybody around the world using various forms of media. The proactive use of media has been both a boon and a bane for all the industries, especially the Entertainment Industry. While this platform is used by them for sponsoring or promotion of their creative work, people with malicious intent tend to rob this work and produce it as their own. This has led to various issues of infringement of intellectual property rights. All the creators get their work copyrighted in order to protect it from getting copied and to earn revenue in

case someone else intends to use their work. But still, despite the stringent laws on piracy, most of the films of both India and the world get released on various media platforms, some even before their official release. Therefore, the topic here deals with this toil and turmoil of the film industry, which has led to numerous IPR violations.

For example, 4 years back, the movie '*Udta Punjab*' was leaked online two days before its official release, and a complaint was filed by the movie's producers. The Cyber Crime cell of Mumbai police arrested a 25-year-old for uploading the movie on his website and was charged under the Information Technology Act, 2000. Similarly, '*Paanch*', a movie which couldn't be released commercially, was released online on piracy websites.

CONCLUSION

The Parliament has made strict damages available against such crimes. If a person uses a movie on a platform without taking due permission from its creators, then the person can be punished with a jail term between 6 months – 3 years and a fine of Rs. 50,000 – Rs. 10,00,000 under the Cinematograph Act of 2019. However, there have been many cases of Piracy, yet they go unreported, even though they have a financial bearing on the creators, mainly

because the cases are never found by the Cyber Cells of our country. Therefore, it is imperative that for protecting the work of the entertainment industry from illegal use in Media, the IPR Laws of India, in addition to being made, should also be implemented stringently, so as to avoid any future case of misuse of any creative work.

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AN IP GUIDE FOR FILMMAKERS

-Joanna L. Mathias

Films are a digital art form used to simulate encounters that convey thoughts, stories, emotions, feelings, aesthetics, or mood with the use of moving pictures. These images are usually accompanied by sound and, more rarely, by other sensory stimulations. Moving pictures of a film are generated by photographing real scenes using a motion picture camera, by photographing drawings or miniature models using conventional animation techniques, by means of CGI and computer animation, or by incorporating any or more of these techniques with other visual effects. Films are cultural items produced by particular cultures. They represent and, in turn, influence those cultures. Film is considered to be a significant type of art, a source of mass culture and an effective tool for educating — or indoctrinating — citizens. The visual base of film gives it the strength of universal communication. Some films have become popular attractions worldwide with the use of dubbing or subtitles to translate the dialogue into other languages.

The process of film making, and Intellectual Property are intertwined. Without Intellectual Property, films would not exist. Intellectual Property allows producers to attract the resources required to get a film production off the ground; enables directors, screenwriters and actresses, as well as many designers and technicians who work behind

the scenes, to earn a living; and promotes technical advances that expand the limits of imagination and make the seemingly impossible, possible. In this article we will see how Patents, Copyrights and trademarks are applicable to films and its utility for filmmakers.

PATENTS

Patents grant their owners an exclusive right, for up to twenty years, over the invention described in the issued patent claim. A key aspect that distinguishes patents from other kinds of IP protection is that the published patent documentation must enable a consumer of ordinary skill to make and use the invention.

Utility and design patents are useful to filmmakers as the film is their invention and utility patent protects the way the invention is used and works while a design patent protects the way an invention looks. Filmmakers use hardware tools to create their films: cameras, tripods, lighting systems, etc. These items are patented and are likely used to improve the functionality of the item by the film maker. In the process of doing so they can use patent law to protect any novel and innovative ways they use to create sets, carry equipment, etc. If an invention makes a process easier, more efficient, or more innovative, and if it is reverse-engineerable for other users, it may be protectable under a patent. Further,

filmmakers use software tools in their films such as CGI, 3D, animation, green screen, etc. These aspects can be patented as manufacturers of technology similar to how hardware items are patented.

TRADEMARKS

A trademark is a word, name, logo, symbol, device, or any combination thereof, that can be used as a means of identity for goods or services. Trademarks allow prospective consumers to weigh the reputation of the manufacturer of the product or the service company they wish to receive.

Trademarks are useful for filmmakers in building up their brand. Trademarks signify a word or logo that shows people where a product comes from or who the product belongs to. In the filmmaking industry, trademarks can apply to the names of movies, the names of studios, the names of your production company, etc.- from the broad appeal of 20th Century Fox and the more idiosyncratic approach of its sister company, Fox Searchlight, to animation icon, Pixar, and family-friendly Disney. Like other businesses, movie studios use trademarks to create a distinctive identity and to stand out in a crowded market place for filmmakers seeking to monetize their work by sharing it on a widespread, national, or international scale, they would be best off with publicly registering for trademark protection.

One of the most commonly known examples of trademark registration in filmmaking is the MGM lion and soundbite that occurs at the beginning of

the MGM Studios film. Over time, and over hundreds of thousands of shows, buyers have come to equate MGM with the lion and the roar. This is called secondary meaning or trade dress, which is the final piece of trademark protection, and the most difficult to get. It means that the trademark has gained such a significant industry reputation that consumers now know from the sound itself that it refers to MGM. A movie title can also be protected as a trademark, e.g. Star Wars or Mickey mouse, as well as key characters and film elements such as James Bond, 007, Harry Potter and the Simpsons. Registering these film elements as trademarks can open the door to lucrative licensing and merchandizing agreements that can help defray costs of production and film promotion.

COPYRIGHTS

Copyright is the main form of IP protection for filmmakers. The copyright system allows artists, creatives, filmmakers, etc. to come forward with their creations for the betterment of society to increase the overall enjoyment of life for all. Without copyright law, individuals will not be able to make a living as an artist. Copyright legislation helps artists to monetize their skills. Filmmakers may copyright their script, their characters, their screenplays, the direction of the stage, the design of the stage, etc. They can use specific copyright protections for words in the script, and then again for performances that deviate or contribute to the

script by using human embodiment. The Indian Copyright Act, 1957 per se does not cover titles of films, books of songs; this is especially so because the title of the work is too short and is incapable of being an individual work protected under the Act. This was reiterated by the Madras High Court in its division bench decision in the case of *M/s Lyca Productions & Anr. vs. J. Manimaran*.

The “motion picture” has always been at the intersection of innovation and entertainment, bringing together audio, visual, and editing technologies in a constantly evolving attempt to thrill the masses. The creative process and business models of the film industry are being refined as emerging technologies are being used to create, manufacture, finance, distribute and market film productions. So much so that the use of emerging technology has encouraged small and independent filmmakers from the non-traditional markets of developing nations to reach regional and international markets. These filmmakers face

tremendous challenges as they strive to stay up to date with the transition of the legal and commercial film environment. This simplified guide is written with the intention for it to be used by persons not trained or who are not experts in intellectual property law and are wishing to identify the aspects of intellectual property in filmmaking.

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CHRIST UNIVERSITY-IPR CELL

2020 Activities:

- **The Patent- Copyright cell in collaboration with the Department of Economics conducted a webinar on the topic *Copyright Basics, Process and Costs* on 26-06-2020**, for all faculty members and research scholars. The speaker for the event was **Dr. Debabrata Samanta**, and the technical support was provided by **Mr. Vinay M**. The webinar focused on the importance of copyrights, the processes involved in drafting as well as their filing, and the costing systems of the various types of copyrights.
- **The CU-IPRC collaborated with the Department of Sociology and Social Work to present an online webinar on the topic *Copyright Basics, Process and Costs* on 9th July,2020** for research scholars and faculty members of the department. The speaker for the day was **Dr. Debabrata Samanta**, and **Mr. Vinay M** provided the technical support. The webinar conducted for the Department of Sociology focused on the types of copyrights one can file, the processes and costs involved in the same, and the approaches towards building an aware society with regards to one's intellectual property rights.
- **The CU-IPRC also collaborated with the Department of English to conduct an online webinar on the topic, *Copyright Basics, Process and Costs* on 12th September 2020** which was open to students as well as faculty members. **Dr. Debabrata Samanta** the key-note speaker, and **Mr. Vinay M** provided the technical support to conduct a successful event. The webinar explored the importance of copyrights for upcoming writers and focused on the kinds of disputes that could arise in creative materials. It also consisted of a question-answer round which solved queries related to the costs and processes involved in filing a copyright.
- **The CU-IPRC collaborated with the Department of Economics to conduct a successful online webinar on the topic *The Art of Writing Copyright* on 16th September 2020**. The key-note speakers were **Dr. Debabrata Samanta**, and **Dr. Biswas**, who are both outstanding research scholars and part of elite IT societies. The hour-long webinar was open to all students and faculty of the Economics department. The focus of this webinar was on writing an efficient copyright, which also included the relevance and importance of IPR in the 21st century, along with the tips and tricks of the field.
- **The CU-IPRC also collaborated with the Department of Education to conduct a successful online webinar on *Copyright Basics, Process and Costs* on 7th October,2020**. The key-note speakers being **Dr. Debabrata Samanta**, and **Dr. Biswas**, who have immense expertise in dealing with patents and copyrights and have numerous research papers to their name.**Mr. Vinay M** provided technical support.

- **The CU-IPRC conducted a one-day webinar on *Intellectual Property Rights with Focus on Patents*, in collaboration with the Departments of Computer Science and Statistics. The webinar was conducted on 8th February 2020**, and invited faculty members as well as research scholars. The webinar focused on the types of patents, the intricacies of patent drafting as well as the general importance and focus of IPR in the upcoming generation. The speaker for the day was Shri. B. Ahilan, Deputy Controller of patents and designs, Department for promotion of Industry and Internal Trade, Ministry of commerce and trade, Government of India, Chennai.

