

**INTERNET AND COPYRIGHT PROTECTION:  
EMERGING TRENDS IN INTERNATIONAL  
LAW**

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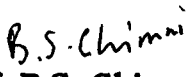
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**CERTIFICATE**

This is to certify that the dissertation entitled "***Internet and Copyright Protection: Emerging Trends in International Law***," submitted by **Sandeep Kumar Mahapatra** is in partial fulfilment of requirement for the degree of **Master of Philosophy**. It is his original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this University or of any other University.

  
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## LIST OF ABBREVIATIONS

AHRA	Audio Home Recording Act
BBS	Bulletin Board Service
CD	Compact Disc
CMI	Copyright Management Information
CNN	Cable News Network
DAT	Digital Audio Tape
DMCA	Digital Millenium Copyright Act
DRAM	Dynamic Random Access Memory
DVD	Digital Video Disc
EC	European commission
EC Directive	European Copyright Directive
EFTA	European Free Trade Area
EU	European Union
IITF	Information Infrastructure Task Force
IPRs	Intellectual Property Rights
ISPs	Internet Service Providers
MP3	Moving Pictures Experts Group Audio Layer3
MPEG	Moving Pictures Experts Group
NII	National Information Infrastructure
OSP	Online Service Provider
P <sub>2</sub> P	Peer to Peer
RAM	Random Access Memory
RIAA	Recording Industry Association of America
ROM	Read Only Memory
SCMA	Serial Copy Management System
TRIPs	Trade Related Intellectual Property Rights
UCC	Universal Copyright Convention
UR	Uruguay Round
URL	Universal Resource Locator
US	United States
WCT	WIPO Copyright Treaty

## LIST OF CASES

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## GLOSSARY OF TERMS USED

- Access provider** A company that sells Internet connection. Known variously as Internet access or service providers (IAPs or ISPs), e.g. Demon, CompuServe or America online.
- Anonymous Remailers** It is a facility provided to the users of Internet through which they can send messages without their identity being revealed.
- Archiving** Storing of information to provide research tool to researches.
- Browser** A software programme, such as Netscape Communications or Microsoft's Internet Explorer, that allows you to read and download Web documents.
- Bulletin Board System (BBS)** A computer system accessible by modem. Members can dial in and leave messages, send e-mail, play games, and trade files with other users.
- Bulletin board** One computer running software allowing multiple people to access the same information and to post information. Virtually all bulletin boards are text and graphics only, although they could become capable of displaying audiovisual works.
- Caching** Generally refers to the process of making an extra copy of a file or set of files for more convenient retrieving of the same used by the Service Providers to provide speedier access to a most-sought after material. It is a loosely used term that generally refers to the process of making an extra copy of a file or set of files for more convenient retrieval.
- Circuit Courts** In the US legal system, the country is divided into different circuits, each having more than one state under its jurisdiction and apex court in each circuit



is called, according to the number assigned to that circuit.

**Compression**

It is a technological process through which the size of a music file is reduced without affecting the quality of music.

**Computer Memory**

The storage facilities of a computer. Some of the computers storage is internal. Internal computer memory can be classified as being Read Only Memory (ROM) or Random Access Memory (RAM). ROM is permanent and cannot be altered. RAM is transient memory and the contents are alterable. When the computer is switched off, the contents of RAM are erased.

**Computer Program**

A series of instructions which control or condition the operation of a computer.

**Crawlers**

Automatic software used to search the Internet for relevant material, which is then stored by creating an index.

**Cryptographic Algorithm**

A cryptographic algorithm is a mathematical function that takes intelligible information (plain text) as input and changes it into unintelligible cipher text.

**Cyberspace**

It is a place without physical walls or even physical dimensions in which interaction occurs as if it happened in the real world and in real time but constitutes only a virtual reality. It more commonly refers to the collection of online virtual communities as a whole.

**Encryption Envelopes**

These are software devices which encrypt intellectual property in such a way that access can be obtained only by using the proper key.

**Exhaustion**

A Doctrine emanating from EC law. basically, the owner of an intellectual property right which to

articles which have been put into circulation by him or with his consent anywhere within the EC can not exercise the right to prevent the subsequent import, export or sale of those particular articles. The right is said to be exhausted.

**Fixation**

Fixation means the embodiment of sounds or other representations of sounds from which they can be perceived, reproduced or communicated through a device.

**Framing**

A type of linking where material from an inline link is displayed within the frame or window border of a page of the linking website.

**Host**

Your host is the computer you contact to get on to the Net.

**Hot List**

A list of all the particular websites which serves as an index for a user to contact others on the list and get the required information.

**Hypertext**

Text where any word or phrase may be linked to another point in the same or another document. These links trigger other documents to be displayed.

**Interactive Websites**

Those websites which allow users to upload material apart from giving them the opportunity to download material from them.

**ISP**

Internet service provider. A company that sells access to the Internet and other online services.

**Link**

It is an embedded electronic address that points to another web location. Links may be of at least two types. The first type 'outlink' merely provides a vehicle by which a person browsing a web page can go another site by clicking on the link. The second type 'in-line link' is a pointer to a document, image, audio clip or the like somewhere on the web contained in another's web page which, in effect,

pulls in the image, text or audio clip from the other web page into the current document for display.

**Moral Rights**

The rights that the author of a copyrighted work has independent to the economic rights of the copyright owner. The moral rights are to be identified as the author of the work and to be able to object to a derogatory treatment of the work.

**MP3**

The Moving Picture Experts Group Audio Layers known as MP<sub>3</sub> is a music format which compresses the music file to 1/12<sup>th</sup> of its original uncompressed size and enables faster transmission and easier storage.

**MPEG**

The Moving Picture Experts Group is a group of people, who set technical stand and for digital video and audio compression.

**Multimedia**

The combination of different forms of media, such as graphics, texts, sound recording.

**Offline Browsers**

Software used to browse the Internet automatically and to collect and compile the required material.

**Packet**

A unit of data. In data transfer, information is broken into packets, which then travel independently through the Net. An Internet packet contains the source and destination addresses, an identifier and the data segment.

**Passive Websites**

These are websites which provide different kind of information and do not solicit user participation.

**Phonograms**

Also called sound recording embodying performance.

**Right Management Information** An anti copying mechanism containing identities such as author of the work, the year of publication, terms and conditions of use.

**Safe Harbors**

Conditions the criteria under which an Internet Service Providers is not liable for infringing action by third party.

<b>Sampling</b>	A term used to refer when the users go through a copyrighted work available on the Internet so as to decide whether to buy that or not.
<b>Scrambling</b>	This is a technological process of assigning codes to a particular file which can be viewed only after being decoded by a device compliant to decode such files.
<b>Serial Copy Management System (SCMS)</b>	A technological system, which allows a digital recording device to obtain, send and act on information about the generational status of the music file it is reading.
<b>Space Shifting</b>	A term used for the use of a copyrighted work after these being recorded.
<b>Telnet</b>	Telnet is simple Internet service that allows a remote user to access the facilities of their home network as if they were directly connected to it.
<b>URL</b>	Uniform resource locator. The standard addressing system for the World Wide Web.
<b>Usenet</b>	It is a database of distributed message and acts as a forum for discussions and exchanges on particular topics.
<b>Water Mark</b>	Anti copying mechanism used to protect copyrighted work, particularly musical work so that such music can be played only in a technological device meant for this purpose.
<b>Web</b>	The World Wide Web or WWW the generic terms for a network of graphic/hypermedia documents on the Internet that are interconnected through hypertext links.
<b>World Wide Web</b>	It is a system of linking millions of documents on thousands of computers together across the Internet using hypertext links.

***Chapter I***  
Introduction

# CHAPTER I

## INTRODUCTION

Technological progress involves conflicting consequences for the owners of intellectual property rights. On the one hand, the scope of these rights is enhanced bringing new claimants for protection. On the other hand, the new technologies bring in the prospect of violation of such rights by providing easier methods of unauthorised use.<sup>1</sup>

The developments in the field of digital technology has done precisely this. The Internet,<sup>2</sup> which is a product of this new technology, has emerged as the basic foundational structure for the much vaunted and over hyped information super highway. It has moved from a quiet means of communication in academic and scientific research circles into the commercial arena and private homes. The Internet, having become a major global data pipeline through which large amounts of creative content and information is moved across transnational borders, has raised issues of intellectual property protection for the material available on and through it.<sup>3</sup>

In this regard, copyright provides one of the most important forms of intellectual property protection. For much of the work that will move on the Internet will be works of authorship such as musical works, multimedia works, movies, software, database and the like, which are within the usual subject matter of traditional copyright. The large volume of copyrighted material that would be transacted through the Internet has made the owners of the copyright concerned. They are feeling threatened by the fact that digital technology has enabled the users the ease to make virtually unlimited number of perfect copies, which was not there in the analog medium, as the proposition of making copies of a copyrighted work used to be a costly affair.<sup>4</sup> To put it differently, copyright law has to change with changes in technology;<sup>5</sup> the challenges of digitization and Internet has meant that it is time for copyright to expand its horizon. Copyright law must now operate in 'cyberspace'<sup>6</sup> which knows no boundary and hence the concept

<sup>1</sup> Peter Drohas, ed., *Intellectual Property* (Aldershot, 1999) p.386.

<sup>2</sup> Network of networks of computers.

<sup>3</sup> Lilian Edwards and Charlotte Waelde, *Law and the Internet: Regulating Cyberspace*, (Oxford, 1999), pp.15-20.

<sup>4</sup> Thomas C. Vinje, "A Brave New World of Technical Protection: Will There Still Be Room for Copyright?" *E.I.P.R.*, Vol.8 (1996), p.431.

<sup>5</sup> Paul Goldstein, "Copyright Highway: From Guttenberg to the Celestial Juke Box," *Oregon Law Review*, Vol.73 (1994), p.27.

<sup>6</sup> Cyberspace was first coined by science fiction writer Bruce Sterling in his book *Mirror Shades: The Cyberpunk Anthology* (1996).

that copyright law was territorially confined body of law needs changes. In other words, copyright must 'globalise' to be fit for the cyberspace era.

Secondly, the conventional copyright laws were designed primarily to deal with the creation, distribution, and sale of protected works in tangible copies. In a world of tangible distributions it was easy to know when a copy had been made. However, the nature of Internet makes it difficult to know, whether a copy of the work has been made or not. The reason being Internet uses a technique known as 'packet switching' to transmit information, by which data to be transmitted is broken into smaller units or 'packets' of information. These packets are then sent through the network of computers as discrete units, often through multiple different paths and often at different times. In this process the data so transmitted gets copied, though for a short time into the Random Access Memory (RAM) of the computer. This raises the prospect of infringement of copyright.

Thirdly, in a tangible medium the acts of copying and distribution were clearly distinguishable and formed the basis of the distinction made in the copyright law between the acts of primary infringement (such as copying) and acts of secondary infringement (such as distribution). However, in the digitised environment represented by the Internet, the distinction between copying and distribution has blurred owing to the mode of data transmission.<sup>7</sup>

Apart from the issue of finding a solution to what constitutes copying, the problem of identifying and tracing infringement needs to be addressed as Internet has made it possible for disseminating copyrighted work from any part of the world to any destination world over. Added to this the problem becomes more acute when anonymous remailers<sup>8</sup> are taken to consideration as, it enables the dissemination of copyrighted work without disclosing the identity of the persons involved. Since such dissemination takes place through the service providers,<sup>9</sup> the possibility of making them contributorily liable for infringement of copyright needs to be explored. In other words, the other problem in need of a solution is the issue of fixing up the liability of service providers.<sup>10</sup> Finally, the question of applying appropriate jurisdiction and that of enforcement action also needs to be answered. Since the Internet crosses boundaries and knows no border, we are faced with a situation of deciding proper jurisdiction. When infringement is committed by a person situated in a state, and the aftermath effects someone in another state, even if the proper forum to settle such a dispute is found the related question of enforcing such decision arises.

<sup>7</sup> Edwards and Waelde, n.3, pp.22-23.

<sup>8</sup> Anonymous Remailers is a facility provided to the users of Internet through which they can send messages without their identity being revealed.

<sup>9</sup> Service providers are those who facilitate transmission of and access to information on the web.

<sup>10</sup> Jarrod Winer, *Globalisation and the Harmonisation of Law* (London, 1999), pp.109-110.

All these issues have led to many legal battles and courts have come out with decisions. Copyright being the child of technology from the first<sup>11</sup> needs to be modified in the context of the ever increasing technological development that is taking place that is taking place in the digital era. The need of the hour is expansion of horizons of copyright to make itself effectively operational in 'cyberspace.'<sup>12</sup> By entering into the 'cyberspace' copyright would be covering new territory which knows no border, and hence must 'globalise,'<sup>13</sup> providing relief for copyright infringement and at the same time ensuring that the interests of the users are also duly protected.

### **I. Whither Copyright Law in Cyberspace**

The laissez-faire freedom of electronic transaction through the Internet has made it the place for transacting information, including copyrighted material. This freedom of information has always been a topic of debate and has brought in two strands of thought, widely differing from each other. One line of argument forwarded by the proponents of limitless freedom says that there should be no imposition of copyright law on the information in the net.<sup>14</sup> Furthering this line of thought is the view that copyright law has become unimportant in the digital age and the production of intellectual property will continue unabated without powerful copyrights.<sup>15</sup> Following this argument is the view that Internet should not be regulated by any regulations legislated by states and such regulation be left in the hands of the users.<sup>16</sup>

The contrary line of argument holds the view that Internet needs to be regulated through legislation and rules to safeguard the interest of the copyright holder.<sup>17</sup> Adhering to this view is the report published by various states like the USA and trade groupings like the EU. These views go a step further and call for a high protectionist stand and for the copyright holder to the extent that the user is given a secondary treatment. For example, the National Information Infrastructure (NII) set up by the USA for proposing legal changes to US Intellectual Property law

<sup>11</sup> Graeme W. Austin, "Social Policy Choices and Choice of Law of Copyright Infringement in Cyberspace," *Oregon Law Review*, Vol.79 (2000), pp.575-576.

<sup>12</sup> *Ibid.*, pp-575-576.

<sup>13</sup> *Ibid.*, pp-575-576.

<sup>14</sup> John Perry Barlow, "A Framework for Rethinking Patents and Copyright in the Digital Age," downloaded from <http://www.eff.org>.

<sup>15</sup> David Post and David R. Jonson, "Law and Borders: The Rise of Law in Cyberspace", *Stanford Law Review*, Vol.48 (1996), p. 1367.

<sup>16</sup> Scamoil Spichandler, "The Wild Wild Web: Non-Regulation as the Answer to Regulation Question," *Cornell International Law Journal*, Vol.33 (2000), pp.436-437.

<sup>17</sup> Jack L. Goldsmith, "Against Cyber Anarchy," *The University of Chicago Law Review*, Vol.65, No.4 (Fall 1998), pp.1200-01.



recommended high protection standard for copyrighted material, thereby raising doubts as to whether users can still enjoy privileges like fair use.<sup>18</sup>

The proposals made by this working group (NII) sought to protect copies of copyrighted material in 'any form.' Which would mean that copies stored in the RAM memory of a computer would constitute an infringement. Secondly, the report sought to eliminate fair use right whenever a use is licensed. Thirdly, it wanted to put an end to the concept of 'first sale' rights given to the user which enabled the person to have sole right over a copyrighted material after the purchase is made. These formulations tried to put the user in a bind giving little leeway to exercise his right.

The Green Paper on 'Copyright and Technological Challenge' prepared by the European Union and the subsequent European Copyright Directive (EC Directive)<sup>19</sup> closely follows the line adopted by the NII.

These two divergent approaches to copyright protection in the Internet has made the issue murkier. So as to address this situation where technology seems to precede legal developments, and the Internet is proclaimed to be "literally lawless."<sup>20</sup> Several initiatives have been taken at the international and national levels.

## **II. Overview of International Legal Developments in this field**

At the international level, the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO) have taken measures to identify principles and rules to address the problem of copyright protection in a digitised environment. These initiatives are briefly discussed below.

### **A. WTO**

The General Agreement on Tariffs and Trade (GATT) dealt with the issue of protection of Intellectual Property Rights (IPRs) in its Uruguay Round of Trade Negotiations. As a result of the deliberations in this round, the Agreement on Trade Related Intellectual Property Rights (TRIPs) was entered into. Though the provisions of TRIPs did not specifically address the problems of copyright protection in Internet, its provisions can be applied to it. The agreement on TRIPs provides:

<sup>18</sup> Bruce A. Lehman, *The Report of the Working Group on Intellectual Property Rights*, Intellectual Property and the National Information Infrastructure (Washington, D.C., 1995), pp.9-11.

<sup>19</sup> The European Commission has adopted various directives on copyright in 1991, 1993, 1996 and recently in 1999.

<sup>20</sup> Special Issue "Welcome to Cyberspace" *Time International* (Spring 1995), p.7.

1. Recognises computer programs and literary works as provided under the Berne Convention and also provides that compilations of data, which reason of the selection on arrangement of their contents constitutes intellectual creation and hence be protected as literary works.<sup>21</sup> Since transactions through the Internet constitute of computer programs and compilation of data, these provisions can be applied.
2. For the first time recognises the right of commercial rental for authors of computer program and cinematographic works, which would authorise them to give on rent their works.<sup>22</sup>
3. With respect to the rights of performers,<sup>23</sup> the Agreement grants them the authority to fix their performance and to prevent unauthorised fixation of their work. Secondly, they are also granted the right to prevent unauthorised broadcasting of their works by wireless means.<sup>24</sup> Added to this, TRIPs grants rental rights to producers of phonograms and the exclusive right of reproduction.

### **III. World Intellectual Property Organisation (WIPO)**

The WIPO has been in the forefront of providing recourse to copyright protection through its regular deliberation on emerging issues related to this area. With regard to copyright protection in the digital environment, WIPO initiated deliberations and consultation among member states on two treaties, viz., the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). They both were adopted in 1996. These two treaties have significantly broadened the scope of copyright protection in the era of cyberspace and hence are novel in many respects.

#### **A. WIPO Copyright Treaty (WCT)**

The WCT is a comprehensive document covering various aspects of copyright protection in the Internet. The Treaty recognises copyrights for computer programs and databases whatever may be the 'mode of or form' of expression.<sup>25</sup> The Treaty further recognises some new rights in the context of Internet. These are the right of communication, right of distribution and the right of rental.

Explicit reference is made to the Internet and particularly to the World Wide Web in articles of the Treaty that deal with communication right.<sup>26</sup> Realising the importance of the

<sup>21</sup> Article 10, TRIPs Agreement.

<sup>22</sup> Article 11, TRIPs Agreement.

<sup>23</sup> Article 14, TRIPs Agreement.

<sup>24</sup> Article 14 (2) and 14 (4), TRIPs Agreement.

<sup>25</sup> Articles 6 and 7, WIPO Copyright Treaty, 1996.

<sup>26</sup> Article 8, WIPO Copyright Treaty, 1996.

greater use in future to use technological measure to protect copyright of digital works. The WCT has made provisions for legal remedies in case of circumvention of such technological measures.<sup>27</sup> The Treaty also makes provisions to prevent removal or alteration of information regarding the work, author of the work, terms and conditions of the use of the work, etc. These provisions strengthen the scope of copyright protection in Internet and give the holder of copyright the means to safeguard his interests.<sup>28</sup>

With respect to reproduction right, the Treaty follows the provisions made under Article 9 (2)<sup>29</sup> of the Berne Convention and makes it applicable to the digital environment. This formulation leaves wide open. Since Article 9 of the Berne Convention grants the authors of copyrighted work exclusive right and reproduction of their work in 'manner or form,' the issue of whether temporary copying constitutes reproduction or not is left to interpretation.

To make itself implementable the Treaty calls upon Contracting Parties to adopt legislation to adhere to the provisions of this Treaty.<sup>30</sup> An added feature of this Treaty is the adoption of Agreed Statements to various Articles which outline the broad contours of the Treaty.

## **B. WIPO Performances and Phonograms Treaty (WPPT)**

The second Treaty adopted by the WIPO -Performances and Phonograms Treaty - seeks to protect neighbouring rights of copyright. These are categorised as the rights of performers and phonograms producers. By adopting this treaty, the WIPO has recognised the importance of protecting the rights of performers and phonogram producers in a digital environment. This Treaty also makes explicit reference to the World Wide Web through the provisions regarding right of communication of the work of performers and phonogram producers to the public.<sup>31</sup> The WPPT also makes provisions for legal protection and legal remedies against circumvention of technological measures used to protect the rights of performers and producers of phonogram.<sup>32</sup> Also provided are the obligations concerning rights management information to stop any kind of removal or alteration of any electronic rights management information.<sup>33</sup> These apart, the WPPT

<sup>27</sup> Article 11, WIPO Copyright Treaty, Obligations Concerning Technological Measures.

<sup>28</sup> Article 12, WIPO Copyright Treaty, Obligations Concerning Rights management Information.

<sup>29</sup> Article 9, The Berne Convention deals with the right of reproduction. Article 9 (1) provides that "authors of literary and artistic works protected by this convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form."

<sup>30</sup> Article 14, WIPO Copyright Treaty, 1996.

<sup>31</sup> Articles 10 and 14 of WIPO Performances and Phonograms Treaty, 1996.

<sup>32</sup> Article 18, WIPO Performances and Phonograms Treaty, 1996.

<sup>33</sup> Article 19, WIPO Performances and Phonograms Treaty, 1996.

grants the right of distribution to performers and producers of phonogram.<sup>34</sup> With regard to reproduction rights, the performers and producers of Phonograms are granted exclusive right to reproduce their works 'in any manner or form'.<sup>35</sup> These provisions expand the right of reproduction to the arena of temporary reproduction as well. The WPPT is unique in one aspect that it grants moral right to performers and provides them the opportunity to be identified with their work and also the right to object to any kind of distortion, mutilation or other modifications of their works.<sup>36</sup>

#### **IV. European Copyright Directive (EC Directive)**

The EC Directive is an initiative by the European Union to harmonise copyright law in the context of Internet. The Directive takes cognisance of the world wide web and reference is made to this in the communication right granted to authors, performers and producers of phonogram to make their work available to the public through wire or wireless means in such a way that such work could be accessed by the public at a time and place 'individually chosen by them'.<sup>37</sup> In case of reproduction right the EC grants the authors, performers, and producers of phonogram the exclusive right of 'direct or indirect, temporary or permanent reproduction of their work'.<sup>38</sup> By acknowledging that temporary reproduction of a work infringement the copyright of the holder the Directive signals that copies made in the RAM memory of a computer could be treated as infringement. The Directive has provisions for prohibiting conduct and the use of devices to circumvent technological measures used to protect copyrighted work.<sup>39</sup> Another provision of the EC which needs mention is that regarding the obligations of member states to safeguard rights management information which would enable the copyright holders maximum protection from removal or alteration of such information.<sup>40</sup>

#### **V. National Legislation**

##### **A. The US Digital Millenium Copyright Act (DMCA)**

The DMCA was adopted by the USA in 1998 to bring its copyright law in line with the WIPO Treaties. The DMCA endeavors to provide a high protectionist standard for the rights of copyright holders. This is reflected in the provisions made to prohibit certain conduct thought to

<sup>34</sup> Articles 8 and 12, WIPO Performances and Phonograms Treaty, 1996.

<sup>35</sup> Articles 7 and 11, WIPO Performances and Phonograms Treaty, 1996.

<sup>36</sup> Article 5, WIPO Performances and Phonograms Treaty, 1996.

<sup>37</sup> Article 3 (1), EC Directive.

<sup>38</sup> Article 2, EC Directive.

<sup>39</sup> Article 6, EC Directive.

be infringing, as well as prohibiting the use of certain used for the act of infringement. These provisions are made to prevent circumvention of technological measures used to protect copyrighted work.<sup>41</sup> The DMCA also provides for the safeguard of copyright management information and prohibits any kind of removal or alteration of such information which is used to identify the author or performer and gives the relevant terms and conditions of use.<sup>42</sup>

The most substantive provision of the DMCA is that dealing with the liability of online service providers (OSPs). The Act provides for four safe harbors to limit the liability of OSPs. These safe harbors are saving clauses for the OSPs and prescribe the conditions under which the OSP cannot be made liable for infringing activities of a third party. The four safe harbors available to the OSP are:

1. When the OSP acts as a mere conduit for infringing information and does not participate in the infringing activity,<sup>43</sup>
2. For system caching where caching of information is done by a user, and the OSP only hosts such information,<sup>44</sup>
3. Innocent storage of information provided the OSP does not have knowledge or reason to know that someone else has stored infringing material on its system,<sup>45</sup> and
4. When an OSP refers or links a person to a site containing infringing material at the instance of that person the OSP is not liable.<sup>46</sup>

## **VI. Scope of the Study**

In this background, the rest of the dissertation is divided into the following chapters. The second chapter analyses the major issues pertaining to copyright protection in Internet and tries to identify the implications of these issues on the existing international legal set up dealing with copyright. The third chapter analyses the legal developments that have taken place at the international and national level. It also addresses the status of Indian Copyright Act in the Digital era. The final chapter contains the conclusions of the study.

<sup>40</sup> Article 7, EC Directive.

<sup>41</sup> Section 1201 (a) (1) and (2), DMCA, 1998.

<sup>42</sup> Section 1202 (c), DMCA, 1998.

<sup>43</sup> Section 512 (a), DMCA, 1998.

<sup>44</sup> Section 512 (b), DMCA, 1998.

<sup>45</sup> Section 512 (c), DMCA, 1998.

<sup>46</sup> Section 512 (d), DMCA, 1998.

## ***Chapter II***

### Copyright Issues Pertaining to Internet

## CHAPTER II

### COPYRIGHT ISSUES PERTAINING TO INTERNET

This chapter looks into the various issues, which the Internet has foisted upon us with particular reference to the issue of online piracy of copyrighted music. These include:

1. Traditional copyright issues and the Internet.
2. Various ways and means of copyright infringement on the Internet.
3. Online piracy of music and its consequences.
4. Whether Internet Service Providers (ISPs) are liable for copyright infringement.
5. The question of jurisdiction in case of copyright infringement in the Internet

#### **I. Traditional Copyright Issues and the Internet**

Copyright is a bundle of rights.<sup>1</sup> A copyright holder of a work has got the following rights:

1. Right of reproduction of copyrighted work and copies or phonorecords.
2. The right to prepare derivative works based on the copyrighted work.
3. The right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental or lease or lending.
4. Right to perform copyrighted work publicly in the case of literary, musical, dramatic or choreographic works, pantomimes, and motion pictures and other audiovisual works.
5. The right to display copyrighted work for the categories mentioned in no.4.<sup>2</sup>

Apart from these exclusive rights the author of a work of visual art is given the right:

- i. authorship of that work can prevent any intentional distortion, mutilation or other modification of that work which would be prejudicial to his or her honour or reputation.

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<sup>1</sup> This means that the holder of the copyright has certain rights that are vested in him and only him.

<sup>2</sup> Section 106, US Copyright Act (17 US code), 1976; Section 14, Indian Copyright Act, 1957.

- ii. To prevent any distortion of a work of recognised stature, or any intentional or grossly negligent destruction of that.

These rights are called rights of 'attributed and integrity' otherwise known as moral rights" or "droits morale."<sup>3</sup>

However, the exceptions to these rights are provided in using the work for<sup>4</sup>

- i. The purpose of research and private study.
- ii. Criticism and review.
- iii. Reporting current events.
- iv. In connection with judicial proceedings.
- v. Performance by an amateur club before a nonpaying audience
- vi. Making of sound recordings of musical, dramatic work under certain conditions.

#### **A. Fair Use**

The most extensive potential exception to the copyright owner is fair use.<sup>5</sup> In determining whether a particular use is fair use, four factors are generally considered:

1. the purpose and character of the use, including whether such use is of a commercial nature or non-profit educational;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyright work as a whole; and
4. the effect of the use upon the potential market for the copyrighted work.

The above-mentioned facts about the rights and exceptions given by the traditional copyright law need to be revisited. Particularly so when we are dealing with a digitized environment which has redefined the concept of copyright protection so much so that analysts have pointed out that copyright law has become less important in the age of electronic networks and that production of intellectual property will continue unabated

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<sup>3</sup> Article 6<sup>bis</sup>, The Berne Convention for the Protection of Literary and Artistic Works, 1971.

<sup>4</sup> Section 52, Indian Copyright Act; Article 10, The Berne Convention, 1971.

<sup>5</sup> Section 107, US Copyright Statute (17 U.S.C.), 1976.



even without powerful copyright rights<sup>6</sup>. Hence this section discusses the implications of Internet on the various rights of the copyright holder.

## **B. Right of Reproduction**

In the digital era, this right of the copyright holder is at stake of being infringed of as all interim and received transmission is being categorised as copies. If this be accepted then ordinary activities on the Internet like browsing, accessing information may fall within the copyright holder's monopoly rights.<sup>7</sup>

Almost all works of authorship that are sent through the Internet have upon creation been saved to a disk drive or similar storage device at the computer of the author. When the author sends that work to another party or parties through the Internet he transmits the file to an Internet computer server and router. These routers are connected to several other routers. These connections form a network. Before transmitting the information the original router divides each work into smaller packets of a set length and each packet is given a standard Internet protocol format that includes the address of the ultimate destination. The originating router determines the most efficient path to send the information. Each router that receives and forwards the information after the original transmission makes a new determination of the most efficient path. In case a router is not responding then the router can send the packet to another router so as to reach the ultimate destination. Upon the receipt of a packet by a router, the packet is stored on a disk of that router until the next router can be determined and the packet can be transferred to next router in the selected route. The question that arises is whether during such a transmission through the Internet, where information is stored in the Random Access Memory (RAM) of the originating routing and destination computer, fixation in a tangible medium takes place and if this entitles such works to copyright protection.<sup>8</sup>

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<sup>6</sup> Eric Schlachter, "The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could be Unimportant on the Internet," downloaded from [www.law.berkely.edu/journals/btlj/articles12/schlachter/html/note.html](http://www.law.berkely.edu/journals/btlj/articles12/schlachter/html/note.html).

<sup>7</sup> David L. Hayes, "Advanced Copyright Issues on the Internet," downloaded from [www.fewnwick.com](http://www.fewnwick.com)

<sup>8</sup> F. Lawrence Street and Mark P. Grant, *Law of the Internet*, (Virginia, 2000), p.495.

The copyright statutes of various countries<sup>9</sup> have defined "copies" as material objects other than phonorecords in which a work is fixed by any method known as later developed and from which the work can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or a device. The term "copies" includes the material object other than phonorecords in which the work is fixed.<sup>10</sup> This definition raises two questions:

1. Whether images of transmitted data in RAM qualify as copies; and
2. Whether images of a data stored in RAM are sufficiently permanent to be deemed "Copies."

While addressing the first question, it has to be considered that while transmission is happening through the Internet, only a single packet or may be only a single byte of the data may exist in a given RAM at a given time. For example, the modem at the receiving or transmitting computer might have only one or few bytes of data at a time. A node computer and a router computer may receive only a few packets of the data. Which gives us a picture where partial images of a "copy" of the work is stored in the RAM of a particular computer during transmission. This leads to another point as to whether such partial images stored in RAM can be deemed as *copy* of a work?<sup>11</sup>

The second point to analyse is whether the images stored in the RAM of a computer in the transmission route qualifies as *permanent* to be deemed *copies* for copyright purposes. The definition of *copies* speaks of *material objects* meaning an enduring tangible medium for a work. Hence, whether we can consider the image stored in RAM to be considered the *material object*? Since the images of the data stored in RAM disappears when the computer is switched off and in addition to this most RAM are dynamic DRAM meaning the data has to be refreshed even when the computer is on to make it readable, it makes the data fleeting. The question then is if its embodiment in the RAM is sufficiently permanent to be deemed *copy*?<sup>12</sup>

Following the definition of copy as given above, whereby fixation is required in a

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<sup>9</sup> Section 101, US Copyright Statute, 1976.

<sup>10</sup> Hayes, n. 7.

<sup>11</sup> Street and Grant, n.8, p.496.

<sup>12</sup> Hayes, n.8.

tangible medium of expression which can be perceived, reproduced or can be communicated, it can be said that images of data temporarily stored in RAM do not constitute copies.

A perusal of the cases dealing with this issue gives an inconclusive view. A US District Court in *Apple Computer vs. Formula International*,<sup>13</sup> that copies stored in random access memory (RAM) are merely "temporary" unlike the Read Only Memory (ROM) copies and that running a computer from RAM does not create an infringing random copy.

However, in *MAI Systems corp. vs. Peak Computers*<sup>14</sup> it was held that loading a computer operating system from a magnetic storage into RAM for maintenance organisation created an illegal copy of the programme fixed in RAM. This judgement given by the 9<sup>th</sup> Circuit emphasised that the copy of the operating system was stored in RAM for several minutes and the output of the program was viewed by the user while it was in RAM which confirmed the conclusion that the RAM copy was capable of being perceived with the aid of a machine.<sup>15</sup>

In the light of this observation the issue is whether the partial images stored in the router computer during an Internet transmission be considered as a copy? A judgement delivered by the 7<sup>th</sup> Circuit after the MAI Case in the case of *NLFC Inc. vs. Devcom mid-Am Inc.*<sup>16</sup> indicated that merely proving that the defendant has remotely accessed the plaintiff's software through the terminal emulation programme was not sufficient to prove that a copy has been made.

Another decision leaves unsettled the issue of whether transitory images stored in RAM constitutes a copy. In the *Advance Computer Services Vs. MAI Systems*<sup>17</sup> the earlier MAI judgement was followed. However, the opinion of the court suggests that only copies that exist for several minutes should be constituted a copy within the purview of copyright law.

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<sup>13</sup> 991 F 2D.

<sup>14</sup> 991F 2D 511 (9<sup>th</sup> Circuit1993) Crete dismissed , Street and Grant n.8, p.497.

<sup>15</sup> Ibid, p.497.

<sup>16</sup> 45 F 3d 231(7<sup>th</sup> Circuit,1995).

<sup>17</sup> 845 F.supp. 356(ED. Va1994).

But a recent judgement in *Stenograph L.L.C. Vs Bossard Assocs*<sup>18</sup> the D.C. Circuit held that an infringing copy of a computer programme was made when the programme was loaded into RAM. These issues have certainly raised pertinent questions in the context of Internet. The third chapter to follow addresses these issues and makes a study of the various legislations adopted by the various international organisations and states.

### **C. The Right of Public Performance**

The right of public performance is another right enjoined to the copyright holder. The Berne Convention provides through Article 11<sup>19</sup>, Article 11<sup>bis</sup><sup>20</sup> Article 11<sup>ter</sup><sup>21</sup> and Article 12<sup>22</sup>, the copyright holder with the right of reproduction. Legislation adopted by various states also make provision to this effect. Section 106(4) of the U.S. Copyright Statute grants the owner of the copyright in a work the exclusive right to perform the work publicly. The right applies to literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual work. It does not extend to pictorial, graphic, sculptural and architectural work.<sup>23</sup> The digital performance in Sound Recording Act, 1995<sup>24</sup> grants right of public performance to sound recording. The Indian Copyright Act 1957 provides in section 13 the different categories of work in which copyright subsists. Section 13 grants copyright to original literary, dramatic, musical and artistic works, to cinematographic films and sound recordings. Section 14 (iii) further grants the right of public performance in cases of literary, dramatic, and musical work.<sup>25</sup>

Section 101 of the U.S. Copyright Statute provides that performing a work *publicly* means:

1. to perform it at a public place open to the public or at any place where a substantial number of persons outside the normal family circle has gathered; or

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<sup>18</sup> 144 F. 3d (D.C. Circuit 1998).

<sup>19</sup> Article 11 deals with "Certain Rights in Dramatic and Musical Works," The Berne Convention, 1971.

<sup>20</sup> Article 11<sup>bis</sup> deals with "Broadcasting and Related Rights," Berne Convention, 1971.

<sup>21</sup> Article 11<sup>ter</sup> deals with "Certain Rights in Literary Works," Berne Convention, 1971.

<sup>22</sup> Article 12 deals "Right of Adaptation, Arrangement and Other Alteration," Berne Convention, 1971.

<sup>23</sup> Section 106, U.S. Copyright Statute (17 US code), 1976.

<sup>24</sup> U S Code, 1995.

<sup>25</sup> The Copyright Act, 1957.

2. to transmit or otherwise communicate a performance of the work to a place specified by clause (1) or to the public by means of any device or process whether the members of the public capable of receiving the performance or display receive is in the same place or at separate places and at the same time at different times.<sup>26</sup>

As stated above performing in the public involves either communication or transmitting of a work or both. So this has clear implications for online activity. However, in this regard the issue which is hotly debated is whether to fall within the copyright owner's right of public performance the 'performance' must be accompanied by a transmitted signal that is capable of immediate conversion (isochronous transmission) or whether it is sufficient that the transmitted signal is sent either faster or slower that embodies performance (asynchronous transmission)<sup>27</sup>.

The transmission other than the online one is based on isochronous method. But works transmitted through the Internet may fall within the asynchronous mode and hence may fall outside the ambit of public performance right as given in traditional copyright law.<sup>28</sup> Added to this the packet switching technology through which all Internet transmission is done, has blurred the distinction between the two referred mode of transmission. The reason being that through the use of buffering in memory or storage of information on magnetic or optical storage, either at the transmitting end or the receiving end or both, of all or parts of transmitted data, an asynchronous transmission can produce the affect of an isochronous performance.<sup>29</sup>

As would be analysed in the next chapter the current international and national legislation leaves this issue far from settled.

#### **D. The Right of Public Display**

Article 11(1)(ii) of the Berne Convention provides that 'Authors of dramatic, dramatico-musical work and musical works shall enjoy the exclusive right of authorising any communication to the public of the performance of their works.'<sup>30</sup> Though the Berne

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<sup>26</sup> Section 101 (17 U.S.C.), 1976.

<sup>27</sup> Kent D. Stucky, *Internet and Online Law*, (New York, 1996), p.6-45.

<sup>28</sup> Ibid, p.6-46.

<sup>29</sup> In this mode of transmission of information, currently used in the Internet, the different packets are sent through different computers in a network which are then assembled at the receiving end.

<sup>30</sup> Article 11 (1) (ii), The Berne Convention, 1971..

Convention does not contain the right of public display per se this above-mentioned provision can be construed as the right conferred on the copyright holder in this regard.

The U.S. Copyright Statute grants through section 106 (3) the owner of the copyright in a literary, dramatic, choreographic works a pantomime and a pictorial graphic, sculptural work, inculcating the individual images of a motion picture or other exclusive copyright to display the work publicly.<sup>31</sup>

Section 51 (b) of the Indian Copyright Act provides that "copyright in a work shall be deemed to have been infringed when any person makes for sale or hire or sells, or lets for hire, or by way of trade display or offers for sale or hire any infringing copies of the work. This section read with section 14 of the Act, which deals with "the right of the owner of the copyright" makes it amply clear that the right of public display subsists with the holder of the copyright.<sup>32</sup>

The judgements delivered by U.S. Courts provide a pointer in this regard. In *Playboy Enterprises Inc. vs. Frena*<sup>33</sup> the Court held that the making of photographs available on a Bulletin Board Service(BBS) was a public display even though the display was limited to subscribers who could download it only on demand. Similarly in *Marobie-FL vs. National Association of Fire Equipment Distributors, (NAFED)*<sup>34</sup> where the defendant placed certain files on its web page containing three volumes of copyrighted clips of the plaintiff. The Court ruled that such placing of material constituted a direct violation of its right of public distribution and public display rights. The Court concluded that the mere making available of the files for downloading was sufficient for liability because once uploaded the files were available to Internet users to download.

In *Playboy Enterprises Inc. vs. Hardenburg*<sup>35</sup> the defendant operated a BBS to which the users could upload files and given a credit for each megabyte of upload which entitled them to download a defined amount of data. All the uploading were checked by the employee of the defendant to ascertain that it was free from pornographic content. Many of the plaintiff's copyrighted photographs appeared on the BBS and a suit of infringement was brought. The Court ruled that by doing so the defendant has infringed

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<sup>31</sup> Section 106 (17 U.S.C.), U.S. Copyright Statute, 1976.

<sup>32</sup> Sections 14 and 51, The Indian Copyright Act, 1957.

<sup>33</sup> 839 F.supp1552 (M.D.Fla,1993)Cited in Street and Grant, n.8, p.507.

<sup>34</sup> 45 U.Sp.Q.2d 1236 (N.D.III 1997) cited in Hayes n.7.

<sup>35</sup> 982 F.supp (N.D.Ohio1997) cited in Street and Grant, n.8, p.593.

both the public display and distribution rights of the plaintiffs as it established direct liability. The decision of the court was based on two factors (i) defendant's policy to encourage subscribers to upload files including adult photographs, (ii) Defendant's policy of screening after which the uploaded files were put into the generally available files for subscribers. These factors transformed the situation from being one in which the defendant was a passive provider of space to one in which it became an active participant in the process of copyright infringement.

In *Playboy Enterprises Inc. vs. Webworld Inc.*<sup>36</sup> the defendant was held liable for infringing public displays of copyright images for making such images available through a website by downloading by subscribers.

### **E. The Right of Public Distributions**

Article 14 (ii) of the Berne Convention<sup>37</sup> grants the authors of literary or artistic works the exclusive right of authorising the cinematographic adaptation and reproduction of the works thus adapted or reproduced. Though the Convention does not specify the methods and process through which such distribution can take place the issue remains open to interpretation. Section 106 (3) of the U.S. Copyright Statute grants the copyright owner the exclusive right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending<sup>38</sup>. Section 14 (a) of the Indian Copyright Act grants the copyright holder in the case of literary, dramatic, musical work not being computer program" to issue copies of the work to the public not being copies already in circulation. Section 14 (b) (ii) dealing with the computer programmes also grants the copyright holder the right to sale or give or hire or offer for sale<sup>39</sup> or hire any copy of the computer programme. Section 14 (c) (iii) gives the copyright holder in an artistic work the right to issue copies of the work to the public not being copies already in circulation.<sup>40</sup> Section 14 (d) (ii) dealing with cinematograph films and sound recordings grants the exclusive right to the holder of the copyright to sell or to give on hire or offer for sale or hire any copy in the respective category to the public.

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<sup>36</sup> 991 F.supp.543 (N.D.Texas 1997) cited in Street and Grant, n.8, p.572.

<sup>37</sup> Article 14, The Berne Convention, 1971.

<sup>38</sup> Section 106 (17 U.S.C.106), U.S. Copyright Statute, 1976.

<sup>39</sup> Section 14, The Indian Copyright Act, 1957.

<sup>40</sup> Ibid.

Analysing these provisions it can be said that to implicate the right of distribution three conditions need to be satisfied:

1. a copy must be distributed /issued;
2. distribution / issue must be to the public; and
3. distribution must be by sale, rental, lease, lending, etc.

In case a transmission of a work on the Internet implicates the public distribution right the question arises whether a copy of the work is being distributed? In case of transmission of an artistic work, which is being performed simultaneously, the question is whether it implicates public distribution right, as it is to be ascertained if copies have been distributed. Another area of dispute is when a substantial portion of the work is stored in the memory of recipients' computer, then whether this right is being implicated or not?

Thereafter comes the issue of fixing of responsibility. Assuming that a copy is deemed to have been distributed, then the question is who is to be held to have distributed the copies- the original poster of the unauthorised work, the Internet Service Provider(ISP) or the Bulletin Board Service (BBS) through which the work passes or the recipient?

Various decisions rendered by the U.S. Courts have gone into this question. In *Religious Technology Centre vs. Netcom Online Services*,<sup>41</sup> the Court refused to hold either an Online Service Provider(OSP) or a BBS<sup>42</sup> operator for violation of public distribution right based on the posting of infringing material by an individual. The Court further said that the subscriber is to be held liable and not the OSP, which acts more as a conduit.

However, in *Playboy Enterprises Inc vs. Frena*<sup>43</sup> the Court held the BBS liable of infringing public distribution right for making available photographs to the subscribers for downloading. In this case, the Court held that the defendant was a direct participant in distributing copies of the copyrighted work to the public.

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<sup>41</sup> 991 F.2d at 518 cited in Street and Grant, n.8, pp.548-550.

<sup>42</sup> Internet Service Provider, Online Service Provider and Bulletin Board Service facilitate access to the Internet and act as systems or network in doing so.

<sup>43</sup> 839 F.supp1552 (M.D.Fla,1993), cited in Street and Grant, n.8, p.507.



In *Playboy Enterprises Inc. vs. Chuckeleberry Publishing Inc*<sup>44</sup>, the Court held that uploading copyrighted pictorial images onto a computer in Italy which could be accessed by users in the United States constituted a public distribution in the United States. In contrast to the *Netcom* case, the Court in this case ruled that the defendant did more than providing access to the Internet, instead it provided services giving the subscribers the opportunity to either view or download. Thereby, the Court found the defendant to be involved in active soliciting in distribution of copyrighted photographs in the US, and hence held the defendant liable.

In *Playboy Enterprises Inc. Vs. Webbworld Inc.*<sup>45</sup> the Court held the defendant directly liable for infringing the distribution right by making copyright images through a website for downloading.

The second requirement to infringe distribution right is that the distribution be made to the public. This analogy can be applied to the online context, so as to analyse what constitute as distribution to the public. For example posting of material on a Usenet<sup>46</sup> newsgroup will fall under this whereas sending an e-mail to a single individual will not.

In *Playboy Enterprises Inc. vs. Hardenburg*,<sup>47</sup> the Court held the defendant liable for infringing the public distribution right for making available copyrighted photographs of the plaintiffs to the subscribers of BBS. As discussed earlier the Court took note of the fact that the defendant had a policy to encourage subscribers to upload files, which were later put in the general category. Which led the Court to conclude the active participation of the defendant.

The third element in public distribution is the requirement of either a rental, or transfer of ownership of a copy. In the online context the issue as to what constitutes transfer of ownership is unclear. So is the case with rental, lease, sale or when material is distributed whether receiving a complete copy of a work by a recipients computer

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<sup>44</sup> 939 F sup1032,1039(S.D.N.Y. 1996) cited in Hayes, n.7.

<sup>45</sup> 991 F.Supp.543(N.D.Tex1997)aff'd.168 F.3d486 (5<sup>th</sup> cirri 1999), cited in Street and Grant, n.8, pp.572-73.

<sup>46</sup> Usenet facilitates the user to interact with many other users whereas e-mail is for one to one contact.

<sup>47</sup> Section 106 (17 U.S.C.106), U.S. Copyright Statute, 1976.

constitute transfer of ownership as he has control over the received copy? Similarly, if somebody downloads an on demand movie by paying the required sum whether it is rental or not because such downloaded file is not returned back as is done in the case of usual rental of a copy.

All these rights enjoyed by the copyright holder needs to be reviewed in the context of the online environment, the third chapter deals with this.

## **II. Various Ways and Means of Copyright Infringement on the Internet**

The increased use of Internet has brought to fore new concepts of infringement like broswing,caching,linking,cachingetc., which are construed as violation of copyright of the holder. In this section, an analysis would be done while applying the rights of the copyright holder to various acts on the Internet such as browsing, caching, linking and framing.

### **A. Browsing**

Browsing is the commonest of activities of the Internet users. The question which arises is whether browsing constitutes an infringement of copyright rights of the holder? In case of the traditional copyrights tangible objects are the paradigm of transmission of information, whereas in the case of the Internet it is electronic transfer.

While browsing a work a copy of the work has to be made to the RAM of a computer, and in accord with the *MAI* case,<sup>48</sup> this infringes the right of the copyright holder. While browsing a work on the Internet distribution transmission and access of the work might be required. So it can be argued that though these are incidental to browsing nevertheless such acts technically infringes multiple rights of the copyright holder. In addition browsing may implicate the right of public display and/or public performance.

The NII white paper<sup>49</sup> was of the view that browsing through the copies of the works in the Internet is a public display of at least a portion of the browsed work.

However, it may be argued that the copyright holder will have placed the material

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<sup>48</sup> 991F 2D 511 (9<sup>th</sup> Circuit1993) Crete dismissed , Street and Grant n.8, p.497.

<sup>49</sup> The National Information Infrastructure (NII) was set up by the Clinton Administration in 1993to address the issue of changes to be made in U.S. intellectual property law and policy in the context of Internet.

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on the Internet with the intent and desire that it be browsed. So this style of browsing can come under the doctrine of fair use or implied license. This view was taken by the Court in the *Religious Technology Centre Vs. Netcom On-Line*.<sup>50</sup> The Court said that much of digital browsing is probably fair use or innocent infringement.

Absent a commercial or profit-deriving use, digital browsing is probably fair use; there could hardly be a marketing for licensing the temporary copying of digital works on to a computer screen to allow browsing.

Additionally, unless a user has reason to know such as from the title of a message that the message contains copyrighted materials the browser will be protected by the innocent infringement doctrine.<sup>51</sup>

However, the global nature of the Internet raises the question whether countries all over would apply the defensive doctrine of fair use and implied license for browsing. If the view on this will varies from country to country it will breed uncertainty.

Secondly, when copyright owner start putting notices on their work governing uses of such work then it is unclear how the doctrine of fair use and implied license would be applied. Thirdly, browsing which is akin to reading in traditional media potentially constitutes literal infringement of so many copyright rights represents a shift in the balance between right of purchasers and users on the one hand and the interests of the copyright owner on the other hand. This shift in policy and details of it is far from settled.

### B. Caching

Caching is a loosely used term that generally refers to the process of making an extra copy of a file or set of files for more convenient retrieval. Caching of third party files can occur both locally on the users' computer (either on RAM or on the hard drive) or at the server level. It obviates the need to go back to the original source and is meant for speeding of access to data and to reduce network congestion resulting from repeated downloads of data.<sup>52</sup>

DISS  
Z,1,2674  
11

<sup>50</sup> 991 F.2d at 518 cited in Street and Grant, n.8, pp.548-550.

<sup>51</sup> Fair use and Implied Licence protects the user in this case

<sup>52</sup> Nandan Kamath, *Law Relating to Computers, Internet and E-Commerce: A Guide to Cyber Laws* (Delhi, 2000), p.161.

DISS  
343.7309944  
M2775 In  
  
TH9651



The cached material is generally at a site geographically closer to the user, or on a powerful computer or one that has less congested data path to the ultimate user. The cached information is generally stored only temporarily although the time may vary from a few seconds to few days, weeks or months.<sup>53</sup>

Although different in concept, activities like mirroring and archiving also give rise to the issue of infringement, of the right of copyright holder, in the context of storing information in the Internet. Mirroring involves establishing identical copy of an Internet site on a different server where as archiving involves providing historical repository for information, such as news groups, and mail list. These two categories can also be treated as caching.

### **1. Types of Caching**

Caching may be of the following types:<sup>54</sup>

#### a) Local caching

Caching generally occurs at the end users computer either in the RAM, or on the hard disk, or some combination of both. For example, most browsers' store recently visited web pages in RAM or hard disk. When the user hits the 'Back' key, for example, the browser will usually retrieve the previous page from the cache rather --than-- downloading the page again from the original site. This retrieval from cache is much faster and avoids burdening the network with additional download.

#### b) Proxy caching

Proxy caching occurs at the server level rather than at the end users computer level. A copy of the material from an original source is stored on a server other than the original server. For example, an ISP may store on its own server for a certain period of time web pages that have been previously asked by the ISP users. When another user subsequently requests a page previously stored, the ISP may download the page from its own server, rather than fetching the page from the original source server.<sup>55</sup>

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<sup>53</sup> Schlachter, n.6.

<sup>54</sup> Kamath, n.52, p.161.

<sup>55</sup> Kamath, n.52, pp.160 -161.

Caching presents difficult copyright issues on a number of fronts. As caching involves the making of copies it presents an obvious problem of potential infringement of the right of reproduction. In addition, proxy caching may give rise to potential infringement, of the right of public distribution, public display public performance since copies of the copyrighted works may be further distributed and displayed or performed from the cache server to members of public.

## **2. Pros and Cons of Caching**

As discussed above, caching reduces the congestion in the network and thereby makes access to data faster. However, on the other hand, caching presents a complex legal problem. Though it might seem that caching will fall within the fair user or implied license doctrines, in reality caching carries with it a number of potential detriments to the owner of copyrighted material, which can be categorised as being the following:<sup>56</sup>

### **a. Loss of version control.**

Caching interferes with the ability of a website operator to control what version of information is delivered to the end user. For example, a website may have been substantially improved, yet an old version of material from the site may reside in the proxy server of the end user's ISP. Many end users therefore may not see the improved version of the website its owner desires to present to the public. Another area of concern is that suppose a website owner is notified that the site contains infringing defamatory material and the website owner removes the material promptly to avoid liability. Still it may continued to be distributed through old cache versions giving rise to potential ongoing liability.

### **b. out of date information<sup>57</sup>**

Many websites may contain time sensitive information such as stock quotes and sport scores. If the information is obtained from a cache rather than the original website and the cache has not been refreshed recently the user may get out of date information or

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<sup>56</sup> Hayes, n.7.

<sup>57</sup> Ibid.

information that is no longer accurate. Therefore unknowingly she has to rely on inaccurate information.

c. Interference with timed information<sup>58</sup>

The problem of interference with timed information is closely related to that of out of date information. For example, a website owner may have contracted with an advertiser to display an advertising banner during a certain window time. If the page from the site is downloaded in to a cache during that time and is not refreshed for several hours, users will see the ad for more than the stipulated time, for which the advertisers paid and not see the next slot of advertising.

d. Inaccurate page impression and other information<sup>59</sup>

Page impression refers to the number of times a page is displayed from the sites to the users. Many websites keep track of it and use it as a measure for advertising changes. The more a site generates page impression among users the more the site can charge for advertisement placed on the site. Access to cached version may not be counted as page impression at the original site itself and the original website owner may not know how often a given page was viewed from the cache. Reduced page impression leads to reduction in the revenue generated by the website.

e. Loss of Limits on Access

Caching may also result in the loss of control over access to information at a site. For example, suppose a website owner desires to limit access to material on a site to a single user by allowing access only after entering a password. Such user could download the material by entering the password and store the information on a proxy server and which is then accessed by unauthorised users, thereby making others also to gain access to such material.

### **C. Linking and Framing**

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<sup>58</sup> Hayes, n.7.

<sup>59</sup> Ibid.

The popularity of the world wide web has increased many folds in the last few years and with this the volume of commercial activity has also shown an upward swing. However, this has given rise to certain practices which have become ubiquitous by the authors of the websites and pages which are seen as violative of others intellectual property rights.<sup>60</sup> Linking is one of such practice along with framing, caching etc.

Linking allows a website user to visit another location on the Internet. A "link" is an embedded electronic address that points to another web location. Links may be of two types<sup>61</sup>

#### 1. Outlink<sup>62</sup>

This provides a vehicle by which a person browsing a web page can go to another site by clicking on the link. The outlink stores the electronic address of the destination site, and clicking on the link sends that address to the browser, which in turn moves the user to the new destination.

#### 2. In line link<sup>63</sup>

In line link is a pointer to a document, image, audio clip or the like, somewhere on the web contained in another's web page which in effect puts the image, text, audio clip from the other web page into the current document for display. In other words, a user looking at X's web page will see on that page image, text, or an audio clip that was actually "pulled in" from the site owner Y's web page.

### **D. Framing**

Related to linking is the practice of Framing in which material from an in-line link is displayed within the 'frame' or window border of a page of the linking website. This type of linking is often referred as framing.<sup>64</sup>

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<sup>60</sup> M. Ethan Katsh, *Law in a Digital World* (NewYork, 1995), p.370.

<sup>61</sup> Ibid, p.370.

<sup>62</sup> Hayes, n.7.

<sup>63</sup> Ibid

<sup>64</sup> Ramond Chan, "Internet Framing: Complement or Hijack?" downloaded from [www.mttl.org/html/volumefive.html/chan.htm](http://www.mttl.org/html/volumefive.html/chan.htm)

The use of frames and framing are two different concepts. Frames allow a website designer to divide her web pages into multiple regions or sections that can operate independently of each other. Frames are often used to create a fixed region which may contain texts, graphics, hypertext links, and inline links that a view always see. In the Internet context frames are used by many websites to create multiple windows on the users computer screen. Each frame or window may display a different web page.<sup>65</sup>

Both linking and framing raise a number of copyright issues. In case of linking an out link points to a site containing infringing material may, for example, cause further infringing reproductions, public performances, public distributions, public displays and/or importation to occur when the user reaches that site and the infringing material is downloaded, imported, and/or performed or displayed to the linking user.<sup>66</sup>

Even if the material on the destination site is not infringing of its own right, the reproductions distributions and displays that take place as result of the outlink are established generally without the explicit permission of the owner of the material on the destination site.

Whether an outlink might also be considered of an unauthorised derivative work is unclear. A line of argument says that outlink could be considered nothing more than a reference to another work, much like a citation in a law review article that should not be considered a derivative work. It can also be argued that the material on the linked site is neither altered by the link nor incorporated into the linking site but is seen in its original form when the user arrived there as a result of the link.<sup>67</sup>

A different argument in contradistinction to the above one can also be given which views that website as a virtual collective work comprised of all material available to be viewed by the user in the course of browsing through the site. Links, therefore, cause an incorporation in a virtual sense, of the linked material into this collective work, thereby in some sense creating a derivative work. Defences like the fair use and implied license doctrines may be applied to many outlinks. The argument for this is that many website owners will want their material disseminated as widely as possible and references to the site through links will be considered desirable. However, these defences will be

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.



defeated if owner of the linked site argues that such links were non-consensual and resulting in burdensome amount of traffic on the linked site. Further the owner of the linked site can also argue that the increase in traffic acts detrimental to its commercial interest because it prevents distribution of copyrighted material to the targeted users.<sup>68</sup>

Going by this argument the issue of direct infringement can arise. In addition to this if a linked site contains infringing material the link may give rise to contributory infringement on the part of the linking site. Particularly if the linking site is promoting the copying, transmission, public display or public performance of the material at the linked site.<sup>69</sup> These are some of the issues which have given rise to a number of cases challenging linking and framing on copyright grounds.

## **1. Cases on Linking and Framing on Copyright Grounds**

### **a. The Shetland Times Case<sup>70</sup>**

In *Shetland Times Co. Ltd. Vs. Wills*, a case out of Scotland Times ('Times') the plaintiff maintained a website containing copies of articles that appeared in the printed version of the newspaper. The website presented the user visiting it with a "front page" containing headlines. Clicking on the headline linked the user to the full text of the article. *The Times* planned to sell advertising space on the front page. The defendant, the Shetland News ("News") also maintained a website. *News* took verbatim the headlines from the *Times* and placed them on its web page to allow users at News site to link directly to the full text of the Times article without having to view the Times front page. This bypassing of Times front page harmed the site as the viewers who went through the link would not see the advertisement resulting in the loss of commercial benefit accruing to Times. The plaintiff sued the defendant in the Scotland Court of Sessions alleging that News copying of Times headlines constituted copyright infringement. The Court issued an "interim edict" (temporary order) ruling that the headline could be copyright able literary works. The Court rejected the defendant's argument that the headline were not the

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Scotland Court of Sessions Oct24, 1996, cited in Hector L. Maquveen, "Shetland Times Case," *Journal Of Business Law*, (May 1998), pp.297-99.

product of sufficient skill of effort. The parties subsequently settled their dispute by agreeing that News would be permitted to link to stories on Times on the following manners each link to any individual story would be acknowledged by the legend 'A Scotland Times Story" appearing underneath each headline and of the same or similar size as the headline; adjacent to any such headline or headlines there would appear a button showing legibly the Times masthead logo; and the legend and the button would each hypertext links to the Times online headline page.

**b. The Total News Case** <sup>71</sup>

This was the first case to challenge framing as copyright infringement. The total news website was designed to make over 1200 news sources all over the world available at a single site. These news sources included those operated by the Washington Post, Time-Warner, Cable News Network (CNN), Times Mirror, Dow Jones and Reuters. When a viewer hyperlinked to one of the news sources from Total News site the selected site was actually drawn into the Total News website and displayed as part of it. However, not all the content of the said site was displayed. Instead, the viewers saw five independent frames; a large right centred frame displaying the external site contents, the totalnews.com URL at the top, a horizontal frame along the bottom of the screen displayed commercial advertisement sold by Total News, a vertical frame on the left hand side that contained a menu of hyperlinks to plaintiff's news services.<sup>72</sup> Thus, the content of the external website such as Times website were displayed surrounded by frames containing Total News URL and advertising sold by Total News.

Because the news window of the Total News frame was smaller than the full screen in size the effect of the framing by the defendant was to display only a portion of the original screens of material from the linked sites at any given time and the viewer was forced to scroll the news window horizontally or vertically to see all of the materials from the linked site.<sup>73</sup> Thus, advertisements contained in the original pages of the linked sites

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<sup>71</sup> See Wash.Post V. Total News Inc. No97civ1190(PKL)) (S.D.N.Yfiled Feb 20, 1997) downloaded from [www.ljx.com/internet/complain.html](http://www.ljx.com/internet/complain.html)

<sup>72</sup> Ibid., para 33.

<sup>73</sup> Ibid., para 10

were reduced and in some cases were totally obscured by the Total News frame. At the same time, user was exposed to the advertising contained within the Total News frame.

This state of affairs saw defendants, number of news service providers, the Washington Post, Cable News Network, Times Mirror, Dow Jones and Reuters News Media commencing suit against the Total News site and its affiliates. In their complaint, the plaintiff alleged that Total News had "engaged in the Internet equivalent of pirating copyrighted material from a variety of famous news papers, magazines, or television news programmes packaging those stories to advertisers as part of a competitive publications or program produced by the defendants and pocketing the advertising revenue generated by their unauthorised use of the material." In all plaintiffs' argued nine causes of action: (1) misappropriation, (2) federal trademarks, (3) trademark infringement (4) false designation of origins, false representation and false advertising, (5) trademark infringement and unfair competition under state law (6) dilution under state law, (7) deceptive acts and practices, (8) copyright infringement, and (9) tortious interference.<sup>74</sup>

The plaintiffs filed this suit in February 1997. They did not mention which specific rights of the copyright holder were infringed but only stated that the exclusive right under 17 U.S.C. S106<sup>75</sup> was infringed. The plaintiffs further said that while the link to news services were displayed on the news frame advertising sold by Total News was simultaneously shown in the advertisement frame, which replaced the advertising space sold by the defendant to the advertisers. Moreover, the Total News URL and not the actual URL of the original news source was displayed in the address position of the web browser.

In June 1997 the parties reached a settlement pursuant to a stipulated order of settlement and dismissal under which Total News agreed to stop framing the plaintiff's websites. However, the settlement permitted Total News to maintain outlinks from the Total News website to any of the plaintiff's websites provided that the links were only hyperlinks consisting of the linked site in plain text.

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<sup>74</sup> Ibid., para38-76.

<sup>75</sup> Ibid., para72.

### c. The Ticketmaster Case<sup>76</sup>

The case was brought in April 1997 by Ticketmaster Corporation against Microsoft Corporation based on Microsoft's "Seattle Sidewalk" website to Ticketmaster's website. Again in February 1998 Ticketmaster <sup>77</sup>filed a second amended complaint, which asserted claims for copyright, and trademark infringement as well as for unfair competition based on various common law and state law theories.

The plaintiff Ticketmaster maintains a website ([www.ticketmaster.com](http://www.ticketmaster.com)) through which it sells and markets tickets to various entertainment events. The "Seattle Sidewalk" site, one of a number of city guides maintained by Microsoft on the Microsoft Network offers a quick guide to entertainment and restaurants available in the Seattle area. Microsoft placed links on the Seattle sidewalk to the Ticketmaster site so that users at the former could purchase tickets to events of interest on line through the latter. Negotiations between the two had failed on the issue of sharing profits and Microsoft established the links without permission from the Ticketmaster. The link so established bypassed the homepage of the Ticketmaster in many instances.

In its claims filed <sup>78</sup>before the Federal Court Ticketmaster alleged copyright infringement on the following grounds that (a) in creating links to the Ticketmaster's site Microsoft viewed and copied onto its computers copyrighted contents of Ticketmaster's website, and (b) in the operation of the links, Microsoft was reproducing publicly, distributing and displaying without permission Ticketmaster's copyrighted website material.

In its defence Microsoft put forth the following arguments (a) that Ticketmaster when it chose to set up the web page assumed the risk that others would use its name and URLs; (b) that Ticketmaster is estopped from complaining about Microsoft's link because Ticketmaster encourages users to seek out its website and refers others to the site; and (c) that Microsoft's presentation of information about Ticketmaster on its Seattle sidewalk site is commercial speech protected by the First Amendment.<sup>79</sup>

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<sup>76</sup> Civ.No.97-3055(DPP)(C.D. Cal.1997)

<sup>77</sup> Ibid.

<sup>78</sup> *ibid.*

<sup>79</sup> *Ibid.*

Finally both sides reached a settlement through which Microsoft was permitted to link to Ticketmaster site but not through links that bypassed Ticketmaster's homepage.

**d. The Futuredontics Case<sup>80</sup>**

This case was filed by Futuredontics against Applied Anagramatics. The plaintiff maintained a website relating to its dental referral service. It was alleged by the plaintiff that the defendant was framing material from the Futuredontics website. The frame displaying the plaintiffs' material contained the defendant's logo, information about the defendant, etc. The plaintiff claimed that this amounted to the creation of an infringing derivative work. The defendant argued that its frame should be 'viewed' merely as 'lens' which enabled Internet users to view the information that was placed by the plaintiffs. The Court did not agree to this and said that the complaint filed by Futuredontics sufficiently alleged copyright infringement.

**e. The Bernstein Case<sup>81</sup>**

In this case the plaintiff Bernstein a professional photographer filed a complaint against the defendant J.C. Penny and alleged that the website maintained by J.C. Penny promoted a perfume. The promotion allegedly included a 'hyperlink' to an Internet movie database which in turn allegedly linked to *SUNSET* the Swedish University network which allegedly contained infringing copies of the plaintiff's photographs. The plaintiff insisted that the defendant J.C.Penny deliberately designed its website so that visitors can see those two photographs for which benefit was taken by the defendant.

The defendant argued that the plaintiff's arguments were based on an untenable and unprecedented theory <sup>82</sup>that, if accepted, would destroy the Internet as a means of worldwide communication for three reasons. First, a company whose product is displayed on another company's website cannot be held liable for the other company's website. Second, hyperlinking to the allegedly infringing photography is not direct infringement because J.C.Penny website or other intermediary website do not copy or process the infringing material. Third, hyperlinking does not constitute contributory infringement as

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<sup>80</sup> 45 U.S.P.Q.2d 2005(C.D.Cal 1998), cited in Street and Grant, n.8, p.598.

<sup>81</sup> 98-2958R(EX)(C,,D.Cal dismissed Sep.22, 1998, Street and Grant, n.8, p.532.

<sup>82</sup> Ibid.

there was no direct infringement. Finally no knowledge of or substantial participation in infringement could be inferred to the perfume company where the linking website made no mention that Internet users could navigate the hyperlinks to infringing material.<sup>83</sup> The Court granted motion to dismiss without comment.

## **2. Derivative Works and Internet**

As discussed above, links in the Internet can be categorised as unauthorised creation and derivative works. The definition of derivative works does not say that for a work to be so categorised needs to be fixed in any tangible medium. The judgement in *Lewis Galoob, Toys Inc. Vs. Nintendo America Inc*<sup>84</sup> confirmed this view. Thus those who alter copyrighted work in RAM may face liability under derivative works rights.

Some of the issues of the Internet that have not yet been tested in Court raise potential issues under the derivative works right.

### **a. Crawlers Creating Indexes<sup>85</sup>**

A number of services offer full text search indexes for material on the Internet by utilising automatic software often referred to as 'crawlers' or 'spiders' which searches the Internet to locate material, temporarily copy such materials and create full text index of the material. Here the question is whether the resulting index is an unauthorised derivative work? Applying the criteria as to what constitutes a derivative work it can be argued that since the index involves "abridgement" or "condensation"<sup>86</sup> of the material it is a derivative work. On the other hand, one can argue that the indexing is merely a functional recording of facts about a work of authorship and is therefore not based upon any of the expression of that work in a derivative work sense. Further, it seems likely that in many instances, the copyright owner is unlikely to raise objections to the creation of such indexes as they enable others to locate the work.

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<sup>83</sup> n.81.

<sup>84</sup> 964 F.2d 965(9<sup>th</sup> Cir. 1992).

<sup>85</sup> Hayes, n.7.

<sup>86</sup> Ibid.

### **b. Commercial Compilation of Free Information<sup>87</sup>**

Another area of activity which has raised concern is systematic gathering of materials from the Internet which are compiled and sold for a fee. This is ostensibly done to easily provide the purchasers a convenient way out from going to the original site to retrieve such material. In traditional media if one were to collect articles, say from newspapers on a particular topic and market them, then there is likelihood of infringing derivative work rights. So the question is how this kind of activity be treated in the context of Internet. However a definite answer to this still eludes us.

### **c. Archiving<sup>88</sup>**

Through this activity large archives of varied subject is being stored. Generally this is done to provide research tool to future historians of Internet. However, the use of such treasure trove by business interests cannot be ruled out. To the extent such compilations are made to facilitative historical research should they be deemed within the fair use exception to the derivative works right? Should the fact that these materials can be used by business interests take out the fair use exception? These are some of the questions without answers.

### **d. Offline Browsers<sup>89</sup>**

A number of software packages known as 'offline browsers' have come on the market. By using this software the user can browse the Internet automatically and can visits sites predefined by them. Through this process a user can collect all the pages from these sites into copies on the users hard disk. Often the browsing and compiling is done overnight to enable the user to browse the material the next day, but at hard disk speed which is hundred times faster than actually browsing the web. So a compilation of materials from various sites of particular interest to the user is created. If the resulting compilation is used purely for personal use then it may fall under the fair use doctrine.

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

However if the compilation is used for commercial purposes then the issue whether it violates the derivative works right comes into the picture which is unsettled.

**e. Voice Browsers.<sup>90</sup>**

This type of browser access text material from a source translates the works of the text into audible form and reads the material by the user. It is unclear in this change of medium from textual to aural form constitutes the unauthorised creation of a derivative work?

Other Internet activities that involve changes of media will raise similar derivative works issues. For example, does adjusting the brightness, density and compression of an image during digital scanning constitute the making of a derivative work.

### **III. Online Infringement of Copyrighted Music**

With technological advancement, the form in which music is made available to the consumers has changed from analog to the digital. Unlike analog recording digital recordings do not diminish sound quality with repeated playing. The digital music format made available to the consumers come in the shape of compact disc (CD).

The popularity gained by Internet has made it a promising medium through which music can be distributed or sold to consumers anywhere in the world. The marketing and distribution avenues for music on the Internet are endless<sup>91</sup>. From the perspective of record companies and artists, the Internet offers unique opportunities to shape and control and distribution to their advantage.

However this opportunity is turning out to be a nightmare for the music industry. For the introduction of a new music format, the MPEG (Moving Pictures Express Group)<sup>92</sup> audio player, better known as MP3, has made it a child's play to pirate copyrighted music in the Internet. The MP3 format is an algorithm for compressing

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<sup>90</sup> Ibid.

<sup>91</sup> William Fisher, "Digital Music: Problems and Possibilities" downloaded from [www.law.harvard.edu/Academicaffairs/coursepages/+fisher/music/Digitalpurposes.html](http://www.law.harvard.edu/Academicaffairs/coursepages/+fisher/music/Digitalpurposes.html)

<sup>92</sup> Moving Picture Express Group(MPEG)is a group of people who meet under the ISO to generate standards for digital video and audio compression



digital music into files, which are manageable in size, yet near CD quality in sound<sup>93</sup>. MP3 is the compression standard and outweighs other standards like AT&T's and a2b music and liquid audio. The AT&T format however is a closed format containing copyright control measures whereas MP3 does not have any technical copyright control measures embedded.<sup>94</sup> MP3 also differs because encoding is free of charge whereas others charge a fee. Hence MP3 has become the perfect instrument for piracy because of its open format. The MP3 format compresses music from the normal format to one-twelfth of its original size making it suitable for use on personal computers and Internet. MP3 files can be downloaded to any hard drive and are utilised through the computers or directly from the Internet.<sup>95</sup> This has led to a situation where free music invasion is in full swing and it is fueled by the nexus of the Internet and advanced computer technology.

The MP3 files available on the web fall into two categories,<sup>96</sup> those posted for free distribution by artists to gain publicity and illegal MP3 files that have been ripped from copyrighted compact discs. Since the MP3 format suits the consumer to download music from the Internet, companies are developing new multimedia technologies that have MP3 playing capabilities.

These technologically advance gadgets have brought major record label, in the music industry and the manufacturers of the gadgets to loggerheads in the USA. Many legal battles have ensued on the issue of whether these MP3 portable recording devices infringe copyright or not.

## **A. Case Laws**

### **1. RIAA vs. Diamond Multimedia System<sup>97</sup>**

RIAA<sup>98</sup> is the trade group of the recording industry which includes recording companies and copyright owners of the music made and distributed in the US. The RIAA represents over ninety percent of the recording industry. Teaming with the music industry

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<sup>93</sup> Fisher, n.91.

<sup>94</sup> Stephen W. Webb, "RIAA v Diamond Multimedia Systems :The Recording Industry attempts to Slow the MP3 Revolution," taking aim at jogger friendly Diamond Rio, 7 Rich.J.L.&Tech, 5 Fall 2000 downloaded from [www.richmond.edu/~jolv7il/note2.html](http://www.richmond.edu/~jolv7il/note2.html)

<sup>95</sup> Fisher, n.91.

<sup>96</sup> Webb, n. 94.

<sup>97</sup> 180 F.3d 1072,1075(9th Cir),Web n.94.

<sup>98</sup> See "RIAA: About Us," at [www.riaa.com](http://www.riaa.com)

RIAA has undertaken aggressive efforts in shutting down illegal sites that facilitate the illegal downloading of copyrighted music in the MP3 format.

The other party in the suit was Diamond Multimedia systems Inc (Diamond) which manufactures the portable MP3 playing device RIO PMP 300 (Rio).<sup>99</sup> This player is smaller than a deck of cards, has no moving parts and plays back songs recorded in MP3 format. After the songs are transferred to RIO from a computer the device can playback music back through attached headphones achieving very close to CD quality sound. The Rio device is capable of storing 32 megabytes of compressed music resulting in approximately 60 minutes of playtime from its memory capacity.

The suit filed<sup>100</sup> by RIAA against Diamond mainly focussed on the scenario where it felt that sales of a portable MP3 player promotes the illicit use of MP3 files. According to the complaint, RIAA alleged that Rio was "designed to recopy to its eternal memory MP3 files that already have been copied from music CDs to a computer hard drive." The RIAA alleged that the Rio's multigenerational process was violative of the serial copy management system (SCMS) and thereby violates the Audio Home Recording Act (AHRA)<sup>101</sup> passed by the USA. RIAA further argued that the use of devices utilising MP3 technology in the way Rio does only encourage the increased availability of illicit files. This availability of large quantity of MP3 files, contended RIAA, frustrate the development of legitimate digitally downloadable music. Furthermore, RIAA argued that illegal MP3 files diminish the value of artist's work.<sup>102</sup>

Diamond, putting forth its defence contended that the argument advanced by RIAA to characterise Rio as a digitally audio recording device does not meet the specifications laid down in the Audio Home Recording Act (AHRA). The AHRA defines<sup>103</sup> a digital audio recording device as

Any machine or a device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other

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<sup>99</sup> Stephen L. Brauner, "High -Tech Boxing Match: A Discussion of Copyright Theory Underlying the Heated Battle Between the RIAA and the MP3ers," downloaded from [www.vjolt.student.virginia.edu](http://www.vjolt.student.virginia.edu)

<sup>100</sup> See "Blame it on Rio," WIRED NEWS, 9 October 1998, downloaded from [www.wired.com/news](http://www.wired.com/news).

<sup>101</sup>The Audio Home Recording Act was adopted in 1992 by the USA to meet the challenge posed by advanced recording devices.

<sup>102</sup> "Blame it on RIO" n.100.

<sup>103</sup> Webb, n.94.

machine or device, the digitally recording function of which is designed or marketed for the primary purpose of, making a digital audio copied recording for private use.

Citing this definition Diamond contended that Rio was not able to record directly from a digital music recording; therefore, Rio is not a digital audio device. Rather the company characterised <sup>104</sup>its device as designed to store and playback audio file transferred from the computer's hard drive.

According to Diamond, the Rio player does not receive any transmission. Its abilities are limited to the storage of MP3 files that a computer has already downloaded to its local hard drive. Therefore Diamond argued that its Rio player is not a "a digital recording device."

Another issue where RIAA tried to pindown Diamond was that the Rio player was violating the Serial copyright Management system (SCMS)<sup>105</sup> provided in the AHRA. The Act places serial recording restrictions on certain type of recording devices. The relevant portion<sup>106</sup> of the Act reads " No person shall import, manufacture or distribute any audio recording device [that] does not conform to the serial copy management system." The SCMS blocks serial recording but the open MP3 format does not recognise, nor does it convey general information it received and played; which the SCMS does.

Diamond argued that new technological capability in Rio is that one can detach the player from the computer. The device consequently should be classified as a type of computer peripheral.<sup>107</sup> Diamond articulated in its response to RIAA's complaint that the Rio is not a duplicating device nor is it capable of facilitating serial copy of recordings. The company further argued that Rio does not even record music, the personal computer does the recording function and then writes the resulting files to the Rio memory. Hence the AHRA did not apply as the Rio can only store and play files.

In its suit filed in the United States District Court for the Central district of

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<sup>104</sup> Brauner, n.99.

<sup>105</sup> Section 1001(10) of the Audio Home Recording Act defines "serial copying" as "the duplication in a digital format of a copyrighted musical work or sound recording from digital reproduction of a digital musical recording" downloaded from [www.google.com](http://www.google.com)

<sup>106</sup>Section 1001(3) Audio Home Recording Act, *ibid*.

California, the RIAA requested a temporary restraining order and preliminary injunction to prevent the release of Rio player into the market. Though the Court gave a preliminary restraining order, it refused to grant an injunction because the Court found that the RIAA had not made the necessary showing for an injunction based on AHRA.<sup>108</sup>

In the hearing for preliminary injunction, the Court found that while a digital audio recording device does not have to be able to record 'independently' from a computer it must be 'capable of making recording.' Though the District Court rejected Diamond's arguments, the Court of Appeals agreed to the contentions made by the defendant.<sup>109</sup> The legislative history of the Act (AHRA) was consulted by the Court of Appeals and it was found that the Senate Report made it clear that computer hard drives cannot be classified as digital audio recording device. Further delving into the Act and legislative history made the Court conclude that the computer hard drives are exempt from the definition of a digital music recording. Since Rio downloads the files from the hard drive of a computer the ruling of the Court makes it clear that Rio is not a digital audio recording device.

On the issue that SCMS technology had not been incorporated the Court went on to find that "it [was] nonsensical to suggest that the Rio must [send]... copyright and generation status information" <sup>110</sup>as required by AHRA. The Court reasoned that incorporating SCMS technology into Rio would be ineffective in preventing the harms of illegal MP3s. The Rio player could not possibly "act upon. Copyright and generation status information" because the MP3 files it plays will not contain the necessary information.

The Court of Appeals gave cursory treatment to the prospect the Rio could reproduce a digital music recording from transmission, rather than directly producing a digital music recording. It appears that Rio may receive transmission but Diamond disputed that indirect reproduction of a transmission was covered by the Act. The

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<sup>107</sup> Brauner, n.99.

<sup>108</sup> AHRA, n.105.

<sup>109</sup> Webb, n. 94.

<sup>110</sup> Brauner, n.99.

designation of digital audio recording device is one capable of making "a reproduction in a digital recording format of a digital music recording whether the reproduction is made directly from another digital music recording or indirectly from a transmission."<sup>111</sup> Diamond disputed that the "indirectly" modifies the recording of the underlying digital music recording rather than the recording from transmission. The Court agreed with Diamond's interpretation and turned down RIAA's view that the transmission must be indirect to fall within the scope of the Act.

This judgement portrays how technological development has outpaced legal developments. After the decision, RIAA and Diamond entered into an agreement to end all litigation. The Diamond Rio now incorporates the SCMS.

However, the RIAA has kept track of the online piracy of music and has brought action against those companies which are enabling reproduction of copyrighted music.

## **2. UMG Recordings Inc Vs. MP3.com Inc**

MP3.com was launched in January 2000 to provide users with a variety of CDs to download at their convenience. In order to make this happen Mp3.com bought thousands of copyrighted CDs to provide their users free of charge<sup>112</sup>. The viewers could then download the available music by either providing proof of existing ownership, a process known as "Beam It". Proof of ownership was demonstrated by an individual placing his copies of the CD on the computer's CD-ROM where it could be verified by the server. Another method to get access to the collection is by agreeing to purchase the CD, the process is called "instant Listening."<sup>113</sup>

The activities of the MP3.com site set alarm bell ringing among the members of the RIAA and a suit <sup>114</sup>was brought by one of the members, UMG Inc. against MP3.com

It was argued that the online trading in music is a violation of the plaintiff's copyrighted rights. It was further alleged on behalf of the plaintiff that such activities have negative implications for the music industry.<sup>115</sup> The defendant put forth the

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<sup>111</sup> Section 1001(3) The Audio Home Recording Act.

<sup>112</sup> Jayne A. Pemberton, "Update: RIAA v Diamond Multimedia Systems, Napster and MP3.Com," downloaded from [www.richmond.edu/~jolt/v7il/note3.html](http://www.richmond.edu/~jolt/v7il/note3.html)

<sup>113</sup> Ibid.

<sup>114</sup> See UMG Recordings Inc. v MP3.Com Inc, 92 F Supp.2d (S.D.N.Y.2000), Pemberton, n.112.

<sup>115</sup> Ibid.

argument that providing of music by it has the sanction of the fair use <sup>116</sup>doctrine of the copyright Act of the USA.

The Court looked to the four elements of the fair use doctrine as provided in the Act. First the Court concluded that the activities carried on by the defendant was of commercial in nature as MP3.com could make profit through it. Secondly, the Court found that the copyrighted material at issue was clearly creative in nature thus further decreasing the defendant's hopes of getting protected under the fair use doctrine.

Thirdly, the Court analysed whether a substantial portion of the copyrighted material was provided to the user and found that the CDs in their entirety were being provided. Therefore, the defendant could not get this benefit as well. Finally, the Court found that the defendant failing to prove that its activities were having any positive effect on the music market. Hence the Court concluded that the fair use doctrine could not be applicable.

The defendant also contended that it provided a service to the music industry by providing consumers with CDs that would otherwise be pirated. The Court was not convinced with this argument and held that it was bald claim and "hardly appeals to the conscience of equity."<sup>117</sup> The Court granted plaintiff's motion for partial summary judgement and held that the defendants committed copyright infringement.

The District Court reviewed the history and evidence of MP3.com to calculate the damages for copyright infringement. The Court held that the defendant was willingly and consciously provided copyrighted music to its users. Additionally, the defendant's infringing actions were potentially harmful to the plaintiff. In the end the Court said that the assigned damages must send a message to the Internet companies engaged in providing copyrighted material. The Court concluded that the damages of \$25,000 per CD which could reach a total of \$250 million.<sup>118</sup>

### **3. A&M Records Inc. vs. Napster Inc.**

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<sup>116</sup> 17 U.S.C. 107 deals with the fair use of copyrighted works.

<sup>117</sup> Pemberton, n.112.

<sup>118</sup> Ibid.

Napster is a software developed by a 19-year-old college dropout, Shawn Fanning.<sup>119</sup> This software has heralded a new era in uploading and downloading music to and from the Internet. Though Napster started as a program to facilitate exchange of music between its designer and his college friends, it has grown into a company. Within a years time since its inception in 1999 Napster attracted more than 25 million users.

Napster revolutionised the concept of communication by introducing the Peer to Peer (P2P) method through which users swap data from one PC -or "Peer" - to another without going through a central server.<sup>120</sup> Napster is a shareware software which can be downloaded to a PC from the Napster site ([www.napster.com](http://www.napster.com)), free of cost. A first time user is required to register with Napster system by creating a "user name" and password. If a registered user wants to list available files stored in his computer's hard drive on Napster for others to access, he must first create a "users library" directory on his computer hard drive. The user then saves his MP3 files in the library directory using self-designated file names. Then the user has to log in to the Napster system using his user name and password. This music share software then searches his user library and verifies that the available files are properly formatted. If the same is found then Napster software uploads the names of the MP3 files to the Napster servers. The content of the MP3 file remains stored in the users' computer<sup>121</sup>.

Once uploaded into the Napster servers, the users MP3 file names become a part of the "collective directory" of files available to transfer to other users when this user logs into the Napster.

The second function performed by Napster is searching<sup>122</sup> for available MP3 files through Napster's search function and through its hotlist function and its "search index" makes a search of its collective directory. The user gets access to this directory either entering the name of a song or an artist as the object of the search. The query is then transmitted to a Napster server and automatically compared to the MP3 file names listed in the server's search index. The Napster server then searches the search index and sends back to the user a matching list. While so doing the Napster server does not search the

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<sup>119</sup> Karl Taro Greenfield, "Meet The Napster," TIME, 2 October 2000, pp.31-32.

<sup>120</sup> Ibid.

<sup>121</sup> A&M Records Inc V Napster Inc., No cv-90-05183-MHP downloaded from [www.riaa.com/decision](http://www.riaa.com/decision) of the 9<sup>th</sup> circuit.

<sup>122</sup> Ibid.

content of the MP3 files; rather the search is limited to a "text search of file names" indexed into a particular cluster.<sup>123</sup>

To use the 'hotlist' function the Napster user creates a list of other users name from whom he has obtained MP3 files in the past. When a user logs into the Napster's server the system alerts the user if any other user in his hotlist is also logged into the system. If so the user can access an index of all MP3 file names in a particular hotlisted users library and request a file in the library by selecting a file name. The content of the hotlisted users MP3 files are not stored on the Napster system.

Once a contact is established then the Napster software obtains the Internet address of the requesting user and the Internet address of the 'host user.' The Internet address of the latter is then conveyed to the requesting users computer by the Napster server. The requesting users computer uses this information to establish connection with the host user and downloads a copy of the contents of the MP3 file from one computer to the other over Internet, "Peer to Peer." A downloaded MP3 file can be played directly from the users hard drive using Napster's music share program or other software. The file may also be transferred back into an audio CD if the other user has access to equipment designed for the purpose.<sup>124</sup>

The launch of Napster not only transformed the music business but also helped in launching a new programming movement. The Peer to Peer (P2P) start ups brought to fore by the Napster has given an altogether novel idea to many business houses to develop an alternative<sup>125</sup> to Internet. The new P2P network may not supplant the old, but it offers a new space for creating and transferring them faster more freely, more widely than ever before since the new network gives the users the opportunity to exchange files directly avoiding server bottlenecks. The possibility of infringing intellectual property rights. Therefore, increased manifold has made the music industry to look for solutions to this problem. This is evident from the response of the music industry according to which Napster has infringed copyrights of the major music labels represented by the RIAA. The matter came to a head when RIAA filed a suit against the Napster for alleged copyright infringement in a U.S. District Court. What has emerged out of the decisions rendered by

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<sup>123</sup> Ibid.

<sup>124</sup> Napster decision, n.121.

<sup>125</sup> Greenfield, n.119, p.33.



the District Court and more recently by the Ninth Circuit has far-reaching legal implications.

On December 6, 1999 A&M Records Inc. joined by several recording companies brought on suit against Napster Inc. for alleged contributory and vicarious federal copyright infringement under the Digital Millenium Copyright Act, 1998.(DMCA)<sup>126</sup>.

#### **a. Napster's Motion For Summary Adjudication**

Napster quickly took the offensive and moved the Court for summary adjudication. The Court looked in detail the process followed by the Napster Users, a description of which has been given earlier.

The Court looked into section 512<sup>127</sup> of the DMCA,(herein after reffered as theAct) which governs the liability of the Internet Service Providers (ISPs) and online services for copyright infringement. Napster argued that their activities did not constitute copyright infringement and claimed safe harbor<sup>128</sup> as a service provider under Section 512(a) of theAct. According to four conditions have to be met to get the benefit of the safeharbor. These are:

1. An individual other than the service provider initiated or directed the transmission of the material at issue.
2. The Internet Service Provider does not select the material transferred, routed, or stored but instead the process is completed automatically.
3. Another person, not the service provider, selects the recipient of the material.
4. The material housed on the server is not available to individuals other than the named recipients, nor is it available to the intended recipient for an unreasonably long time.

Napster argued that it was not infringing copyrighted music, but was simply providing a forum where users could share music. Napster supported its argument for

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<sup>126</sup> The Digital Millenium Copyright Act (DMCA), 1998 was enacted by the USA In response to the Internet treaties adopted by the WIPO, a detailed discussion of these will be done in the next chapter.

<sup>127</sup> Section 512 of the DMCA deals with the liability of the ISPs and outlines the safeharbors a detailed discussion of this is made in the next chapter.

<sup>128</sup> Safe harbor gives certain exemption to the ISPs in the case of infringement of copyright

safeharbor by emphasising that it never initiates the transfer of music over the Internet; transfers are always initiated by the users. Napster also argued that the transmission of

music files through their service occurs automatically and they do not alter, or modify files. Further Napster argued that they do not choose the recipient. Citing all these arguments Napster contended that they were protected under Section 512(a) of the Act, the plaintiff argued that Napster was a facilitator of Internet copyright infringement. The plaintiffs' asserted that each of Napster's functions must be assessed independently under Section 512 (n) of the Act,<sup>129</sup> before safeharbor be properly determined. According to the plaintiffs certain aspects of Napster's service functioned as locator tools and hence had to meet the more stringent safeharbor requirements of Section 512(d) of the Act<sup>130</sup> which deals with locator tools such as search engine, index, directory and links.

The plaintiff also argued that the defendant played an indirect role in transfer of music file as it occurred between the users. So they argued that Section 512(a) of the Act<sup>131</sup> could not be applied. Finally the plaintiffs citing 512 (i) of the Act <sup>132</sup>which requires the service provider to adopt, implement, inform users of its policy to terminate services for all repeated copyrighted infringement. Additionally, the music industry argued that Napster failed to follow such a policy. Hence the safeharbor concept could not be applied.

In its analysis the Court found that some of the functions rendered by Napster falls under the category of locator tool. The Court disagreed with Napster's view that these aspects were not fundamental to its main function and concluded that Section 512(a) did not apply to Napster.

The Court further analysed that if some of the Napster's functions come under Section 512(a) and found that music file is transferred through the Internet and not through Napster's own system. The Court concluded since Napster does not transmit, route, or provide connections through the system it has failed to demonstrate it qualifies

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<sup>129</sup> Section 512 (n) states that subsection (a), (b), (c) and (d) describe separate and distinct functions for applying this section, Digital Millennium Copyright Act, 1998.

<sup>130</sup> Section 512 (d), Digital Millennium Copyright Act, 1998.

<sup>131</sup> Section 512 (a) provides safeharbor provision for an Internet Service Providers where it merely acts as a mere conduit of information.

<sup>132</sup> This section outlines the elements necessary to get safeharbor status

for 512(a) safeharbor<sup>133</sup>. The Court declined to give summary adjudication in Napster's favour.

#### **b. The Music Industry's Plea for Preliminary Injunctive Relief**

In August 2000, the music industry moved for a preliminary injunction in order to prevent Napster from transmitting copyrighted music without express permission of the owner of the copyright. Napster argued that it was protected under the expanded version of the fair use doctrine established in *Sony Corp. of America v. Universal Studio Inc.*<sup>134</sup> The defendant also argued that the services provided by it did not infringe copyright but instead promoted the music industry through increased exposure.

The District Court looked into four factors outlined in *Sony* and also analysed the fair use doctrine as set out in Section 107<sup>135</sup> of the US Copyright Act. First, the Court analysed whether Napster's use of copyrighted materials was commercial. The Court was of the view that the downloads were not of commercial nature. Therefore, they could not be classified as personal also owing to the magnitude of and anonymous nature of the Napster's clientele it was obvious that commercial element was missing.

The Court then looked into the nature of the copyrighted work and found that the material being traded was for entertainment purpose and was creative in nature and thus reduced Napster's chances for protection under the fair use doctrine

The Court then looked into the amount of copyrighted material used and found that downloading of MP3 files entails copying music in its entirety. Finally, the Court explored Napster's impact on the potential market value of the copyrighted music and found diminished the music industry's sale

The District Court found that Napster cannot be granted protection under the fair use doctrine<sup>136</sup>. The Court also declined to take the arguments forwarded by Napster that it should be afforded protection for many of its other activities like space shifting, sampling and authorised distribution of new artistic work. The Court reasoned that these

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<sup>133</sup> Decision n.121.

<sup>134</sup> 464 U.S 47(1984), the S.C. of the USA dwelt upon the fair use doctrine

<sup>135</sup> 17 U.S.C.section 107.

<sup>136</sup> See *A&M Records Inc. v Napster Inc* no c.99-05183MHP 2000 (denying Napster's motion for summary adjudication) at [www.napster.com](http://www.napster.com).

additional uses of Napster were not its fundamental operation<sup>137</sup>. The Court also examined the issue of contributory infringement and found that the plaintiff had demonstrated enough evidence to show that Napster had actual or constructive knowledge<sup>138</sup> of third party's direct infringement. The Court also examined the issue of vicarious copyright infringement for which it needs to be shown that the defendant supervises and have a direct financial interest. The Court held that Napster was in a position to play a supervisory role if it so wanted<sup>139</sup>. Regarding Napster's financial interest the Court found that the defendant was planning to expand its user base to increase revenue.

The Court after analysing all factors granted injunction in favour of the plaintiff. On appeal a stay was granted by the US Court of Appeals for the Ninth Circuit.

### **c. The Napster Case in the Ninth Circuit<sup>140</sup>**

The United States Court of Appeals for the Ninth Circuit took up the present case on 2<sup>nd</sup> October 2000 and delivered its judgement on 12 February 2001.

The Court looked into all aspects of the case and decision given by the District Court and itself analysed the issues raised by both the parties. In addition the Court also analysed the decision given by the District Court.

The Ninth Circuit Court had at its disposal the issue of reviewing a grant or denial of preliminary injunction for abuse of discretion. The Court said: "on review, we are required to determine whether the Court employed the appropriate legal standards governing the issue of a preliminary injunction and whether the District Court correctly apprehended the law with respect to the underlying issue at hand."<sup>141</sup> Analysing the plaintiff's claims that Napster's users were directly infringing the copyrighted works of theirs, by wholesale reproduction and distribution of those works, the Court gave its own view. The Court agreed with the decision of the District Court which had concluded that the plaintiff's have ownership over seventy percent of the files available with Napster.

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> A&M Records Inc.V Napster Inc C 99-5183MHP(Granting Napster motionof preliminary injunction

<sup>140</sup> Decision, n.121.

<sup>141</sup> n.121.

Secondly, the District Court had also determined that the plaintiff's exclusive right under section 106 were violated.<sup>142</sup> The Ninth Circuit Court looked into this and agreed with

plaintiff's allegation that Napster users infringe at least two of the copyright holders exclusive rights, the right of reproduction (Section 106(1)) and distribution (Section 106(3)). Further, the Court held that Napster users who upload file names to the search index for owners to copy violate plaintiff's distribution rights. Napster users, who download files containing copyrighted music, violate plaintiff's reproduction rights.<sup>143</sup>

The Ninth circuit then looked into Napster's assertion of affirmative defence to the charge that its users directly infringe plaintiff's copyrighted musical composition and sound recordings. The ground on which Napster contended this was the application of the fair use doctrine. Napster identified three specific<sup>144</sup> alleged fair uses:

- i. Space shifting - where users access a sound recording through the Napster system that they already own in audio CD.
- ii. Sampling - where users make temporary copies of the work before purchasing.
- iii. permissive distribution of music by new and established artist.

The Ninth Circuit went into the District Court's finding on fair use, which the Court had reached by considering factors visited in Section 107 of the US Copyright statute. As mentioned earlier the District Court had found that Napster's user was not fair user. The Ninth Circuit Court agreed to this view and made an analysis of each of the four factors, which constitute Fair Use.

On the first count, the Court concluded that the District Court's findings that Napster's users engage in commercial use of the copyrighted material was not erroneous.

The Court was of the view that "direct economic benefit is not required to demonstrate commercial use. Further repeated and exploitative copying of copyrighted works, even if the copies are not for sale constitute commercial use."<sup>145</sup>

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> The 9<sup>th</sup> Circuit's decision, n.121.

The Court of Appeals found the same occurring in the present case as repeated and exploitative unauthorised copies of copyrighted were made to save the expense of purchasing authorised copies.

Secondly, the Court took cognisance of the second factor, that is, the nature of the use and agreed with the District Court's findings that the work of the plaintiff's is creative in nature hence fair use could not be applied.<sup>146</sup>

Thirdly, the Court of Appeals analysed the third factor the portion used and concluded that the District Court had not erred by deciding that 'wholesale copying' of copyrighted work occurs because of file transfer. However, the Court added that in certain cases the use is fair even when the protected work is copied in its entirety.<sup>147</sup>

Finally, the Court of Appeals analysed the fourth factor effect of use on market. The District Court had ruled that Napster harms the market in at least two ways:

- a. It reduces audio users among college students.
- b. Raises barriers to plaintiff's entry into the market for the digital downloading of music.

The Court of Appeals agreed with the findings of the District Court about Napster's deleterious effect on the present and future digital download market. Moreover, the Court added that lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works. Thereafter, the Ninth Circuit analysed Napster's contention that its identified uses and of sampling and space shifting were 'wrongly excluded as fair use by the District Court.'

Napster had put forth the argument that sampling is not commercial activity, for it does not affect the plaintiff's market adversely and that it was a fair use. All these arguments were turned down by the District Court on the ground that (i) sampling remains a commercial use even if some users eventually purchase the music. Since Napster allowed users to download a full, free permanent copy of the recording, instead of the sixty seconds or full song free downloads provided by recording companies which are 'timed out' that is, exists for a short time on the download 's computer, the District

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<sup>146</sup> Ibid, p.23.

<sup>147</sup> Sony Corp. vs. Universal Studios, Inc. 464 US 417 (1984).

Court concluded it was commercial in nature. The Court of Appeals agreed with this. It also analysed Napster's contention that the user's downloading of 'samples' increases or tends to increase audio CD sales. The Court again agreed with the District Court 's finding this could not be treated as fair use and held that "increased sales of copyrighted material attributable to unauthorised use should not deprive the copyright holder of the right to license the material."<sup>148</sup>

The Court of Appeals concluded that sampling could not be taken to be fair use.

Napster maintained that Space Shifting is a fair use. It put forth the view held in *Sony*<sup>149</sup> and *Diamond*,<sup>150</sup> but the District Court refused to apply the standards of those cases. The Court of Appeals concurred with this. The Court held that "both *Diamond* and *Sony* are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of copyrighted material to the general public; the space shifting of copyrighted material in these cases exposed it only to the original user."<sup>151</sup> Hence the Court of Appeals held that the space shifting could not be taken as fair use.

The Court then looked in to the plaintiff's claims that Napster is liable of contributory and vicarious copyright infringement. The Court of Appeals analysed the District Court's finding that Napster was liable for contributory infringement. It examined the elements required for contributory infringement, viz., knowledge and material contribution.

Regarding the Knowledge of Infringement, the District Court had held that Napster had actual and constructive knowledge that its users exchanged copyrighted music. It had also rejected Napster's contention that it did not have knowledge of "specific acts of infringement" reasoning that the law does not require this.

Napster however claimed protection by citing the *Sony v. Universal Studios Inc.*<sup>152</sup> But the Court of Appeals held that Napster's actual, specific knowledge of direct

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<sup>148</sup> Decision, n.121.

<sup>149</sup> n.134.

<sup>150</sup> RIAA vs. Diamond Multimedia Systems, n.94.

<sup>151</sup> n.134 and n. 94.

<sup>152</sup> n.134.

infringement renders the *Sony* judgement inapplicable. However the Court of Appeals followed the *Sony* in deciding that the requisite level of knowledge could not be imputed to Napster merely on the ground that Peer to Peer technology might be used to infringe plaintiff's copyright. The Court departed from the reasoning given by the District Court to establish contributory infringement. The Court of Appeals was of the view that the District Court placed "undue weightage on the proportion of current and future non-infringing use"<sup>153</sup>.

The Court then took note of the *Netcom*<sup>154</sup> case where it was held that "evidence of actual and specific knowledge is required to hold an ISP liable for contributory infringement." Further *Netcom* suggested that if the service provider had the knowledge of infringing activities and takes no step to purge such activities then liability can be assigned to it. Nevertheless, the Court of Appeals was of the view that in the present case Napster has sufficient knowledge of the system. Hence the Court of Appeals concurred with the findings of the District Court.

Apart from this, regarding the issue of Material Contribution, the Court of Appeals agreed with the District Court's view that Napster contributed material for infringement of copyright of the plaintiffs because it provides the "sites and facilities" for direct infringement. So the Court of Appeals found Napster liable for contributory infringement.

The Court of Appeals then had to analyse whether the defendant (Napster) had the right and ability to supervise the infringing activity and it had any direct financial interest in such activities to ascertain liability for vicarious infringement. While analysing these elements the Court found Napster liable. The District Court gave the view that Napster was planning to increase its revenue in the future based on "increase in user base." The Court of Appeals agreed with this and held that Napster financially benefits from the availability of protected works on its system.<sup>155</sup> The District Court found that Napster had the right and ability to supervise its user conduct. The Court of Appeals agreed to this in part.

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<sup>153</sup> Decision of the 9<sup>th</sup> Circuit n.121.

<sup>154</sup> *Religious Technology Centre vs. Netcom Online Services* 991 F.2d at 518 cited in *Street and Grant*, n.8, pp.548-550.

<sup>155</sup> n.121.



The Court of Appeals took note of Napster's "reservation of rights policy stating that the services can be terminated if a user violates applicable law. So it gave the view that the reserved right to police exercised to the fullest to escape imposition of vicarious liability.

The Court of Appeals agreed with the District Court's findings that Napster had the right and ability to police the system and failed to exercise that right to prevent the exchange of copyrighted material. However, the Court of Appeals in contrast to the District Court recognised the limitation of Napster's policing system of its users' activities. The Court reasoned<sup>156</sup> that the architecture of the Napster system allows it only to check that the files are in the proper MP3 format and does not read the content. But Napster had the ability to locate infringing material listed on its search indices and could terminate it, held the Court of Appeals. Since the file names are within the 'premises' of Napster to police, the Court of Appeals gave this view.<sup>157</sup>

The Court of Appeals accepted the findings of the District Court's conclusion that the plaintiffs' have demonstrated a likelihood of success on the merits of the vicarious infringement claim.

The Court of Appeals held Napster liable for vicarious infringement. After finding that it failed to supervise the activities of its users and used to get financial benefit out of the activities.

The Court of Appeals concluded that the preliminary injunction imposed by the District Court against Napster was correct. However the Court sought to modify the scope of the injunction in respect of contributory liability. The Court opined that contributory liability may potentially be imposed<sup>158</sup> to the extent that Napster:

- a. receives reasonable knowledge of specific infringing files with copyrighted music compositions and sound recordings.
- b. knows or should know that such files are available at the Napster system.
- c. fails to act to prevent distribution of the works.

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<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

The Court held that the "mere existence of the Napster system absent actual notice and Napster's failure to remove the offending material is insufficient to impose contributory liability. But Napster would be vicariously liable when it fails to affirmatively use its ability to patrol its system and precludes access to infringing files listed in the search index."<sup>159</sup>

The Court further held that the preliminary injunction, which was stayed, was overboard as it placed the entire burden to ensure that "no copying, downloading, uploading, transmission or distributing of plaintiff's work occur on the system." Instead the Court placed the burden of providing notice to Napster of copyrighted works and files containing such work available on the Napster's system. But Napster was assigned with the burden of policing the system within the limits of the system<sup>160</sup>.

#### **d. The Aftermath of the Decision**

The 58-page decision of the U.S. Circuit Court of Appeals dealt with many hitherto unanswered questions. The decision came as a precedent for determining the liability of copyright infringement in an online context. It also set ground rules for fixing liability on ISPs. At the same time the 58 million users of the Napster system were left baffled because of the possibility of the closing down after the judgement.

Many legal experts were of the view that the music industry and Napster would reach an agreement, whereby Napster will be allowed to provide music on a subscription basis.<sup>161</sup>

Napster, on its part, announced that with Bertlesmann, a major recording label, it had devised a new form of digital-rights management architecture, which will, for the first time, let Napster keep track of and impose restrictions on music shared over its system. According to which a subscription fee will be charged.<sup>162</sup> Part of which will then be passed on to performers and record labels. In this new set up-some are calling it as NapsterII- when a music file over the system it will be "wrapped "in a protective layer. The layer will be a digital lock, to open the file and get the music another user will need a

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<sup>159</sup> Ibid

<sup>160</sup> Ibid

<sup>161</sup> Amy Harmon, "Napster Ruling Sparks Search for Alternative to Free Music," *International Herald Tribune*, 14 February 2001, p.16.

<sup>162</sup> Adam Cohen, "In Search of Napster II," *TIME*, 26 February 2001, p.58.

digital key provided by Napster.<sup>163</sup>

#### **IV. Liability for Internet Service Providers**

The dramatic development of Internet has spawned a number of legal issues. The liability of Internet Service Providers (ISPs) for copyright infringement taking place through their services is perhaps the most vast and vexed issue to be addressed by the legal fraternity.<sup>164</sup>

ISPs are the mainstays of communication in the World Wide Web as all activities in the Internet are done through them. The material that is carried, stored, forwarded, or delivered by the ISPs can infringe another's copyright.<sup>165</sup> For example, a copyright holder may see his rights infringed when someone posts copyrighted material on the website without consent, which is then downloaded. In this context, the question is, to what extent ISPs should be held liable for illegal actions initiated by others. In other words, should ISPs be held liable for infringing activities of the third party?

So as to understand the liability issues related to ISPs it is necessary to differentiate as distinctly as possible the role of the different intermediaries or ISPs. The division of ISPs according to their roles is especially important since the scope of liability that might be imposed may differ depending on the specific role of the ISPs. The different functional roles that can be carried out by the ISPs can be categorised<sup>166</sup> as follows:

- i. Network Operator - Provides facilities for the transmission of data such as cables, routers, and switches.
- ii. Access Providers - Provides access to the Internet users connect to the Internet through their access providers.

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<sup>163</sup> Ibid., p.58.

<sup>164</sup> Rosa Julia Barcelo, "Liability for Online Intermediaries: A European Perspective," *E.I.P.R.*, Issue 12 (1998), p.453.

<sup>165</sup> Ibid., p.453.

<sup>166</sup> Fina Macmillan and Michael Blackney, "The Internet and Communications Carrier's Copyright Liability," *E.I.P.R.*, Issue2, (1998).

- iii. Host Service Providers - Provides a server on which it rents space to users to host content, for instance, a webpage which can incorporate all kinds of materials.
- iv. Bulletin Board Operators, News Groups and Chat Room Operators - Provides space for users to read information sent by other users and to post their own messages. There are two types of news groups, moderated and unmoderated. The chat rooms allow direct communication in real time.
- v. Information Location Tool Providers - Provides tools to Internet users to find websites of their interest.

Each of these actors have a role to play when an Internet user wishes to use Internet. The Internet user first needs to connect to the network via an access provider. Then assisted by a browser software and by an information tool, the user will identify and contact the server operated by the host service provider where the web page is located. Once a user gets access to the webpage of his interest, he can upload or download material to his personal computer.

In this environment the liability of ISPs for copyright infringement is not clear. For example, if a subscriber makes copyright material available through the Internet without the permission of the copyright owner, then the questions to be answered are:

- (i). if that person is liable for any infringing copies made by persons downloading the material;
- (ii). Is the ISP liable as a facilitator by authorising infringement?;
- (iii). A sender who transmits infringing material via the Internet may be liable by the act of transmission infringing copyright. The sender may also infringe if, he or she is regarded as performing, displaying, showing playing or broadcasting the material. This is because the act of sending a message containing infringing material knowing that it would be copied being transmitted constitutes infringement. The cases where a person makes infringing material available to be browsed by others via the Internet raises the question of infringement may arise;<sup>167</sup>

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<sup>167</sup> S.K Verma, "Liability Of Internet Service Provider," *Paper Presented In National Seminar On Challenges of Internet: Cyber Law and Enforcement of Copyright Law*, 3-4 March 2001, New Delhi.

(iv). Similarly, a recipient of the material may infringe copyright when he or she gets it onto his or her computer by instructing the sender to send the infringing copyrighted material.

(v). ISPs carrying bits of data containing infringing material may be liable for infringement of copyright by the fact of having copied the material which passes en-route; even though copying might be automatic and though the ISPs never see the material in question.<sup>168</sup>

(vi). The case law concerning the liability of the ISPs shows that copyright owners have sought to hold ISPs and Bulletin Board Services (BBS) operator liable on theories of direct liability, contributory liability and vicarious liability.

#### **A. Direct Liability**

Whether the ISPs are directly liable for copyright infringement or not has formed part of many decisions delivered by the courts of U.S.A.

##### ***Religious Technology Centre Vs. Netcom Online Communications services Inc.***<sup>169</sup>

This case has been discussed in detail in the preceding sections. The Court found that *Netcom* could not be held liable for direct infringement of copyright of the plaintiff for the action of a third party. The Court held the ISP to be a conduit which did not keep an archive of files for more than a short duration. The Court held that it was impossible on the part of an ISP to segregate between infringing and non-infringing material passing through its system and hence reached the above conclusion.

In *Sega Enterprises Ltd. Vs. MAPHIA*<sup>170</sup> also the Court did not attribute direct liability on the BBS for the uploading and downloading by subscribers of unauthorised copies of Sega's video games through the BBS because the operator had not taken part in the very act of uploading or downloading themselves though they encouraged the initial uploading.

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<sup>168</sup> Ibid.

<sup>169</sup> 991 F.2d at 518 cited in Street and Grant, n.8, pp.548-550.

<sup>170</sup> 948 F.Supp.923 (N.D..Cal.1996), Street and Grant, n.8, p.566.

In *Sega Enterprises. Vs. Sabella*<sup>171</sup> also the above view was taken by the Court.

In both the cases the logic given by the *Netcom* Court was followed.

In *Subafilms Ltd. MGM-Pathe Communications*<sup>172</sup> the Ninth Circuit concluded that direct liability did not arise merely because a person placed material on a network for subsequent unauthorised copying, display, performance or the like. The Court opined that no independent "right of authorisation" was created by section 108 of the U.S. Copyright Statute. So under the reasoning of Subafilms decision, even if loading material onto a server encourages (or authorises) copying through downloading that authorisation does not suffice for direct liability.

These decisions show that so as to establish direct infringement liability on the part of an ISP or BBSs some kind of direct volitional act need to be established.

In some of the decisions of the Court's ISPs have been held liable for direct infringement, when their activities had shown any form of direct involvement.

In *Playboy Enterprises Inc. Vs Frena*.<sup>173</sup> A bulletin board service (Frena) was found to be infringing the copyright of the plaintiffs. The BBS used to upload copyrighted pictures from the plaintiff's magazine (*Playboy*) which could be downloaded by the subscriber. The Frena Court held that a BBS operator may be directly liable for distributing or displaying to the public copies of copyrighted work without authority from the owner of the copyright. The Court had strong evidence to show that the defendant Frena in fact did know that the images were copyright protected.

In *Playboy Enterprises Vs. Webbworld Inc.*<sup>174</sup> action was brought against the defendant, owner of a website on the grounds that it provided copyrighted images of the plaintiffs to the subscribers on the basis of a monthly fee. Webbworld made those available on its Netpics.com site to Internet users. Webbworld obtained these images from selected adult oriented "news groups." These images were "posted" by the "news groups" which were then downloaded by the defendant.

The Court found that Webbworld both had access to *Playboy's* famous publication

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<sup>171</sup> No.C 93-04260 CW, 1996 US Dist.(N.D.Cal..Dec18,1996), Street and Grant, n.8, p.563.

<sup>172</sup> 24 F.3d1088 (9<sup>th</sup> Circuit,1994).

<sup>173</sup> 839 F.Supp1552 (M.D.Fla, 1993), cited in Street and Grant, n.8, p.507.

<sup>174</sup> 991 F.2d at 518 cited in Street and Grant, n.8, pp.548-550.

and that the Webbworld images were "virtually identical" to the plaintiff's photographs. The Court found that Webbworld improperly reproduced and distributed and displayed PEI's copyrighted works. All of these actions violated the plaintiff's exclusive rights under copyright law.

The Court rejected Webbworld's argument that it merely functioned as a service provider because the defendant sold images, not "access." Further Webbworld took affirmative steps to cause the copies to be made. On these grounds the Court found direct liability of the defendant

All these cases go to show that some kind of a direct volitional act on the part of the infringer of copyright is required to establish direct liability.

## **B. Contributory Liability**

A party may be held liable for contributory infringement where "with knowledge of the infringing activity, [it] induces, causes or materially contributes to the infringing activity of the another."<sup>175</sup> As laid down in the *MAPHIA* case,<sup>176</sup> the standard of knowledge is objective: to know or have reason to know that the subject matter is copyrighted and that the particular uses were violating copyright law. So to prove liability for contributory infringement, there must be direct infringement to which the contributory infringer has knowledge and encourages or facilitates.

So an ISP which has the knowledge of infringing activity or has reason to know that such activities are being carried on by the users cannot escape liability. For example, in *Religious Technology v. Netcom Online Communication Services*<sup>177</sup> the Court held that the ISP *Netcom* could be contributorily liable for infringing postings by an individual named Elrich, of copyrighted religious materials to Usenet through the ISP after the Services was given notice of the infringing material. The Court ruled that if the plaintiff's could prove the knowledge element, *Netcom* will be liable for contributory infringement since its failure to simply cancel Elrich's infringing message and thereby stop an

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<sup>175</sup> 17 U.S.C Section

<sup>176</sup> n.170.

<sup>177</sup> *Religious Technology Centre vs. Netcom Online Services* 991 F.2d at 518 cited in Street and Grant, n.8, pp.548-550.

infringing copy from being distributed worldwide constituted substantial participation in Elrich's public distribution of the message."

However, the Court noted that when an ISP is unable to verify a claim of infringement, there may be no contributory liability. The Court ruled that where an ISP could not reasonably verify a claim of infringement owing to possible fair use defense, the lack of copyright notices on the copies, or because of the failure of copyright holder's to provide necessary information that there was likely infringement, in such cases ISP would not be held liable for allowing the materials for distribution through its system. While saying so the Court imposed an obligation on the part of the ISP to actively attempt to verify a claim of infringement and to take appropriate action in response.

In the subsequent MAPHIA case,<sup>178</sup> the Court (N.D. of California) held a BBS and its service operator liable for contributory infringement for both uploading and the subsequent downloading of copies of Segas' videogames by users where the system operator had knowledge that infringing activities were going on through its service. Further, the Court noted that the BBS specifically solicited uploading of the games for downloading by users of bulletin board. In this case Sherman, the operator of the bulletin board system, knew that uploading and download of unauthorised copies of Segas' videogames were taking place via its system. Sherman raised the plea of fair use defence saying that the games were used at peoples home and any copyright violation was de minimis.<sup>179</sup> The Court rejected this argument as Sherman was encouraging the upload and download of Segas video games in order to encourage the sale of his Segas game copying hardware and in order to upload and download services. Since the entire works were copied for economic and commercial gain and it had the effect of reducing sales of the games, the Court held that fair use defense could not be applied.

The Court also applied the *Netcom* judgement to this case in finding whether the higher standard set by it would make Sherman liable or not. Netcom had established that direct participation on the part of the ISP is required to prove liability. Following this line of argument the Court ruled that "Sherman did more than provide the site and facilities for the infringing conduct. He actively solicited the users to upload unauthorised games

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<sup>178</sup> n.171.

<sup>179</sup> n.170.



and substantially participated by inducing, causing or materially contributing to the user's infringing conduct.

### **Sega Enterprises Ltd. Vs Sabella<sup>180</sup>**

In this case the plaintiff brought action against the defendant for alleged copyright infringement. The plaintiff Sega produces generic computer for videogame system and videogame program that operates in the Genesis system. The Genesis system is designed to permit the operation of any videogames contained in Sega cartridges.

The defendant operated a bulletin board called The Sewerlines. Unauthorised copies of Sega were copied into the system. Sabella contended that she had no knowledge that games have been copied onto BBS and that she never copied nor authorised others to copy such games.

However, Sega argued that Sabella was liable for contributory copyright infringement because the defendant knew that her BBS users were making copies of Sega games.

The Court found that Sabella knew of the infringing activity on her BBS and that she provided a site for those activities and substantially participated in those activities by advertising and encouraging the upload and download of the infringing files.<sup>181</sup>

### ***Playboy Enterprises Inc. Vs Russ Hardenburgh Inc<sup>182</sup>***

In this case the defendant posted 412 graphic image files copyrighted by the plaintiff, Playboy Enterprises Inc. on the defendant's bulletin board service. These images were then made available to paying customers of the defendants. The defendant encouraged subscribers to upload information onto its bulletin board in exchange for credit which allowed them to download additional images. The Court ruled that the defendant liable for contributory infringement because "they clearly induced, caused and materially contributed any infringing activity which took place on their [bulletin board services.]<sup>183</sup>

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<sup>180</sup> n.171.

<sup>181</sup> n.170.

<sup>182</sup> Section 106 (17 U.S.C.106), U.S. Copyright Statute, 1976.

<sup>183</sup> Ibid.

The two recently decided cases - the MP3.com and Napster by the US courts have laid down the parameters to find the liability for ISPs.

As discussed in the earlier section,<sup>184</sup> the MP3.com Court had found that providing of music to users by the MP3 .com violate rights of the holders in this case the RIAA.

In the Napster case,<sup>185</sup> the Ninth Circuit of U.S. Court of Appeals found the defendant, a service provider contributorily liable for the Court was convinced that Napster had knowledge that its users were engaged in infringing activity through its system.

### c. Vicarious Liability

A party may be vicariously liable for the infringing acts of another if it has (1) the right and ability to control the infringer's act, and (2) receives a direct financial benefit from the infringement. Knowledge is not an element in this case unlike contributory liability.

The Netcom case<sup>186</sup> is one of the principal decisions to consider the vicarious liability of an ISP. In that case the Court refused to impose vicarious liability on Netcom. The Court based its ruling by applying both the criteria to the Netcom. The defendant argued that it could not possibly screen messages before they were posted given the speed and volume of the data that goes through its system. The plaintiff on the other hand argued that the defendant could do so by making modifications in the software and Netcom had done so earlier. On the second criteria the Court held that there was no evidence to suggest that Netcom received any financial benefit out of the infringing activities of third party. So the claim of vicarious liability was not accepted.

In another decision handed over after the Netcom decision, - *Marobie-FL Inc. Vs. National Association Of Fire Equipment Distributors*<sup>187</sup> the Court citing the Netcom decision refused to hold vicariously liable an ISP supplying Internet service to a website

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<sup>184</sup> See UMG Recordings Inc. v MP3.Com Inc, 92 F Supp.2d (S.D.N.Y.2000), Pemberton, n.112.

<sup>185</sup> A&M Records Inc V Napster Inc., No cv-90-05183-MHP downloaded from [www.riaa.com/decision](http://www.riaa.com/decision) of the 9<sup>th</sup> Circuit, n.121.

<sup>186</sup> Religious Technology Centre vs. Netcom Online Services 991 F.2d at 518 cited in Street and Grant, n.8, pp.548-550.

<sup>187</sup> Marobie-FL vs. National Association of Fire Equipment Distributors, 45 U.Sp.Q.2d 1236 (N.D.III 1997) cited in Hayes n.7.

that contained infringing material because the infringement that occurred through the website did not financially benefit the ISP.

In the **Napster** decision<sup>188</sup> delivered in February 2001 the Ninth Circuit held the ISP (Napster) vicariously liable as the Court found that Napster had the right and ability to control the infringing activity carried on by the users of the system, who used to get music in the MP3 format through the Napster server.

Analysing the second element, that is, financial benefit to the Internet Service Providers, the Court held that Napster was planning to generate revenue by increasing its user base. Hence both the criteria were satisfied and the Court held that Napster was vicariously liable.

All the judicial decisions show that ISPs are at the receiving end for infringing activities carried on by third party though conditions do apply to hold them liable. Hence legislations have been adopted by international organisations like the WIPO, the Wipo Copyright Treaty(WCT) and Wipo Performance and Phonogram Treaty(WPPT) laying down the criteria to deal with liability of the ISPs. National legislation adopted by the USA the Digital Millennium Copyright Act(DMCA) also deals with this aspect of copyright law. Those apart the EC has also adopted directives to address this issue. All the initiatives will be discussed in detail in the next chapter.

## **V. Jurisdiction in the Case of Copyright Infringements**

The phenomenon that is Internet has made borders permeable, what with gaining access to anything on the world wide web from anywhere in the world with the click of the mouse. However, this has made the task of finding jurisdiction over any unlawful activity carried on via the Internet difficult. Since a person situated in say country A can post infringing materials through an ISP having its server in that country or other country which then is accessed by someone in country B. In this context the question arises as to selecting the proper forum to address this issue. Whether a person is subjected to the jurisdiction of a particular court can be a difficult question when the defendant person's conduct was transmitted through the Internet from a foreign jurisdiction and possibly was stored on multiple computers located in multiple jurisdictions around the world. The

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<sup>188</sup> Napster Decision, n.121

difficulty becomes even more intense when the said person placed information on any material in a remote computer server and it was the decision of another person to download the material to the forum jurisdiction. As stated earlier the Internet does not have any territory or boundaries. Should the purely local action of placing something on an Internet service located in someone's office or home result in legal entanglements throughout the world without any further action?

#### **A. Internet and the concept of territoriality**

In the traditional method of settling disputes the Courts have used the geographical location of the parties to find jurisdiction. As a result most traditional approaches determining which jurisdiction is appropriate have been based on territory. In tort law the principle of *lex loci delicti*, the place in which injury occurred, has often been ruled to be the forum.

However in the case of Internet the *lex loci* approach may give rise to three unique difficulties<sup>189</sup> that do not arise in the analog world:

1. Where copies are distributed globally the Courts may be seized of an infringement action to apply a multiplicity of domestic copyright laws. Which would mean a daunting task for the courts and may impede efficient enforcement of copyright owner's right. The necessity to apply foreign copyright law seems to increase the risk that a case may be dismissed on "forum non conveniens"<sup>190</sup> grounds.
2. Problems with *lex loci* approach arises where the terminology used to describe infringing activities within particular domestic statutes does not adequately capture the kinds of unauthorised exploration of copyright material that the Internet makes possible. With respect to digitization and Internet.
3. Conflict of laws in the copyright context is another area of concern.

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<sup>189</sup> M. Ethan Katsh, *Law in a Digital World*, (New York, 1995), pp.588-89.

<sup>190</sup> *Ibid.*, pp.588-89.

Ascertaining jurisdiction over Internet transmission has brought to the fore the debate whether cyberspace can be regulated and if so how it can be done.

According to one view the cyberspace cannot be regulated<sup>191</sup>. The arguments given by these writers are based on both descriptive and normative claims. On the descriptive side they claim that the application of geographically based conceptions of legal regulation and choice of law to a geographical cyberspace activity either makes no sense or leads to hopeless confusion. On the normative side, they argue that because cyberspace transmission occur simultaneously and equally in all national jurisdictions, regulation of this flow of information by any particular national jurisdiction illegitimately produces significant negative spillover effects on other jurisdictions. Instead their view, national regulation should "defer to the self-regulatory efforts of cyberspace participants." The contrary view to this argues that regulation in cyberspace is feasible and legitimate from the perspective of jurisdiction and choice of law.<sup>192</sup>

The proponents<sup>193</sup> of the first view who are sceptics of applying regulation in cyberspace believe that transnational disputes cannot be resolved by choice of rules law. Which selects a unique governing law on the basis of where an event occurs or where transacting parties are located. Such choice of law rules are thought to promote rule of law values like uniformity, predictability and certainty. However, the proponents<sup>194</sup> of the second view contest this and put forth the argument that the first view is akin to nineteenth century territorialist conception of resolving disputes. They are of the view that this traditional approach to law has long been overthrown by the developments which have taken place in the past century. Citing developments of legal realism and legal positivism, they build their argument to bring home this point. Another ground on which the rigid territorialist conception is challenged is the advancement achieved through technology which has brought newer form of communications. According to this

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<sup>191</sup> See David Post and David R. Jonson, "Law and Borders: The Rise of Law in Cyberspace", *Stanford Law Review*, Vol.48, (1996), p. 1367.

<sup>192</sup> Jack L. Goldsmith, "Against Cyberanarchy," *The University Of Chicago Law Review*, Vol.65, No.4, (Fall 1998), p.1200.

<sup>193</sup> *Ibid.*, p.1201.

<sup>194</sup> *Ibid.*, pp.1201-2.

view all these changes have led to an expansion of permissible base for territorial jurisdiction. Now they say a state can apply its law if it has a "significant contact or significant aggregation of contacts",<sup>195</sup> creating state interest, such that choice of its law is neither arbitrary nor fundamentally unfair.

Based on all these arguments they believe that a transnational transaction can legitimately be regulated by the jurisdiction where transaction occurs and the jurisdiction where significant effects of the transactions are felt and the jurisdiction of the parties burdened by regulation are from.<sup>196</sup> In the case of Internet the principle of sufficient minimum contacts has been applied. The following gives an account of this. Though matters dealt may not be concerned with copyright infringement, in particular, in case of Internet transaction, nonetheless these views can be used to decide this issue as well.

### **B. Minimum Contacts Analysis for Internet Cases**

So as to determine a jurisdiction over a dispute having extraterritorial implications the state must establish that it has power over the target of the person allegedly involved in infringing activity. This is determined by examining the 'Minimum Contacts.' If the action against a person "*in personam*" then the 'minimum contacts' must apply to the defendant. If the action is against a thing "*in rem*" then the 'minimum contacts' must apply to that thing.<sup>197</sup> "*In rem*" jurisdiction might apply to the assertion of claims for jurisdiction based on an e-mail storage box or a stored file that is located on a computer server in the forum jurisdiction. However, in such case the criterion of satisfying the test of reasonableness by the courts might not be possible. So in this context, the disputes would be decided based on the "*in personam*" jurisdiction.<sup>198</sup>

In the traditional notion of establishing minimum contacts with a jurisdiction has been based on domicile, consent or committing action in the state. The first two requirements, domicile and consent can be present in the Internet transaction as these are not affected because jurisdiction can be asserted by a forum where the Internet

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<sup>195</sup> Ibid., pp.1200-1201.

<sup>196</sup> Ibid., pp.1206-1207.

<sup>197</sup> Street and Grant, n.8, p.281.

<sup>198</sup> Ibid., p.281.

transaction occurs. Secondly, consent being a volitional act, courts can ascertain whether this is present in an Internet transaction. Therefore, the only part of the minimum contacts test that is different in an Internet transaction or dispute is whether sufficient transaction was related to the jurisdiction. Since most of the Internet related actions are electronic transmissions, courts will be examining whether transmissions from a foreign site to the forum jurisdiction were sufficient minimum contacts to constitute jurisdiction.<sup>199</sup>

In **Compuserv Inc Vs. Patterson**<sup>200</sup> the U.S. Court of Appeals for the Sixth Circuit found personal jurisdiction in an Ohio court over an Internet user from Texas because

- a. He subscribed to an online network in Ohio.
- b. Entered into an agreement for the marketing of his software using an online network that transmitted message to the plaintiff in Ohio.

The Court concluded the Internet user "reached out" from Texas to Ohio and "originated and maintained" contacts in Ohio<sup>201</sup>.

### **1. The Reasonable Requirement Test**

After establishing jurisdiction on the basis of minimum contacts, a state must still establish that asserting jurisdiction is reasonable. Judges are to satisfy the principles of fair play and substantial justice as propounded by the *International shoe case*.<sup>202</sup> Following this guideline the U.S. Supreme Court laid down the following five factors in *Volkswagen Corpn Vs. Woodson*<sup>203</sup> to analyse whether the contacts are reasonable:

1. Burden of the defendant.
2. The forum state's interest in adjudicating the dispute.
3. The plaintiff's interest in convenient and effective relief.
4. The interstate judicial system's interest in obtaining the most effective resolution of the controversies.
5. The shared interest of the several states in furthering substantive social policies.

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<sup>199</sup> Goldsmith, n.192, pp.1207-1208.

<sup>200</sup> 89 F.3d 1257(6<sup>th</sup> Cir1996), cited in Street and Grant, n.8, p.306.

<sup>201</sup> Ibid., p.306.

<sup>202</sup> 326 U.S. 310(1945).

<sup>203</sup> 444 U.S.286(1980).

Drawing analogy from these tests to establish jurisdiction, one can apply these yardsticks to copyright infringement in online transaction.

### **C. Jurisdiction for Websites Located In Various Jurisdictions**

The present search to find a suitable solution for subjecting a defendant to a specific jurisdiction in a foreign forum has led the courts to divide the web sites into two categories.<sup>204</sup> Which are the Passive web site and the Interactive web site. Passive websites are those which provide the user with different kind of information and unlike the interactive websites do not solicit participation of the users in uploading material or in providing inputs. These may be based on a system of payment or free of charge. When such websites purposefully and intentionally do some infringing activities having applications in a particular jurisdiction then the court can often find that minimum contact exists and hence jurisdiction can be exercised<sup>205</sup>. The Interactive web sites are those where a user can exchange information with the host computer. In this case the exercise of jurisdiction is determined by examining the level of interactivity and the information that gets exchanged<sup>206</sup>

In the *United States Vs. Thomas*<sup>207</sup> Robert and Carlene Thomas were found guilty for disseminating obscene material through a bulletin board service maintained in California. These obscene images were downloaded by a federal agent in Tennessee. The Thomases were prosecuted in Tennessee while the bulletin board was located in California. The Court applied the minimum contact principle in deciding the case.

However, the case would have taken a different turn had it been a dispute between two different countries. In this type of situation the problem of enforcing judgement arises. Which imposes few enforceable controls on a country's assertion of personal jurisdiction. If a country exercises personal jurisdiction on an exorbitant basis, the resulting judgement will be unlikely to be enforced. In another country, similarly local public policy exceptions to foreign judgements are common place in all countries. One of

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<sup>204</sup> See *Zippo Mfg. Co. v Zippodot Com, Inc.*, 952 F.Supp.1119, 1124 (W.D.Pa1996).

<sup>205</sup> Michel S. Rothman, "It's a Small World Afterall: Personal Jurisdiction, the Internet and the Global Marketplace", *Maryland.Journal Of Law and Trade*, Vol.23, No.1 (1999), pp.142-43.

<sup>206</sup> *Ibid.*, p.143.

<sup>207</sup> 74 F.3d 701 (6<sup>th</sup> Cir)cert denied, 519 US 8201993, Street and Grant, n.8, p.287.



the solutions to this impasse could be, affected countries agreeing to take measures to make the order enforceable.

So as to evade jurisdiction of a state, the person providing infringing material through the Internet might shift his/her base to another state. For example, he/she can employ telnet or anonymous remailers<sup>208</sup> to make it difficult to discern the geographical location of the materials. This would make the task of enforcing local jurisdiction difficult. However, this does not mean that local regulation is inefficacious because a nation can regulate people and equipment in its territory to control the local effects of the extraterritorial activity. Such indirect regulation is being employed by countries to regulate local harms caused by offshore Internet content providers.

For example, nations penalise<sup>209</sup> in state end users who obtain and use illegal content or otherwise who participate in illegal cyberspace transaction. They also regulate the local means through which foreign content is transmitted by imposing screening obligations on in state ISPs and other entities that supply or transmit information. These regulations make it more costly and more difficult for in-state users to obtain content from and transact with regulation evaders abroad.<sup>210</sup>

Filtering<sup>211</sup> of contents is one of the methods of screening to regulate flow of information in Internet. This is done precisely to check the dissemination of infringing materials. Software filters can be employed at the end users level as well as at the level of the Internet Service Provider. Many jurisdictions<sup>212</sup> have already mandated the use of filtering and identification mechanism to block infringing material. Though these mechanisms primarily focus on pornographic content, terrorist literature disseminated through the Internet, illegal and illicit trading, nevertheless such technology can be employed to protect copyrights of the holder.

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<sup>208</sup> Telnet allows a computer to log into a remote computer over the Internet once connected to the foreign computer, the user can perform any Internet function as though he/she were logged onto a terminal in the foreign computer. An anonymous remailer allows a sender to send message by keeping the identity of that person a secret.

<sup>209</sup> Germany, Australia have implemented laws to deal with this, Goldsmith, n.192, p.1223, fn.99.

<sup>210</sup> Ibid., p.1224.

<sup>211</sup> Ibid., p.1224.

<sup>212</sup> The USA has adopted the DMCA, the EU has adopted the European Copyright Directive providing technical measures to deal with the various rights of the copyright holder in the context of Internet.

It seems likely that the techniques and technologies for controlling cyberspace information flow will continue to develop in scope and sophistication and will play an important role in resolving jurisdictional quandaries presented by the borderless medium. The preceding section outlined the various ways and means to address the issue of jurisdiction in Internet. Another way of addressing this is the choice of law Tools.

#### **D. Choice of Law Tools**

The conflict of laws arising out of multijurisdictional reach of the Internet can be compared with similar transnational transaction occurring between different jurisdiction. Though cyberspace conflicts are not different from non-cyberspace conflicts, cyberspace presents two related choice of law problems. The first is the problem of complexity. This is the problem of how to choose a single governing law for cyberspace activity that has multi jurisdictional contacts. The second problem concerns *Situs*. This is the problem of how to choose a governing law when the locus of activity cannot be easily pinpointed in geographical space.<sup>213</sup> The choice of any dispositive contact or any particular law in these cases will often seem arbitrary as several jurisdiction have legitimate claim to apply their law. Whatever law is chosen seemingly regulatory interests of the nations whose laws are not applied may be impaired.<sup>214</sup>

The problem of complexity and situs are genuine.<sup>215</sup> They are not, however, unique in cyberspace. Identical problems arise in all time in real space. For example such problems are prevalent in real space events such as airplane crashes, mass torts, multistate insurance coverage or multinational commercial transactions.

Resolution of choice of laws problems in these context is challenging. In these cases not all-geographical contact is of equal significance. In the context of infringing copyright in Internet involving multi jurisdictional problem, the law of the source country and end user countries have much greater claims governing the copyright action than the laws of country of person who built the server and the country of the server whose

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<sup>213</sup> Goldsmith, n.192, p.1232.

<sup>214</sup> Larry Cramer, "Choice Of Law in Complex Litigation," *New YorkUniversity Law Review*, Vol. 71, No.547, (1995), pp.551-65.

<sup>215</sup> *Ibid.*, p.552.

hyperlink pointed to the server that contained the infringing material. In addition, even in extraordinary complex cases where numerous law potentially apply these laws will often involve similar legal standard thus limiting the actual choice of law to two or perhaps three options.<sup>216</sup>

Like the problem of complexity, the situs problem is pervasive in real space jurisdictional conflicts. The situs problem arises whenever legally significant activity touches one two or more states such as when poison is administered in one state, takes effect in another and kills in a third. The situs problem arises when a bodily injury occurs in one state based on negligence connected in another for there is no logical reason why the place of injury should be viewed as the place of tort any more than should the place of negligence. In all these situations the importance of any particular geographical contact is never self evident; it is legal rather than factual considerations that is built into the forms of choice of rules.

So the complexity and situs problem to some degree in all transnational conflicts, and are exacerbated in real space and cyberspace alike as jurisdictional contacts proliferated. No choice of rule law will prove wholly satisfactory in these situations. However in the context of cyberspace transaction it would not be right to say that such transactions be resolved on the basis of geographical choice of law criterion. The reasoning, these are not the only choice of law criteria and certainly not the best in the contexts where the geographical laws of events is so unclear.

Domicile and its cognates such as citizenship, principal place of business, habitual residence, and so on are also vital choice of law criteria that have relevance to problems like those ion cyberspace, that involve the regulation of intangibles or multinational transactions.

However when the problems poised by choice of law rules and the issue of jurisdiction become so tangled to be resolved through the methods suggested above the states can adopt international harmonisation standards to reach an agreement.

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<sup>216</sup> Goldsmith, n.192, p.1236.

## **E. International Harmonisation**

As stated above states can reach a common ground to resolve the issue of jurisdiction. Example of this is found in the Brussels and Lugano Conventions<sup>217</sup> entered into by the member states of the European Union.

The Brussels Convention on Jurisdiction and Enforcement of Judgements in civil and criminal matters of 1968 was agreed upon by the member states of the European Union. The Lugano Convention was entered into in 1988 and is a parallel convention between European Commission member states and the members of the European Free Trade Area (EFTA). Both these conventions allocate jurisdiction in civil and criminal matters and provide for reciprocal recognition and judgements within the territories of the EC and EFTA. The conventions determine which contracting state's court has jurisdiction to hear a dispute and whether a Internet order by the court of one contracting state must be recognised and enforced in by the court of another contracting state.

The general rule of both the conventions is that a defendant must be sued in the state in which the party is domiciled. Article 2<sup>218</sup> of the Brussels Convention says that "persons domiciled in a contracting state shall, whatever their nationality be sued in the courts of that contracting state."

Article 59<sup>219</sup> of the Convention defines domicile as the 'seat' of a company or other legal person or association as determined by the private international law of the contracting state where the court seized of the dispute is situated.

## **F. Jurisdiction Agreement**

Under Article 7<sup>220</sup> of the Brussels Convention provides that parties to a dispute can agree to submit the matter to the jurisdiction of a particular state. In such a state the courts of any other contracting state will invariably honour that agreement provided that agreement is in writing and signed by all parties. In case if one or more parties are

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<sup>217</sup> Stephen York and Ken Chia, eds, *E-Commerce: A Guide to the Law of Electronic Commerce*, (London, 1999), p176.

<sup>218</sup> Ibid, p.178.

<sup>219</sup> Ibid., 216, p.178.

<sup>220</sup> Ibid.

domiciled in a contracting state then Article 17<sup>221</sup> confers jurisdiction on a nominated state where none of the parties are domiciled in a contracting state then the nominated court has the option to decline jurisdiction. When this happens the courts of any other contracting state may assume jurisdiction based on their own respective national laws.

In some disputes courts of particular contracting states have exclusive jurisdiction whether or not the defendant is domiciled in a contracting state. According to Article 16 disputes concerning real property situated in a contracting state gives the courts of that particular contracting state exclusive jurisdiction.

Article 24<sup>222</sup> of the Convention permits a court to grant provisional protective measures even if the court does not have jurisdiction under the Convention over the substantive aspects of the dispute. Article 31 of the Convention states that a judgement that is enforceable in any other state in which interested party is located if enforcement is sought in that state.

The reach of these agreements are limited to the states of the European Union and at the international level we don't have any convention or treaty dealing with this sensitive issue. Nevertheless a beginning has been made in a recently concluded conference which was held at The Hague to sort out this problem. Over 50 states world over met and conferred to find a plausible solution to this intricate issue<sup>223</sup>.

As the above discussion shows the legal community has to deal with a host of issues that the Internet has brought to fore. The traditional notions of the right of the copyright holder and the privileges granted to the users are undergoing a sea change as the parameters of deciding these rights and privileges are changing in the online context. Many new stake holders have also emerged, like the Internet Service Providers (ISPs), bringing in vexing problems of deciding liability and fixing responsibility. Another issue calling for attention is that of finding jurisdiction for a borderless medium. Yet another perplexing issue is that related to the newer modes of infringements like caching, framing, linking, etc. All these points to the fact that the legal fraternity would have hands full of issues to address in the Digital Environment.

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<sup>221</sup> Ibid.

<sup>222</sup> n.8, p.322.

<sup>223</sup> "Regulating the Internet Tied Up in Knots," *The Economist*, 9 June 2001.

## ***Chapter III***

### Overview of Legal Developments

## CHAPTER III

### OVERVIEW OF LEGAL DEVELOPMENTS

This chapter looks into the work of different international organizations. The later part of the chapter also discusses the legislations adopted by regional bodies and states. As was discussed in Chapter II, the coming of age of the Internet has brought with it many unanswered questions, which have in a way jolted the traditional copyright laws. Hence the urgency and necessity to enact legislations, which keep pace with the technological advancement is felt all the more. International organizations like the WTO and the WIPO have taken the initiative in this regard.

However, it is to be noted that in all these initiatives the Berne Convention for the Protection of Literary and Artistic Work (Berne Convention), 1971, forms the foundation on which the new treaties are to be based. For both the WTO and WIPO have drafted rules keeping in mind the provisions given in the Berne convention.

The WTO has a separate agreement dealing with Intellectual Property Rights—the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement. Though this agreement does not address directly the issue of Copyright Protection in the context of the Internet, the various provisions under the Copyright and Related Rights section provides inputs to deal with this.<sup>1</sup> It is a step forward from the Berne Convention as various rights of computer programs<sup>2</sup> are being protected.

The WIPO on the other hand has addressed the above mentioned issue in a detailed manner through two treaties—the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT), which are known as the Internet Treaties.<sup>3</sup>

The European Union (EU) has adopted the European Copyright Directive following the adoption of the WIPO Treaties and the provisions made in this addresses

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<sup>1</sup> The TRIPS Agreement has provisions made in Article 9 through 14 to deal with copyright and neighbouring rights, Annex C to the agreement establishing WTO.

<sup>2</sup> Article 10.1 of TRIPS protects computer programs both at the source or object code.

<sup>3</sup> Since the WCT and the WPPT were adopted keeping the Internet in mind, hence these treaties are also called Internet Treaties.

many issues pertaining to copyright, which have arisen in the context of the Internet. The US has also made changes to its copyright statute following the provisions made by the WIPO Treaties and covers a wide range of issues in the context of Internet.

Also to be discussed in this chapter is the Indian Copyright Act in the light of the treaties enacted by the WIPO. Hence this chapter looks into the following:

1. Provisions made by the WTO TRIPS text.
2. The WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT).
3. The EC Directive.
4. The Digital Millennium Copyright Act (DMCA) enacted by the U.S.A. to implement the WIPO treaties
5. The Indian Copyright Act in the digital era

## **I. WTO**

The WTO came into being after the completion of the Uruguay Round in 1994. The GATT has governed the rules and norms of international trade in goods since 1948. The Uruguay Round Agreement<sup>4</sup> extended multilateral rules and disciplines to intellectual property rights, trade in services, trade related aspects of investment measures, and trade in agriculture.

Thus, the Uruguay Round (UR) was a departure from the earlier rounds in that it brought intellectual property under the ambit of GATT. The issue of intellectual property was brought in the UR at the insistence of the developed countries led by the USA. The developing countries opposed this move as they thought that it would undermine their own interests. But at the end the views of the developed countries prevailed as they sought to prevent their trade interest from piracy.<sup>5</sup>

What came out of UR on this issue was the Agreement on Trade Related Intellectual Property Rights (TRIPs Agreement).

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<sup>4</sup> The final of the seven rounds of talks held under the aegis of GATT and brought WTO to existence.

<sup>5</sup> T.N. Srinivasan, *Developing Countries and Multilateral Trading System from the GATT and the Uruguay Round and the Future* (Delhi, 1998), pp.52-53.



The TRIPs Agreement addresses patents, copyrights, trade marks, industrial design and trade secrets. It makes national treatment as the basis for the protection of foreign works. In addition, Article 4<sup>6</sup> of TRIPs outlines the "most favoured nations" principle.

Though the TRIPs does not deal with the issue of copyright in cyberspace the provisions with regard to copyright and related rights give enough indication that these can be interpreted to apply to the online environment.

### **A. TRIPs and Copyright Protection**

Section 1 of the TRIPs deals with Copyrights and Related rights in Articles 9 through 14. Article 9.1<sup>7</sup> provides that members are to comply with Articles 1 through 21 of the Berne Convention and its appendix. However, TRIPs does not give the members right or obligations with respect of Article 6<sup>bis</sup><sup>8</sup> of the Berne Convention, which deals with the moral rights of the author. This shift from the Berne Convention can be attributed to the view expressed by the developed countries that the incorporation of moral rights would be incompatible with the trade focus of TRIPs.

The Agreement clarifies two important points relating to new technology

(i). Article 10 (1)<sup>9</sup> provides that a computer program, whether in source or in object code, shall be protected as literary work under the Berne Convention.

(ii). Article 10 (2)<sup>10</sup> of the Agreement provides that a data base or other compilation of data or material shall be protected under copyright even where it includes data or other material that as such is not protected under copyright, provided that the database or compilation constitutes an intellectual creation.

These provisions can be applied to the online environment as infringing software can be treated as literary works. In the case of multimedia any infringement can be brought under the ambit of the provision of Article 10 (2), which recognises protection for compilation of data and computer programs.

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<sup>6</sup> Article 4, TRIPs Agreement.

<sup>7</sup> Article 9, TRIPs Agreement.

<sup>8</sup> This Article makes provisions for moral rights "to claim authorship; to object to certain modifications and other derogatory actions." Article 6<sup>bis</sup>, Berne Convention, 1971.

<sup>9</sup> Article 10 (1), TRIPs Agreement.

<sup>10</sup> Article 10 (2), TRIPs Agreement.

A second provision having implications for copyright protection in the online environment is Article 14<sup>11</sup> of TRIPs. This article deals with the protection of performers, producers of phonograms (sound recording) and broadcasting organisations. This has been incorporated in the TRIPs by taking that Rome Convention<sup>12</sup> into consideration.

Article 14(1) protects phonograph performers from unauthorized fixation and reproduction of their work. Secondly, this article also gives protection to performers against unauthorised broadcast of their work through wireless means.

## II The World Intellectual Property Organisation (WIPO)

The WIPO is a specialised agency of the United Nations. The WIPO provides a forum for international co-operation in the development of rules to define intellectual property rights (IPRs), to administer the rules agreed upon, and to provide technical assistance to desirous contracting parties. The WIPO administers a large number of conventions like the Berne Convention, the Rome Convention, the Paris Convention, etc. An added feature of the WIPO is that it undertakes periodic revision of these treaties and prescribe changes if need be.

In the area of protection of copyright and neighbouring rights the WIPO administers the Berne and the Rome Conventions respectively.

These two treaties have formed the bedrock of the international copyright law and have been widely accepted by countries. But technological changes emanating from scientific endeavour have made it imperative on the part of the WIPO to take stock of the situation. This was in the background in which in 1989 a work program to update the Berne Convention was initiated by the WIPO.<sup>13</sup> This initiative was known as the Berne Protocol since it was conceived as a mechanism to update the Berne Convention. The original purpose was to make explicit in the in the Berne Convention that computer programs and databases are protected copyright matter, and more generally, to update the Convention concerning use of copyrighted works in the digital environment.

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<sup>11</sup> Article 14, TRIPs Agreement.

<sup>12</sup> The International Convention for the Protection of performers, producers of Phonograms and Broadcasting Organisations entered in 1961 is also known as the Rome Convention. *Intellectual Property Reading Material*, (Geneva, 1998), pp.302-308.

<sup>13</sup> Dorothy Schrader, *World Intellectual Property Organisation Copyright Treaty: An Overview*, CRS Report for the Congress (Washington, 1998).

However, consequent to the concerns shown by the European Union and other countries regarding the degree of protection accorded to sound recording under the Berne Convention, the Berne Protocol was split into two phases in 1992. The second phase dealt with the protection of the rights of performers and producers of phonograms to update the International Convention for the Performers, Producers of phonograms and broadcasting organisations or the Rome Convention.<sup>14</sup>

The Berne Protocol was meant to clarify the protection that authors of all kinds of literary and artistic works enjoy and address much of the digital agenda that new technologies had raised for authors and other rights holders.<sup>15</sup> The digital agenda of the Berne Protocol addressed some of the technological developments having implication for copyright law that can be divided into four<sup>16</sup> basic categories:

1. The production of work in the digital form
2. The combination of works (even non copyrightable material ) in new ways.
3. The delivery and use of works by new transmission means.
4. The increase in physical and electronic delivery of works across borders.

### **1. Digitisation of work<sup>17</sup>**

After the adoption of the Berne Convention, a sea change has taken place in the technological development transferring the world from an "analogue" to a "digital" one where copyrighted works have been put into binary forms (electromagnetic zeroes and ones). It has allowed authors to make printed publications available for temporary use on line. The use of compact disc (CD) to produce high quality sound recordings and that of digital video disc (DVD) brought to fore the possibility of distributing artistic and literary works online. Which in turn had implications for copyright law.

### **2. In combination of works: the Multimedia Phenomena<sup>18</sup>**

Another technological development affecting copyright law is in the area of

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<sup>14</sup> Ibid.

<sup>15</sup> Allen N. Dixon and Martin F. Hansen, "The Berne Convention Enters the Digital Age," *E.I.P.R.*, no.11 (1996), pp.604-605.

<sup>16</sup> Ibid., p.605.

<sup>17</sup> Ibid., p.605.

<sup>18</sup> Ibid., p.606.

multimedia products. Which means that a product that combines different types of works or sensory experiences- words, photographs, music, songs, moving images, computer programmes and delivers them in a single medium such as CD-ROM. This presented a problem of categorising such works and how to apply the traditional copyright law.

### **3. Delivery and use by transmission<sup>19</sup>**

Transmission of work in the digital medium has posed another problematic area for traditional copyright law. Internet has brought this to a new high as this is a totally new medium of transmission, making a break from the old media like radio and television transmission, that could be regulated. However, in the case of then only a temporary copy of a work is made in a computer memory which could be accessed by the user through the help of intermediaries like the Internet Service Providers (ISP) or Bulletin Board Service (BBS). All this paraphernalia attached to the Internet has made the task applying the traditional; copyright law difficult.

### **4. Transmission across borders.<sup>20</sup>**

Internet transmission has permeated national boundaries and has put to hold the copyright laws, of various countries as well as the Berne Convention. Since this legislation apply to acts occurring within national borders their applicability in the case of Internet looks difficult.

#### **A. The Berne Protocol**

The Berne Protocol formed the basis for finding solutions to the issues raised above and made provisions for certain areas which are discussed below. During the negotiation of the WIPO Treaties, these provisions were taken to consideration by the different delegations and formed the Draft Text of the WIPO Treaties. The Berne Protocol made provisions for the followings;

1. computer programs
- 2 data bases,
- 3 reproduction right

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<sup>19</sup> ibid p506

- 4 distribution right
- 5 public communication right/transmission right, and
- 6 technological measures

### **1. Computer Programs**

The Berne Protocol provided protection to computer program as "literary works" within the meaning of Article 2<sup>21</sup> of the Berne Convention and further provided that such protection would apply to the "expression...in any form" of a program. By doing so, the Protocol adhered to the provisions made under the TRIPs Agreement.<sup>22</sup> Secondly, this provision, by doing so, conformed to the view that copyright is an appropriate vehicle for protecting computer programs, that the literary work rubric rather than a special category of work can be made applicable.<sup>23</sup> Thirdly, this provision meant that protection is accorded to the various forms of expression, but not to the underlying ideas. In taking this approach, the Berne Protocol intended to be declaratory of the existing provisions of the Berne Convention.

### **2. Databases**

Article 5<sup>24</sup> of the Draft Text provided protection to collections of data or other material, in any form, constitutes that by reason of their selection constitutes "intellectual creations." This text follows Article 10(2)<sup>25</sup> of the TRIPs Agreement in providing protection to copyrightable databases.

### **3. Right of Reproduction**

Article 7<sup>26</sup> of the Draft Text sought to clarify that the permanent or temporary reproduction of a work constituted "reproduction" within the meaning of Article 9(1) of

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<sup>20</sup> Ibid., p.607.

<sup>21</sup> Basic Proposal for the "Substantive Provision of the Treaty on Certain Questions of Literary and Artistic Work", CRNR/DC/41 downloaded from [www.wipo.org](http://www.wipo.org).

<sup>22</sup> Article 10 (1), TRIPs Agreement provides protection to computer programs.

<sup>23</sup> Basic Proposal, n 21.

<sup>24</sup> Basic Proposal, n.21.

<sup>25</sup> Article 10 (2) provides protection to compilation of data or other material whether in machine readable or other form which by reason of the selection or arrangement of their contents constitutes intellectual creation.

<sup>26</sup> Pamela Samuelson, "The US Digital Agenda at WIPO," *Vanderbilt Journal of International Law*, Vol.37 (1997), p.372.

the Berne Convention. This would have meant that uploading and downloading of the work into the computer memory of purview of "reproduction." As would be discussed in the following sections, this provision became a major point of debate during the Geneva Conference as the question of a whether copy made into a computer' RAM can be considered as reproduction.

#### **4. Right of Distribution**

Article 8 of the<sup>27</sup> Draft Text provided the author's of a work the exclusive right of authorising of the "making available to the public of the original and copies of their work through sale or other transfer of ownership." This provision sought to include the distribution of copyrighted work in the digital medium. Article 9 of the draft text<sup>28</sup> provided that the authors of a work would retain the right to authorise the rental of original or copies of their work even after the first distribution of their work.

#### **5. Public Communication / Transmission right**

So as to address the advances in digital transmission technology, Article 10<sup>29</sup> provided the "Right to Communication." According to this provision, the authors were given the exclusive right of authorising any communication to the public of their works including the making available to the public of their works by wire or wireless means, in such a way that members of the public may access this work from a place and time individually chosen by them.

This provision sought to address the problem of accessing a work through the Internet for which might not be there and give the authors an upper hand to protect their works from infringement.

#### **6. Technological Measures**

Article 13<sup>30</sup> of the Draft Text of the Protocol dealt with the act of "circumventing

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<sup>27</sup> Draft Article 8, cited in Dixon and Hansen, n.15, p.609, fn.29.

<sup>28</sup> Ibid., p.610, fn.31.

<sup>29</sup> Ibid., p.610, fn.35.

<sup>30</sup> Ibid., p.611, fn.39.

technological measures." It sought to deal with various acts, such as information manufacture and distribution of "protection defeating" devices. This provision has meant to ensure that the authors exclusive rights to control reproduction and distribution of his or her own work are protected. It was in this backdrop that the WIPO "Diplomatic Conference on certain Copyright and neighbouring right questions' took place in Geneva from December 2<sup>nd</sup> to 20<sup>th</sup>, 1996 and the provisions made by the Berne Protocol formed the basis of negotiation.

## **B. The Geneva Conference**

The run up to the conference and various rounds of negotiations during the conference witnessed acrimonious debates and lobbying by disparate groups. On the one hand, the USA came armed with its Digital Agenda, which placed the rights of copyright holders on a higher plane vis-à-vis those of the consumers. On the other hand, the European Union (EU) delegation advocated for a balanced approach on certain issues though their views were no different from that of the US. A third group represented by big telecommunication houses and industries put forth their views to safeguard their own interests. A fourth group comprising of developing countries called for an international framework safeguarding their interest as well.<sup>31</sup>

The USA pursued vigorously the Digital Agenda, which was aimed to write the rules of the road for the emerging global information super highway. Under these rules, copyright owners would have stronger rights than ever before and the rights of users to use protected work would largely be confined to those for which they had specifically contracted and paid.

The US digital agenda came out of the work done by the Clinton Administration's Information Infrastructure Task Force (IITF). The task of this body was to make policy recommendation that would promote optimal development of the emerging information infrastructure. The IITF established a number of working groups to focus on specific policy areas. The Group on Intellectual Property Rights produced a white paper in 1995

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<sup>31</sup> Samuelson, n.26, p.374.

and suggested changes to the existing US law on copyright, so as to safeguard the commercial interest of the copyright owners in a digital environment.<sup>32</sup>

The view was pursued by the USA at the Geneva Conference as well. The US white paper digital agenda<sup>33</sup> aimed to:

1. Grant copyright owners an exclusive right to control virtually all temporary reproduction of protected works in the random access memory of the computer.
2. Treat digital transmission of protected works as distributions of copies to the public.
3. Curtail the power of states to adopt exceptions and limitations on the exclusive rights of the copyright owners, including fair use and first use privileges.
4. Enable copyright owners to challenge the manufacture and sale technologies or services capable of circumventing technological protection for copyrighted works.
5. Protect the integrity of rights management information attached to protected works in digital form.
6. Create a *sui generis* form of legal protection for the content of databases which would have enabled the publishers to track every use made of digital copies and trace where each copy resides in the network and what is being done with it any time.
7. Force online service providers to become copyright police.

The EU delegation agreed with the US view on some counts like providing for treating temporary reproduction as violative of copyright, giving rights to copyright holders to challenge manufacture of copyright circumventing technological devices, etc. But the two groups came to loggerheads on the issue of treating digital transmission as distributions of copies to the public. On this issue both sides differed widely, and as would be discussed, this became a rallying point for both of them at the conference.

The Geneva Conference was significant in another way also and that was the attempt by both the USA and the EU to establish hegemony in the arena of IPRs. The US-EU divide was more than evident during the Geneva Conference. The reasons for this are not difficult to discern; the Europeans had hitherto been the dominant players in the field of international IPRs. Starting from the 1886 version of the Berne Convention

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<sup>32</sup> Bruce A. Lehman, *The Report of the Working Group on Intellectual Property Rights*, Intellectual Property and the National Information Infrastructure (Washington, D.C., 1995), pp.9-11.

<sup>33</sup> Samuelson, n.26, p.370.



through the different revisions of the same improved at Paris in 1896, and at Berlin in 1908, and completed Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971 the Europeans played a major role<sup>34</sup> in shaping the rules and norms in the international IPRs system. Apart from these treaties dealing with the rights of the copyright holders, the Europeans were instrumental in providing protection to performers, producers of phonograms and broadcasting organisation through the 1961 Rome Convention.<sup>35</sup> On the other hand, the USA kept away from the Berne Convention and established the Universal Copyright Convention (UCC) in 1952. The UCC was established as an alternative to the Berne Convention and provisions of both the Conventions differed widely. The UCC was in compliance with United States copyright law and the level of protection provided by UCC was lower than that of the Berne Convention.

The UCC differs in approach from the Berne Convention. Article 1 of the UCC merely requires each member nation to provide 'adequate and effective' safeguard as against the specific provision in this regard contained in the Berne Convention. The UCC was tailored to accommodate the formalities required in the American Copyright Act. The UCC, following the US copyright statute, dispenses with the formal requirement of registration, deposit and manufacture of foreign works if the work gives notice bearing the symbol ©, the name of the proprietor and the year of first publication. Another area where the UCC follows the American copyright statute is that, it does not have the provision of protection of moral rights of the copyright holder.<sup>36</sup>

The UCC also included a "Berne Safeguard Clause" to prevent the Berne Union countries from seeking refuge in the lower standards of the UCC. This provision was clearly meant to undermine the authority of Berne. For instance, subsection (a) of the Declaration provided that if a country withdrew from Berne Convention and adhered to the UCC because of the latter's less stringent standards, its authors would be denied protection in all Berne countries.<sup>37</sup> However, the USA felt marginalised for being left out of the largest multilateral copyright agreement of the world, the Berne Convention as the

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<sup>34</sup> David Lange, Mary La France and Gary Myers, *Intellectual Property: Cases and materials* (St. Paul, 1998), p.1063.

<sup>35</sup> Schrader, n.14, pp.302-308.

<sup>36</sup> Lange, France and Myers, n.34, p.1064.

<sup>37</sup> *Ibid.*, pp.1065-1066.

UCC could not draw much support from the developing countries and also from the Europeans leaving little scope for US machination in such an important area. The USA found its place in the arena of international copyright affairs getting diminished. In 1983 it also withdrew from UNESCO, which was administering UCC. In that situation, it had become impossible for the USA to continue demanding greater intellectual property protection abroad without making certain concessions in its domestic law. Without having any other option, the USA acceded to the Berne Convention in 1989.<sup>38</sup>

Though the USA was a late entrant to the Berne Convention, soon after it started to push its own agenda as reflected during the preparation of the Berne Protocol and also during the Geneva Conference. It was this attitude of the United States that made the Europeans jittery. This divergence of views assured that the Geneva Conference became the ground to exert supremacy in the field of international copyright law. Notwithstanding all this, the Geneva Conference adopted two treaties, viz., (1) The WIPO Copyright Treaty (WCT); and (2) the WIPO Performers and Phonograms Treaty (WPPT).

However, the Conference failed to adopt the treaty providing legal protection to the content of the database. These two adopted treaties also known as the Internet treaties sought to address the issue of copyright protection in the Internet.

The WPPT and WCT came to be adopted after intense lobbying and negotiations carried on by the representatives of 120 countries and 70 non-governmental organisation, over a period of three weeks.

In some areas, the treaties mirrored the TRIPs obligations, reformulated in the language of the Berne Convention. But in some other areas the treaties reached new ground and right owners obtained desirable new protection. In particular, the establishment of the "making available" interactive rights signifies valuable and important advance in the digital networked world. The provisions on the technological measures and rights management information also break new ground in response to the digital challenge. The treaties also recognise the broader public interest in among other things, access to public information.<sup>39</sup>

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<sup>38</sup> Ibid., p.1066.

<sup>39</sup> Thomas C. Vinje, "The New WIPO Copyright Treaty: A Happy Result in Geneva," *E.I.P.R.*, No.5 (1997), p.220.

Both the treaties sought to establish a balance between the economic interest of the author and the traditional rights granted to the user of a copyrighted work.

### **III. The WIPO Copyright Treaty (WCT)**

The WIPO Copyright Treaty (WCT) represents an improvement upon the Berne Convention, 1971.

#### **A. Substantive Provisions of WCT**

The preamble of the WCT sets the tone and tenor of the treaty. It highlights the necessity to develop and maintain the protection of the rights of authors in their literary works in an effective and uniform manner in consonance with the changes brought in by the development and convergence of information and communication technologies, which have made profound impact on the creation and use of literary and artistic works. The preamble also recognises the need to "maintain a balance between the rights of authors and the larger public interest."<sup>40</sup> While making this provision the preamble of the WCT takes notice of the Berne Convention which takes a balanced approach in this regard.

Article 1 (I) of the WCT says that the "treaty is a special agreement within the meaning of Article 20<sup>41</sup> of the Berne Convention. By making a reference to Article 20 of the Berne Convention which provides that contracting parties to this convention can enter into special agreement so as to "grant to authors more extensive rights than those granted by the convention," the WCT sought to provide copyright holders of literary and artistic works with adequate protection in the digital environment.

As would be enumerated in the following sections, the WCT has addressed the various exclusive rights enjoyed by copyright holders, and at the same time it has come up with new rights like the right of communication/ making available. Apart from these the WCT also contains "Agreed Statements." According to Article 31 (2)<sup>42</sup> of the Vienna

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<sup>40</sup> Preamble of the WIPO Copyright Treaty, 1996.

<sup>41</sup> Article 20 provides for special agreements among countries of the Berne Union so as to provide more extensive rights to the authors than those granted by the Berne Convention.

<sup>42</sup> 1155 United Nations Treaty Series, p.331.

Convention on the Law of Treaties an agreed statement is evidence of the scope and meaning of the treaty language.

## **1. Right of Reproduction**

Finding a consensus regarding reproduction right was one of the most contentious issue during the Geneva Conference. The proposal of including temporary complementary copies within the reproduction right saw the Conference dithering as the various groups put forth their views, and was far from any consensus.

The question first arose in the last Committee of Experts meeting before the Geneva Conference held in May 1996. The European Community and its member states proposed the adoption of a statement to the effect that temporary copies should be included within the reproduction right.<sup>43</sup>

The US also favoured this viewpoint following its "digital agenda."

The following proposal then appeared as Article 7 of the draft copyright treaty.<sup>44</sup> Article 7 (1) of the same provided that "the exclusive right accorded to authors of literary and artistic working Article 9 (1) of the Berne Convention of authorising the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary in any manner or form."

Article 9 (1) of the Berne Convention grants the authors of literary and artistic work the exclusive right of "authorising the reproduction of these works in any manner or form."<sup>45</sup>

Article 7(2) of the draft copyright treaty proposed a special limitation provision and read as:

Subject to the provisions of Article 9 (2) of the Berne Convention, it shall be a matter for legislation in contracting parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction of a transient or

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<sup>43</sup> Vinje, n.39, p.221.

<sup>44</sup> Basic Proposal, WIPO Treaties, Vinje, n.39, p.231.

<sup>45</sup> David L. Hayes, "Advanced Copyright Issues on the Internet," downloaded from [www.fenwick.com](http://www.fenwick.com)

incidental nature, provided such reproduction takes place in the course of use of the work that is authorised by the author or permitted by law.<sup>46</sup>

In the context of Article 7 of the draft copyright treaty, two main and closely related issues arise.

1. The scope of the proposed temporary reproduction right and whether it constituted new or settled law and
2. The scope and nature of exceptions or limitations to that right.<sup>47</sup>

Article 7 would appear to have required the signatories to treat each of the vast number of ephemeral copies made as essential aspects of the operation of digital devices and networks as acts falling within the reproduction right. For example, it would have meant that temporary copies such as ephemeral copies in network servers' random access memory (RAM) as reproduction falling within the exclusive reproduction right.

This became a highly controversial issue as delegations took highly divergent view of Article 7 at the Diplomatic Conference. The EC members were willing to accept Article 7 as proposed in the draft treaty. The USA also agreed on the same. However, some states like Canada took the position that Article 7 should be deleted because it did not allow sufficient flexibility to courts to deal with new technologies. Some countries like Australia, questioned the "need for a provision covering temporary copying in the copyright treaty." Still others, including Singapore, South Africa and Denmark favoured redrafts of Article 7(1) if it were made subject to clearer limitations and exceptions.<sup>48</sup>

In short, a substantial majority of the delegates opposed Article 7 as proposed, whereas the delegations from EU and the US were strongly in favour of it. These delegations were supported by the fact that the Chairman of Committee of Experts included it in the draft treaty and the favour shown by WIPO officials.

The common denominator underlying objections to Article 7 were concerns that Article 7 would inappropriately tilt the balance in copyright law and hinder the growth of the information infrastructure. Many had general concerns about the unreasonable effects

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<sup>46</sup> Ibid.

<sup>47</sup> Vinje, n.39, p.230.

<sup>48</sup> The proceedings of the Diplomatic Conference can be found at [www.hrrc.org/wiponews.html](http://www.hrrc.org/wiponews.html)

of the expanded reproduction right, inter alia, public access to information, and many had questions about the impact of the proposal upon broadcasters. Most importantly many delegations feared that unless properly circumscribed, Article 7 would question the legality of browsing and deprive infrastructure providers like the ISPs of legal security by threatening them with the risk that they would engage in copyright infringement by making ephemeral copies for example in server and router memories, of infringing works put onto their systems by users.<sup>49</sup>

Many telephone and technology companies objected to the proposed Article 7 as it would have put them in the position of monitoring all kinds of activities going on the Internet and their position would have been akin to placing the web for any infringing activities.

Finally, after the floating of several unofficial proposals and number of stormy sessions, the decision was made to delete any reference to Article 7. In the end the Diplomatic Conference agreed to a statement on the reproduction right that did not address the temporary copying. However, this decision was taken by a majority vote unlike the consensual approach adopted on all other issues at the Conference.

The final treaty document adopted an Agreed Statement to Article 1 (4)<sup>50</sup> which asks the contracting parties to "comply with Articles 1 to 21 of the Appendix of the Berne Convention." The Agreed Statement to Article 1(4)<sup>51</sup> of the WCT says that "the reproduction right, as set out in article 9 of the Berne Convention and the exceptions permitted there under fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction, within the meaning of Article 9<sup>52</sup> of the Berne Convention."

However, the provision of the Agreed Statement that (the phrase) 'storage of digital work in digital form in an electronic medium' leaves the question, of whether temporary images stored in RAM will be treated as falling within the copyright owner's

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<sup>49</sup> Hayes, n.45.

<sup>50</sup> Article 1 (4), WIPO Copyright Treaty.

<sup>51</sup> Ibid.

<sup>52</sup> This Article deals with the right of reproduction in the traditional mode of reproduction.

right of reproduction, open ended. The uncertainty was further heightened by the fact that Article 9 of the Berne Convention allows signatories to adopt certain exceptions to the reproduction right raising the prospect of inconsistent exceptions being adopted from country to country. As a result, the prospect of adopting varying standards by countries to this issue has increased.<sup>53</sup>

## **2. Rights of Communication**

The digital revolution has made it possible to disseminate materials over the networks, including material protected by copyright and neighbouring rights such as novels, films and phonograms. Neither the Berne Convention nor other related treaties provide adequate means to control such dissemination. The Berne Convention does not prohibit the right to control the communication of literary works, except in very limited ways giving the right to communicate to the public by broadcasting and other means. However, in the present digital environment literary works like computer programs and other works, hitherto excluded from the purview of the right of communication to the public have become the main objects of communication over networks. The pre-WCT copyright and neighbouring rights treaties were inadequate to deal with the present situation. Furthermore, those treaties do not have provisions to address interactive and on demand acts of communication. The WCT has filled this gap by providing a new right applicable to on demand services covering the whole range of works protected by copyright. This comes in the form of Article 8<sup>54</sup> which says that

Without prejudice to provisions of Articles 11 (1) (ii), 11<sup>bis</sup> (1) (i), and (ii), 11<sup>ter</sup> (1) (ii), 14 (1) (ii) and 14<sup>bis</sup> (1) of the Berne Convention, authors of literary and artistic work shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

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<sup>53</sup> Hayes, n.45.

<sup>54</sup> Article 8, WIPO Copyright Treaty, 1996.

This right of communication to the public is broader than the existing rights of communication to the public contained in the Berne Convention, which are confined to the performances, broadcasts and recitation of works. Article 11 (1) (ii)<sup>55</sup> of the Berne Convention provides the authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right of authorising any communication to the public of the performances of their works."

Article 11<sup>bis</sup> (1) (ii) provides the authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one."

Article 11<sup>ter</sup> (1) (ii) provides that authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of the recitation of their works. A comparison of the provisions of the Berne Convention and the WCT shows that the present Treaty provides right of transmission to the holder of copyright by "wire or wireless means" which was not there in the former. Secondly, the WCT gives the copyright holder the authority to communicate to the public of the recitation of their works.

The Agreed Statement to Article 8<sup>56</sup> addresses the concerns raised by network providers, Internet access providers and similarly situated actors that Article 8 might be applied to the mere provision of a conduit for infringing material. The Agreed Statement says that "it is understood that the mere provision of physical facilities for enabling or making a communication does not amount to communication within the meaning of this treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a contracting party from applying Article 11<sup>bis</sup> (2).

### **3 Rights of Distributions**

The WCT goes a step ahead of the TRIPs agreement and Berne Convention by providing the right of distribution in an online environment.

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<sup>55</sup> Article 11 (1) (ii), Berne Convention, 1971.

<sup>56</sup> Agreed Statement concerning Article 8 WIPO Copyright Treaty, 1996.



Article 6<sup>57</sup> of the WCT provides that "authors of literary and artistic works shall enjoy the exclusive right of distribution and thus right owners will be entitled to control the first sale of a work or a copy thereof, the diplomatic conference was unable to reach any conclusion on the vexing question of exhaustion. However, Article 6(2)<sup>58</sup> gives leeway to the contracting parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the copy of the work with the authorisation of the author."

It is unclear whether this "making available right" reaches the mere posting of copies on the Internet. The Agreed Statement to Article 6 provides: "As used in these articles the expression 'copies' and 'original and copies' being subject to the right of rental under the said articles, refers to exclusively fixed copies that can be put in to circulation as tangible objects."<sup>59</sup>

One interpretation of this provision is that a copy posted on the Internet, being in electronic format is not capable of being "put into circulation as tangible objects." Another argument could be that at least complete copies of downloads to permanent storage at the recipient computer should be treated as the circulation of copies "as tangible objects." Since download in a network can take place on a floppy disc or a hard disc at the recipient's computer, it can be argued that the transmission of electronic copies to "physical" storage media at the recipients end should be treated as within the purview of distribution rights provided in the WCT.<sup>60</sup>

#### **4. Right of Rental**

Article 7 (1) of the WCT provides rental right to authors of computer programs, cinematographic works and works embodied in phonograms.<sup>61</sup> The provisions of this Article are identical to Article 11 of TRIPs and hence breaks no new ground.

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<sup>57</sup> Article 6, WIPO Copyright Treaty, 1996.

<sup>58</sup> Article 6 (2), WIPO Copyright Treaty, 1996.

<sup>59</sup> Agreed Statement Concerning Articles 6 and 7, WIPO Copyright Treaty, 1996.

<sup>60</sup> Hayes, n.45.

<sup>61</sup> Article 7 (1), WIPO Copyright Treaty provides Right of Rental to authors of "computer programs, cinematographic works and works embodied in Phonograms as determined in national law of the Contracting Parties.

## **5. Provisions on Specific types of works, computer programs and databases**

Articles 4 and 5 of the WCT provide protection to computer programs and databases. Article 4<sup>62</sup> provides that "computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention such protection applies to computer programs, whatever may be the mode or form of their expression."

This provision is intended to have the same meaning as the equivalent provision in Article 10 of the TRIPs agreement, which provides that both source and object version of a computer program are protected.<sup>63</sup>

This Article read with Article 2 of the WCT, which provides that copyright protection extends to expressions and not ideas, procedures, methods of operation or mathematical concepts as such," shows that the ubiquitous nature of computer programs in the online environment needs to be protected.

Article 5 of the WCT provides "compilation of data or other material, in any form which by reason of selection or arrangement of their contents constitute intellectual creations, are protected as such."<sup>64</sup> This Article follows Article 10 (2) of the TRIPs Agreement, which provides that "compilation of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creation shall be protected as such."<sup>65</sup>

Article 5 of the WCT also reflects the views expressed in Article 2 (5) of the Berne Convention, which provides that "collections of literary and artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitutes intellectual creations shall be protected as such."<sup>66</sup>

The scope of Article 5 of the WCT extends beyond the paper version of databases, as provided in the words "compilations of data or other material," and applies to compilation "in any form," to electronic databases.

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<sup>62</sup> Article 4, WIPO Copyright Treaty, 1996.

<sup>63</sup> Article 10, TRIPs Agreement.

<sup>64</sup> Article 5, WIPO Copyright Treaty, 1996.

<sup>65</sup> Article 10, TRIPs Agreement.

<sup>66</sup> Article 2 (5), Berne Convention 1971.

## 6. Technical Protection System

The widespread copying of copyrighted works by the use of digital technology poses a serious challenge to protect such works from being infringed. Legislations apart, many copyright owners are of the view that the key to controlling copying in the digital frontier lies in developing and deploying a so-called technical system of protection such as encryption and digital envelopes. But copyright owners remain concerned that newer technologies might come to circumvent such technological measures used to protect copyrighted work.<sup>67</sup> The Diplomatic Conference addressed the issue. Draft Article 13 of the Treaty made provisions in this regard and stated that "Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any services having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of the exercise of rights provided under this Treaty is not authorised by the right order or the law."<sup>68</sup>

The language of the Draft Article 13 closely follows that of the US proposal in this regard<sup>69</sup> which was favoring a provision impinging strict liability on the manufacture of such technological devices who had expected the equipment to be used in a lawful manner. Various concerned nations expressed their views through their respective delegations and were not in favour of such measures. Some countries such as Korea, opposed any inclusion of any anticircumvention provision in the Treaty. Others such as Singapore proposed "sole purpose" or "sole intended purpose" standard for regulating circumvention technologies some delegates wanted an expressive statement that to carve out circumvention for fair use and public domain materials. The European Union gave the view that the knowledge requirement on the part of the manufacturers and service providers was important to fix liability.<sup>70</sup>

Because of all these divergent views the requirement in the Draft Article 13 was

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<sup>67</sup> Vinje, n.39, p.234.

<sup>68</sup> Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the the Protection of Literary and Artistic Works To Be Considered by the Diplomatic Conference. WIPO Document, CRNR/DC/4. Downloaded from [www.wipo.org](http://www.wipo.org).

<sup>69</sup> The US White Paper also made provisions in the same line. Lehman, n.32, p.

<sup>70</sup> [www.hrrc.org/wiponews.html](http://www.hrrc.org/wiponews.html)

lowered down. The USA at this juncture was willing for a compromise. In the end the Conference agreed on a watered-down version of Article 13 and thus the present Article 11<sup>71</sup> of the WCT came to be adopted. This Article provides that "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restricts acts in respect of their works, which are not authorised by the authors concerned or permitted by law."<sup>72</sup>

By agreeing for this, the WCT made this provision applicable to the act of circumvention rather than the manufacture or distribution of the device engaged in circumvention. This focus on acts facilitating infringement avoids the proposal (made at the Conference) which had focussed on devices. In doing so, the WCT preserves the delicate copyright balance.

## **7. Rights Management Information**

Apart from deploying technical systems to protect digitised work, copyright holders also deploy rights management tools to prevent infringement, like "water marks" which enables to identify the holders of the right to the work. However, technological advancement has given rise to the scope of tampering with such anti copying mechanism. The Geneva Conference addressed this issue and adopted Article 12 to deal with such eventualities. This Article provides for effective remedies against the unauthorised removal or alteration of any electronic rights management information or the knowing dissemination of works from which such information has been removed. Article 12 (2) gives the definition of "rights management information" as "information which identifies the work, the author of the work, the owner of any right of the work, or the information about terms and conditions of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of work to the public."<sup>73</sup>

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<sup>71</sup> Samuelson, n.26, p.375.

<sup>72</sup> Article 11, WIPO Copyright Treaty, 1996.

<sup>73</sup> Article 12, WIPO Copyright Treaty, 1996.

## 8. Limitations and Exceptions

The Diplomatic Conference addressed the issue of limitations and exceptions applicable to the rights given to the public vis-à-vis a copyrighted work. The doctrines of first sale, fair use and similar privileges enjoyed by the public came under scrutiny in the context of a digital environment. The US delegation favoured curtailment of users right in these regards and called into question the viability of existing limitations and exceptions, particularly as they might apply to digital works. The US took the position that first sale privileges did not apply to digitally transmitted copies because in contrast with secondary transfer of physical copies, the secondary transfer of a digital copies could not be done without making additional copies of the work for which there would be no authorisation from the copyright owner or the law.<sup>74</sup>

However, the proponents of fair use and similar privileges put forth opposition to this view. The Draft Treaty Article 12 provided that "limitations or exceptions to the rights granted to authors of literary and artistic works be given only in certain special cases." The word "only" meant that this provision aimed to put restrictive measures for users rights. Draft Article 12 (2) did not have any antecedent in the Berne Convention. This Article provided that "Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided," couched in a strong language.

The adoption of Draft Article 12<sup>75</sup> would have tilted the balance between the copyright owners and the public in favour of the copyright owner. However, facing considerable opposition on the count of strong protectionist measures the article was modified. The word "only" was deleted and in the end the curtailment of the rights of users was avoided. Though the initial draft was consistent with a trade based approach to copyright policy, the final treaty reaffirms faith in the concept of maintaining a balance between private and public interests in the copyright policy. It recognises that education, research and access to information are among the social values that a well formed copy right should serve.<sup>76</sup> In the final draft of the treaty these provisions were included as

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<sup>74</sup> Lehman, n.32.

<sup>75</sup> Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the the Protection of Literary and Artistic Works To Be Considered by the Diplomatic Conference. WIPO Document, CRNR/DC/4. Downloaded from [www.wipo.org](http://www.wipo.org).

<sup>76</sup> Hayes, n.45.

Article 10. This Article gives the Contracting Parties the right to set the parameters for limitations and exceptions to the rights granted of authors of literary and artistic work under this Treaty in certain special "cases." The final draft removed "only" before the word "in certain special cases." This would give the countries enough space to set the standards for limitations and exceptions.<sup>77</sup> The Agreed Statement to Article 10 gives the Contracting Parties to "carry forward and appropriately extend into the digital environment," the limitations and exceptions provided by them under the Berne Convention. At the same time, the Agreed Statement also says that the provisions made by Article 10 should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment."

## **B. Other Provisions**

### **1. Enforcement Rights**

Article 14 of the WCT makes provisions for enforcing the Treaty by the Contracting Parties under their legal system. Article 14 (2) asks the Contracting Parties to provide for enforcement procedure so as to deal with the infringement of rights guaranteed by the Treaty.<sup>78</sup> The WCT tried to maintain a balance between the holders of copyright and the users as outlined in the Preamble. However, the rapid development of such widespread use of "shrinkwrap" licenses or electronic equivalents that substantially limits user rights as well as emerging use of encryption and other technological protection, may make the balancing principles of copyright law a thing of the past.

## **IV. The WIPO Performances and Phonograms Treaty (WPPT).**

The Geneva Diplomatic Conference in December 1996 also adopted a Treaty relating to the rights of performers and phonograms. The changes brought about by technological advancements necessitated reforms in the field of neighbouring rights. Copyright and neighbouring rights are interrelated and the latter covers the adaptation of artistic and literary works into sound recordings, films, etc. Neighbouring rights are

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<sup>77</sup> Article 10, WIPO Copyright Treaty, 1996.

<sup>78</sup> Article 14, WIPO Copyright Treaty, 1996.

primarily the off-shoot of technological developments.<sup>79</sup> At the international level, initiatives have been taken to protect the rights of those who adopt copyrighted artistic and literary works into different forms like sound recording, etc. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations adopted in 1961 under the aegis of WIPO outlines the neighbouring rights. This Convention was adopted at the time when analog technology was used to produce phonogram. But in the era of digital technology a different yardstick was needed to guarantee rights to the holders of neighbouring rights. The WPPT precisely does this, and has certain relationship with the Rome Convention.<sup>80</sup> The relation between the two is similar to that of Rome Convention and TRIPs Agreement. This meant that in general obligation of substantive provisions of the Rome Convention is not obligatory on the Contracting Parties as they are free to enact legislations on their own.

2. Only a few provisions those relating to the criteria of eligibility were included in the WPPT.

3. Article 1 (1)<sup>81</sup> of the WPPT contains *mutatis mutandis*, practically the same provision as Article 2 (2)<sup>82</sup> of the TRIPs Agreement. which says that no derogation of obligations between the Contracting Parties as given in the Rome Convention takes place and thereby makes the provision of the Rome Convention applicable to these formulations

Article 1 (2) of the WPPT also deals with the broader question of relationship of copyright on the one hand and neighbouring rights provided in the Treaty on the other. This Article, replicates Article 1 of the Rome Convention word for word. In other words, protection granted under this Treaty "shall leave intact and shall in no way affect the protection in literary and artistic work. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection<sup>83</sup>."

#### **A. Substantive Provisions of the WPPT**

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<sup>79</sup> *Intellectual Property Reading Material*, n.12, p.302.

<sup>80</sup> Lange, France and Myers, n.34, p.1071.

<sup>81</sup> Article 1 (2), WPPT provides that no provision of this Treaty may be interpreted as prejudicing protection given to Copyright in literary and artistic works.

<sup>82</sup> Article 2 (2), TRIPs Agreement.

<sup>83</sup> Article 1(2), WPPT 1996

The provisions of the WPPT cover the following rights applicable to storage and transmission of performance and phonograms in digital systems, limitations on and exceptions to right in a digital environment, technological measures and rights management information and provides definitions for the different terminologies used in the Treaty

## **1. Definitions**

Article 2 of the WPPT contains definitions of "Performers," "Phonograms," "Producers of Phonograms," "Publication," "Broadcasting," etc. This Article also defines "fixation" and "communication to the public." Article 2 defines "Phonograms" as "fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or audio-visual works."<sup>84</sup> This definition purports to apply to fixation of digital representation of sounds. Article 2 (c) defines "fixation" as "the embodiment of sounds or of the representation thereof from which they can be perceived, reproduced or communicated through a device."<sup>85</sup> Article 2 (g) defines "communication to the public" of a performance of a phonogram as the transmission to the public by any medium otherwise by broadcasting of sounds of a performance or the sounds or the representation of the sounds fixed in a phonogram.<sup>86</sup>

The WPPT also deals with the various rights granted to performers and producers of phonograms. These are discussed below.

## **2. Right of Reproduction**

Articles 7 and 11 of the WPPT provides reproduction rights to performers and producers of phonograms. Article 7<sup>87</sup> gives the performers the exclusive right of authorising direct or indirect reproduction of their performances fixed in phonograms in any manner or form. An earlier version of Article 7 had provisions to include "permanent

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<sup>84</sup> Article 2, WIPO Performances and Phonograms Treaty, 1996.

<sup>85</sup> Article 2 (c), WIPO Performances and Phonograms Treaty, 1996.

<sup>86</sup> Article 2 (g), WIPO Performances and Phonograms Treaty, 1996.

<sup>87</sup> Article 7, WIPO Performances and Phonograms Treaty, 1996.



or temporary" reproduction of the works of performers coming under their authorisation to the making of direct or indirect copies of their works. The use of the phrase "permanent or temporary" would have suggested that temporary interim reproduction of performances comes within the performers right of reproduction. Article 7 (2) of an earlier version had reference to transient copies and provided the Contracting Parties the authority to limit the right of reproduction in cases where "temporary reproduction has the sole purpose of making the fixed performance perceptible or where a temporary reproduction is of a transient or incidental nature."<sup>88</sup>

This provision was also deleted as it did not find favour with the delegations of various countries. Article 11 provides reproduction rights to producers of phonograms. It says that "producers of Phonograms enjoy the exclusive right of authorising the direct or indirect reproduction of their Phonograms, in any manner or form."<sup>89</sup>

Article 2 (d) of WPPT defines "producer of Phonograms" as "the person, or legal entity who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds."<sup>90</sup>

The Agreed Statement issued with these provisions of the WPPT provides that "the reproduction right as set out in the Article 7 and 11 and the exceptions permitted there under Article 16, fully apply in the digital environment, in particular to the use of performances and Phonograms in a digital form. It is understood that the storage of a protected performance of a Phonogram in digital form in an electronic medium constitutes reproduction within the meaning of these articles."<sup>91</sup>

The provisions made in Article 7 and 11 and the Agreed Statement there to gives the understanding that any unauthorised transmission of a performance or of a sound embodied in a Phonogram fixing such performance to RAM memory would potentially violate the rights of both the owner of the performance and Phonogram. However, the provisions made under Article 7 and 11 leaves the question whether transient "copies" of performances and Phonograms within the copyright owners reproduction right or not.

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<sup>88</sup> Hayes, note 45.

<sup>89</sup> Article 11, WIPO Performances and Phonograms Treaty, 1996.

<sup>90</sup> Article 2 (d), WIPO Performances and Phonograms Treaty, 1996.

<sup>91</sup> Agreed Statement Concerning Articles 7, 11 and 16, WIPO Performances and Phonograms Treaty, 1996.

### **3. Right of Making Available**

Articles 10 and 14 of the WPPT gives the performers and the producers of Phonograms the right of making available to the public of their works. Article 10 makes this provision for performers and Article 14 makes provisions for the producers of Phonograms. These two Articles have the same language and provide that these two categories must enjoy "the exclusive right of authorising the making available to the public" of their performances fixed in Phonograms and of their Phonograms respectively "by wire or wireless means, in such a way that members of the public may access them from a place and time individually chosen by them."<sup>92</sup>

These provisions are same as provided by Article 8<sup>93</sup> of the WCT and address the issue of digital transmission.

On the question of whether the mere provision of physical facilities for enabling or making a communication in itself amounts to communication within the meaning of WCT and Berne Convention, the Agreed Statement, which was adopted in relation to articles of the WCT intends to clarify the issue of liability of service and access providers in the context of the Internet. Though the WPPT does not have explicit mention of this principle, the Agreed Statement concerning this issue as provided for in the WCT is also applicable mutatis mutandis to the above mentioned provisions of Articles 10 and 14.<sup>94</sup>

### **4. Right of Distribution**

Articles 9 and 12 of the WPPT provide right of distribution to Performers and Producers of Phonograms respectively. Articles 9 (1) and 12 (1) provide that performers and producers of Phonograms "shall enjoy the exclusive right of authorising the making available to the public of the original and copies" of their performances fixed in Phonograms for performers and copies of Phonograms, "through sale and other transfer of ownership."<sup>95</sup> Articles 8 (2) and 12 (2) provide the Contracting Parties with the right to determine conditions under which exhaustion of the right given in paragraph 1 of the both

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<sup>92</sup> Articles 7 and 11, WIPO Performances and Phonograms Treaty, 1996.

<sup>93</sup> Article 8, WIPO Copyright Treaty, 1996.

<sup>94</sup> *Intellectual Property Reading Material*, note 12, p.314.

<sup>95</sup> Articles 9 and 12, WIPO Performances and Phonograms Treaty, 1996.

the articles, "applies after the first sale or other transfer of ownership" takes place in both categories of rights.<sup>96</sup>

This provision maintains the balance between the right of a holder and that of the public by allowing exhaustion of right after the first sale or other transfer of ownership of a copyrighted performance fixed in Phonogram.

## **5. Technological Measures of Protection and Rights Management Information**

The WPPT makes provisions similar to those provided under the WCT for the technological measures and rights management information. The WCT contains these in Articles 11 and 12. Article 18 of the WPPT deals with the technological measures of protection and is similar to Article 11 of the WCT. This Article<sup>18</sup><sup>97</sup> provides "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of Phonograms in connection with the exercise of their rights under this Treaty and that restricts acts, in respect of their performances or Phonograms, which are not authorised by performers or producers of Phonograms or permitted by law." Article 19 provides obligations concerning Rights Management Information. Article 19 (1) calls upon Contracting Parties to provide effective legal remedies to prevent certain acts which infringe rights management information by enabling, facilitating, or concealing "an infringement of any right covered by this Treaty." Article 19 (1)(a) and (b) outlined the acts to be constituting infringement of rights management information. This includes removal or alteration of "any electronic rights management information," distribution, importation for distribution, broadcasting, or making available to the public performances, copies of fixed performances or Phonograms knowing that electronic rights management information has been removed or altered."<sup>98</sup>

An Agreed Statement to Article 19 was adopted, which was same as that of Article 12 of WCT. The Diplomatic Conference stated that this provision applied mutatis

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<sup>96</sup> Articles 8 and 12, WIPO Performances and Phonograms Treaty, 1996.

<sup>97</sup> Article 18, WIPO Performances and Phonograms Treaty, 1996.

<sup>98</sup> Article 19, WIPO Performances and Phonograms Treaty, 1996.

mutandis also to Article 19 of WPPT.<sup>99</sup>

## **6. Exceptions and Limitations**

Article 16 of the WPPT provides for exceptions and limitations under Article 16 (1) of the WPPT. Contracting Parties may "provide for the same kind of limitations and exceptions with regard to the protection of performers and producers of Phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works."<sup>100</sup> Article 16 (2) contains the extent to which the Contracting Parties can set limitations and exceptions to rights provided for in the WPPT. The three steps test suggested are such limitations and exceptions are to be given in (1) certain special cases, (2) which do not conflict with the normal exploitation of performances or Phonograms and (3) are unreasonably prejudicial to the legitimate interest of the performer or the producer of Phonograms."<sup>101</sup>

## **B Other Substantive Provisions**

### **1 National Treatment**

Article 4<sup>102</sup> calls upon Contracting Parties to accord national treatment to other Contracting Parties with regard to exclusive rights granted in this Treaty.

### **2 Moral Right**

Following Article 6<sup>bis</sup> <sup>103</sup> of the Berne Convention, Article 5 of the WPPT grants moral right to performers "as regards to their live aural performances or performances fixed in Phonograms" and gives them the right to be identified as the performer of their performance. It also gives them the right to object to any distortion, mutilation or other modification of his performance prejudicial to his reputation.

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<sup>99</sup> *Intellectual Property Reading Material*, n.12, p.316.

<sup>100</sup> Article 16 (1), WIPO Performances and Phonograms Treaty, 1996.

<sup>101</sup> Article 16 (2), WIPO Performances and Phonograms Treaty, 1996.

<sup>102</sup> Article 4, WIPO Performances and Phonograms Treaty, 1996.

<sup>103</sup> Article 6 bis, Berne Convention provides moral right to the authors of literary and artistic works.

By granting moral right the WPPT adheres to the norms of traditional copyright law and maintains the right of copyright holder.

## **V. Harmonisation of European Union Copyright Law: the European Union Copyright Directive(the EC directive)**

The European Union has taken steps to meet the challenges of copyright protection in a digital environment and has proposed to harmonise copyright laws for the member states. This has come in the form of the EC Directive which contains a strong statement of copyright owner's right to control the reproduction, distribution, and presentation of their works online. The EC Directive requires legislative action by the member states with respect to four rights: the reproduction right, the communication to the public right, the distribution right and protection against circumvention or abuse of electronic management and protection system. The following section discusses the provisions laid down in this regard.

### **A. Right of Reproduction**

Article 2<sup>104</sup> of the EC Directive provides that the member states must provide "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form of copyrighted works which includes

1. Work of authors
2. fixation of the performances of performers
3. Phonograms of Phonogram producers
4. Fixation of original and copies of films producers
5. Transmission by wire or air, cable or satellite broadcast of fixation by broadcasting organisations.<sup>105</sup>

The provisions made under Article 2 of the EC Directive follows the deleted Article 7 (1)<sup>106</sup> of the Draft WIPO Copyright Treaty. The extension of the reproduction

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<sup>104</sup> Article 2, EC Directive, as cited in Michel Doherty and Ivor Giffiths, "The Harmonisation of European Copyright Law for the Digital Age," *E.I.P.R.*, (2000), p.21.

<sup>105</sup> *Ibid.*, p.21.

<sup>106</sup> Samuelso, n.26, p.372.

rights to "direct or indirect" "temporary or permanent" reproductions would seem to cover even the ephemeral copies of the work made during the course of transmission or use of copyrighted work in an online context which should give rise to a situation where copies of a work in the RAM memory of a computer to be treated as reproductions.<sup>107</sup> However, certain exceptions to the provisions made under Article 2 are provided under Article 5 of the EC Directive.

Article 5 (1) of the EC Directive provides an automatic exemption from reproduction right for "transient and incidental acts of reproduction which are integral and essential part of a technological process including those which facilitate effective functioning of transmission systems whose sole purpose is to enable use to be made of a work or other subject matter which have no independent economic significance."<sup>108</sup>

This provision is an exception to the cache copies made by a service provider for Internet transmission.

Under Article 5(2) member states are empowered to provide for limitations to the exclusive right of reproduction, in respect of reproduction on paper or any similar medium with the exception of musical work in published form, effected by the use of any kind of photographic technique provided that the right holders received fair compensation.<sup>109</sup> The same applies in respect of reproduction of audio, visual or audio-visual analog recording media made by a natural person for private and strictly personal use provided right holders get fair compensation. So as to address the problems of digital copying the same provision as given in Article 5 (b) applies with the addition that such acts of copying should not hamper the technical measures used to protect such copyrighted works.<sup>110</sup> Also excludable is the reproduction for non-commercial archiving or conservation purposes by libraries, universities and in respect of ephemeral fixations made by broadcasting organisations.<sup>111</sup>

Article 5 (3) provides for exceptions to reproduction right in certain cases like non-commercial use of a copyrighted work for teaching scientific research, where the source is acknowledged. Secondly such use of copyrighted material is made for the

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<sup>107</sup> Doherty and Giffiths, n.103, pp.18-19.

<sup>108</sup> Article 5(1), EC Directive, Ibid., p.22.

<sup>109</sup> Article 5 (2), (a), EC Directive, Ibid., p.22.

<sup>110</sup> Article 5 (b), EC Directive, Ibid., p.22.

<sup>111</sup> Article 5 (c) (d), EC Directive, Ibid., p.22.

benefit of the disabled and used in a non-commercial way. Thirdly, the use of excerpts in connection with the reporting of current events for the purpose of criticism or review are allowed provided the source is acknowledged.<sup>112</sup>

## **B. Right of Communication**

The EC Directive explicitly adopts both the right of communication to the public of copyrighted work and the right of making available to the public of fixed performance by wire or wireless means. The language used for these provisions parallels that of the WCT and WPPT for similar provisions.

Article 3 (1) of the EC Directive provides the following with respect to the copyrighted works

member states shall provide authors with an exclusive right to authorise or prohibit any communication to the public of original and copies of their works by wire or wireless means including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.<sup>113</sup>

The provisions of this Article closely resembles that of Article 8 of WCT. The phrase communication by wire or wireless means indicates that it also encompasses a right of transmission. This Article is also meant to afford control online access to a work apart from actual transmission of the work.

Article 3 (2) of the EC Directive gives a right of making available to the public of fixed performances by wire or wireless means and provides that member states shall provide for the exclusive right to authorise or prohibit the making available to the public by wire or wireless means, in such a way that members of public may access them at a place and a time individually chosen by them:

1. for performers of fixations of their performances
3. for Phonogram producers of their Phonograms

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<sup>112</sup> Article 5 (3), EC Directive, *Ibid.*, p.22.

<sup>113</sup> Article 3 (1), EC Directive, *Ibid.*, p.21.

4. for the producer of first fixation of films, in respect of original and copies and copies of their films
5. for broadcasting organisations of fixation of their broadcasts, where this broadcast is transmitted by wire or over the air including by cable or satellite.<sup>114</sup>

The rights of Article 3 (2) of the EC Directive is broader than that provided under Article 10<sup>115</sup> of the WPPT. The Article 10 provision of the WPPT applies only to performances fixed in Phonograms, whereas Article 3 (2) goes further and covers fixed performers of audio-visual material as well. This is done to provide protection to online transmission of audio-visual and multimedia work which are likely to be available in the Internet.

### **C. Exceptions**

Article 5 (3) contains exceptions to the exclusive right of communication guaranteed to the copyright holder. These exceptions are same as discussed for the exceptions to Article 2 of the EC Directive in the earlier part of this section.

### **D. Right of Distribution**

Article 4 (1) of the EC Directive provides distribution right to authors of copyrighted work. Under Article 4 (1) member states must "provide authors in respect of the original of their works, or copies thereof with the exclusive right to any form of distribution to the public by sale or otherwise."<sup>116</sup>

The phrase "any form" of distribution might suggest that all online transmission of copyrighted work would fall within the distribution right of EC Directive. However, it is understood that the distribution right is limited only to fixed copies that can be put into circulation as tangible objects.

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<sup>114</sup> Article 3 (2), EC Directive, *Ibid.*, p.21.

<sup>115</sup> Article 10, WIPO Performances and Phonograms Treaty, 1996.

<sup>116</sup> Article 5 (3), EC Directive, Doherty and Giffiths, n.103, p.22.



## **E. Obligations as to Technological Measures**

The EC Directive takes cognisance of the implications of using measures to circumvent technological copyright protection. Article 6 of the EC Directive deals with this and calls upon the member states to provide adequate legal safeguards against the circumvention of any technological measure to protect copyrighted work. Article 6 (2) provides that member states " shall provide adequate legal protection against activities including manufacture or distribution of devices or performance of services, which are carried out knowingly or with reasonable grounds to know that they will enable or facilitate circumvention without authority of any technical measure designed to protect any copyright or rights related to copyright."<sup>117</sup>

Article 6 (3) defines "technological measures" as "any device, product, or component incorporated into a process, device, or product designed to prevent or inhibit the infringement of any copyright or any rights related to copyright." Further, this Article outlines description, descrambling or other transformation of the work or other subject matter.<sup>118</sup>

## **F. Obligations Concerning Rights Management Information**

Article 7 of the EC Directive deals with copyright management information. Article 7 (1) requires member states to prohibit removal or alteration of electronic rights management information or the distribution, importation for distribution, broadcast, communication or making available to the public of works from which electronic and rights management information has been removed or altered, knowingly or having reasonable grounds to know that by so doing one is enabling or facilitating an infringement.<sup>119</sup> Article 7(2) defines "right management information" broadly to mean any information provided by a right holder which identifies the work, the author or any other right holder, the owner of any right in the work, and any number or codes that represent such information, when any of such information is associated with a copy of the work or appears in connection with communication to the public of a work.<sup>120</sup>

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<sup>117</sup> Doherty and Giffiths, n.103, p.22.

<sup>118</sup> Article 6 (4), EC Directive, Ibid., p.22.

<sup>119</sup> Article 7 (1), EC Directive, Ibid., p.23.

<sup>120</sup> Article 7 (2), EC Directive, Ibid., p.23.

The above discussion shows that the developed countries like the USA and the trade blocks of developed countries like the European Commission are veering away from traditional purposes such as promotion of knowledge in the public interest towards a solely trade oriented set of purposes by giving a premium to the rights of copyright holder, which would negate the rights of the users like fair use, exhaustion of right and similar privileges hitherto enjoyed by the users. In this scenario the role of a developing country like India becomes all the more important in providing a balance between the two.

## **VI. National Legislations: The US initiative**

### **The Digital Millennium Copyright Act**

After the adoption of the WIPO Treaties the then US President, Bill Clinton, submitted the WIPO Copyright Treaty to the Senate for its advice and consent and ratification of the same. Based on this two bills- S 1121 and House Resolution 2081-were introduced at the end of July 1997 to make changes to the existing United States Copyright law to make it compliant with the new obligations of the Treaty. These two bills proposed new level of protection (a) against circumvention of anticopying technology and (b) against knowing performance of prohibited acts related to removal or alteration of Copyright Management Information (CMI). In September 1997, an alternative WIPO Treaty implementation bill (S1146) was introduced. This bill addressed the issue of liability of online service providers (OSPs), fair use, distance learning and ephemeral reproduction of copies apart from dealing with anti circumvention measures and CMI. A separate bill, House Resolution 2180 dealt only with the OSP liability.

The Senate Judiciary Committee held hearings on this bill. The House Judiciary Committee approved an amended version of H.R 2281 in April 1998 containing liability of OSP. The Senate Judiciary Committee passed S2087 in May 1998 as a successor to S1121. The substitute bill, known as the Digital Millennium Copyright Act of 1998 (DMCA) was adopted by the US Senate in July 1998.<sup>121</sup>

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<sup>121</sup> Schrader, n.13.

The DMCA hopes to bring US Copyright law "squarely into the digital age." This law proposes to "make digital network safe place to disseminate and exploit copyrighted material" by creating "the legal platform for launching the global digital online market place of copyrighted works." Its goal is to make available via the Internet movies, music, software and literary works that are the fruit of American creative genius.<sup>122</sup>

## **A. Substantive provisions of the DMCA**

The DMCA adds several new provisions to the US Copyright Act, which are contained in a new chapter 12.

### **1 Circumvention of Technological Protection Measures**

#### **a. Prohibition on Conduct**

Section 1201 (a) (1) of the DMCA outlaws conduct to circumvent copyright protection mechanisms and provides that "no person shall circumvent a technological measure that effectively control access to a work"<sup>123</sup> as this provision does not expressly require either knowledge or intent and hence is potentially broad in its reach.

Section 1201 (a) (3) defines "circumvent a technological protection" as "to descramble a scrambled work, to decrypt an encrypt work or otherwise to avoid, bypass, deactivate or impair a technological measure without the authority of the copyright owner."<sup>124</sup>

This section further provides that a technological protection measure "effectively controls access to a work if the measure in the ordinary course of its operation requires the application of information, or a process, or a treatment with the authority of the copyright owner, to gain access to the work." This section set the guidelines as to what constitutes technological protection measure.

#### **b. Prohibition on Devices**

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<sup>122</sup> David Nimmer, "A Riff on Fair Use in the Digital Millenium Copyright Act," *University of Pennsylvania Law Review*, Vol.148, No.3 (January 2000), p.680-81.

<sup>123</sup> Section 1201, DMCA, 1998.

<sup>124</sup> Section 1202 (a) (3), DMCA, 1998.

The DMCA also outlaws devices directed to circumvention of technological protection measures. Section 1201 (a) (2) and 1201 (b) prohibit the manufacture, import, offered to the public, trafficking in any technology, product, service, device, component, or part thereof, that is, primarily designed or produced for the purpose of circumventing technological measures that effectively "controls access to" a copyrighted work or "protects a right of copyright owner or has limited commercially significant use other than to circumvent such technological measures or is marketed for use in circumventing such technological protection measures."<sup>125</sup> Section 1201 (b) (2) provides that technological measures "effectively protects a right of a copyright owner" if the measure "in the ordinary course of operation prevents, restricts or otherwise limits the exercise of a right of a copyright owner."<sup>126</sup>

These provisions in the DMCA go a step ahead of Article 11 of the WCT<sup>127</sup> which prohibits certain conduct circumventing technological protection measures. This provision tries to bring the manufacturers of devices under the purview of copyright infringement and thereby raises concerns regarding fair use rights. Though sections 1201 (a) (1) (2) and (4) set out exceptions under which it is provided that section 1201 is not intended to affect certain "rights, remedies, limitations, or defences to copyright infringement, including fair use."<sup>128</sup> Section 1201 (a) (2) provides that section 1201 does not "enlarge or diminished vicarious or contributory liability in connection with any technology or product, service, device, or enlarged or diminished any right of free speech."<sup>129</sup>

However, these provisions have been criticised by groups such as Digital Future Coalition (DFC), who argue that Section 1201 would negate the fair use rights, because it impose, liability even when the purpose of the activity is permitted by the Copyright Act. They argue that the saving clauses of section 1201(C) are inadequate as it would preclude the manufacturer of such devices from manufacturing and also would have

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<sup>125</sup> Section 1201 (a) (2) and Section 1201 (b), DMCA, 1998.

<sup>126</sup> Section 1201 (b) (2), DMCA, 1998.

<sup>127</sup> Article 11, WIPO Copyright Treaty, 1996.

<sup>128</sup> Section 1201 (a) (2), DMCA, 1998.

<sup>129</sup> Ibid.

implications for those who access such works for entirely lawful purposes.<sup>130</sup>

### **c. Exemptions for Nonprofit Organisations**

Section 1201(d), sets up an exemption from the circumprohibition of Section 1201(a)(1) for non profit libraries, archives, or educational institutions that gain access to a commercially exploited work solely in order to make good faith determination of whether to acquire a copy of that work, provided that a copy of the work is not retained longer than necessary to make good faith determination and is used for no other purpose.

### **d. Encryption Research**

Section 1201(g) provides that it is not a violation of the regulations prohibiting circumventing a technological measure if such circumvention is done as an act of good faith "encryption research". "Encryption research" is defined as "activities necessary to identify and analyze flaws and vulnerabilities of encryption technology applied to copyrighted works "if these activities are conducted to advance the state of knowledge in the field of encryption technology". "Encryption technology" is defined as "the scrambling and descrambling of information using mathematical formulas or algorithms"<sup>131</sup>

### **e. Integrity of Copyright Management Information**

Section 1202(c) defines the term Copy right Management Information (CMI) as any of the following items of information "conveyed" in connection with copies of a work including in digital form but excludes any personally identifying information about user of a work:

- (1) the title and other information identifying the work, including the information set forth on a copyright notice
- (2) the name and other information about the author or the copyright owner of the work
- (3) the name and other identifying information about a performer, writer or director

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<sup>130</sup> Section 1201 (d) (a) (b), DMCA, 1998.

<sup>131</sup> Section 1201 (g), DMCA, 1998.

- (4) associated with a work other than a work performed publicly by radio, and television broadcast station.
- (5) terms and conditions for the use of the work
- (6) identifying number or symbols referring to such information<sup>132</sup>

The term "conveyed" has been defined as not any type of transfer physical or otherwise of the information and merely requires that the information accessible in conjunction with, or appear with the work being accessed. Under this, CMI could include information that is contained in a link whose address is conveyed with the copyrighted work.

#### **f. Prohibition on False CMI or Altering CMI**

Section 1202(a) prohibits any person from knowingly providing CMI that is false or distributing or importing for public distribution. Section 1202 (b) prohibits any person from intentionally removing or altering any CMI, distributing or importing for distributing CMI knowing that it has been altered or removed, or distributing, importing for distribution, or publicly performing works in which CMI has been removed or altered.<sup>133</sup>

#### **g. Exceptions and Limitations**

Section 1202 (d) contains an exception for law enforcement, intelligence and transmission and information security activities. Section 1202 (e) limits the liability of persons for violations in the course of analog transmission by broadcast stations or cable systems if avoiding the activity that constitutes a violation of the CMI integrity provisions is not technically feasible or would create an undue financial hardship.<sup>134</sup>

## **2. Ephemeral Recordings**

Section 402 of the DMCA expands the rights under section 112 of the US Copyright Statute of broadcast radio or television to make ephemeral recordings of materials transmitted via analog broadcasts to include recordings of performance of a

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<sup>132</sup> Section 1202 (c), DMCA, 1998.

<sup>133</sup> Sections 1201 (a) and 1201 (b), DMCA, 1998.

<sup>134</sup> Sections 1202 (d) and 1202 (e), DMCA, 1998.

sound recording in digital format on a non-subscription basis. This section provides exemption to transmitting organisations from circumventing technical measures in making ephemeral copies from sound recordings in case the copyright owner of such sound recording fails to provide such organisations the necessary means for making the recordings.<sup>135</sup>

## **B. Liability of Online Service Providers (OSPs)**

Title 2 of the DMCA deals with the liability provisions of OSPs. It seeks to clearly define the condition under which an OSP is liable for infringement that occurs on the OSP systems or networks and also prescribes limitations thereto. This section also makes provisions for four safe harbors codified in Section 512. If the activity of the OSP falls within the premise of these four safe harbors then it is exempted from liability.

### **1.Safe Harbors**

Section 512 of the DMCA delineates the four different safe harbors given to the service providers. For the purpose of the first safe harbor, a service provider is defined in section 512 (k)<sup>136</sup> as "any entity referring the transmission, routing or providing of connections for digital communications between or among points specified by a user, of material of the users choosing, without modification to the content of the material sent or received." For the other three safe harbors a service provider is broadly defined as "a provider of online services or network access, or the operations of the facilities thereof."<sup>137</sup>

The four safe harbors that could be availed by the service providers are:

1. When the OSP acts as a mere conduit for infringing information.
2. For system caching
3. Innocent storage of information
4. Referral or linking to infringing material.

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<sup>135</sup> Section 402, DMCA, 1998.

<sup>136</sup> Section 512 (k), DMCA, 1998.

<sup>137</sup> Section 512 (k) (b), DMCA, 1998.

### **a. OSP as a Mere Conduit for Infringing Information**

Under Section 512 (a) a service provider is not liable for monetary relief and subject to limited injunctive relief for transmitting, routine, or providing connections to infringing material operated by or for the service provider or by reason of intermediate and transient storage of material in the course thereof. If (a) it is initiated by a person other than the service, (b) it is carried out through an automatic technical process selecting the materials and the service provider does not do so, (c) a service provider does not select the recipient except as an automatic response to the request, and (d) no modification or alteration of such material is done by the OSP. These provisions of the safe harbor are not available to an OSP that initiates, selects, or modifies the content of transmission, or stores in a system that becomes accessible to third parties.

### **b. Caching**

Caching is a process by which an OSP stores copyrighted material on its system to provide speedier access to the users of a much sought after material and to reduce congestion in the network. Section 512 (b) provides safe harbor provision to service providers in a such a scenario to save a service provider from liability. This section defines caching as the "intermediate and temporary storage" of material on a system of network that is operated by a service provider, which was made available only by a person other than the service provider.<sup>138</sup> In this type of cases this section provides that a service provider is exempted from monetary relief and subjects it only to injunctive relief.<sup>139</sup> However, to get this benefit certain conditions need to be satisfied:

(a) the OSP's storage of the cached material must be met through an automatic technical process for the purpose of providing the material to subsequent users who request for the same. This signifies that Section 512 (b) does not appear to cover "advance" caching in which material, is cached for anticipated request for it rather than the first actual request for it.<sup>140</sup>

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<sup>138</sup> Section 512 (b) (1), DMCA, 1998.

<sup>139</sup> Sections 512 (b) (1) (a) (b) (c), DMCA, 1998.

<sup>140</sup> Section 512 (b) (2) (a), DMCA, 1998.



- (b) OSP must not modify the cached material while making transmission of the same to subsequent users.<sup>141</sup>
- (c) The OSP must comply with all rules of the originator of the material for refreshing, reloading or other uploading of the cached material in accordance with the generally accepted standard.<sup>142</sup>
- (d) No interference on the part of the OSP with the technology that returns "hits" information to the person who posted the material.<sup>143</sup>
- (e) The OSP should not violate the provision of conditioned access to materials if the originator has made it a criterion like getting access only after entering a password or paying for the same.<sup>144</sup>
- (f) The OSP must remove or block any material that has been posted without a copyright owners authorisation after being notified that the material has been removed or blocked at the originator's site.

### **c. Innocent Storage of Infringing Information**

Section 512 (c) addresses the issue of the liability of an OSP in a case when infringing material is stored by a user on its system or networks without its knowledge. However, to be entitled to the protection of the safe harbor the OSP needs to be satisfy certain criteria:

- (a) That the OSP lacked actual knowledge of the infringing nature of the material and could not be aware of facts or circumstance from which infringing activities were apparent.<sup>145</sup> Upon gaining "knowledge or awareness" of infringement the OSP must act expeditiously to remove or block access to such material.<sup>146</sup>
- (b) That the OSP must not " receive a financial benefit directly attributable to the infringing activity" in cases where the OSP has the right and ability to control that activity.<sup>147</sup>

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<sup>141</sup> Section 512 (b) (2) (b), DMCA, 1998.

<sup>142</sup> Section 512 (b) (2) (c), DMCA, 1998.

<sup>143</sup> Section 512 (b) (2) (d), DMCA, 1998.

<sup>144</sup> Section 512 (b) (2) (e), DMCA, 1998.

<sup>145</sup> Section 512 (c) (a) (ii), DMCA, 1998.

<sup>146</sup> Section 512 (c) (a) (iii), DMCA, 1998.

<sup>147</sup> Section 512 (c) (b), DMCA, 1998.

(c) The OSP must comply with the notice and take down provisions described in section 512 (c) (3)<sup>148</sup> which specifies that a proper notice includes the identification of the copyrighted work and infringing material in sufficient details to permit the OSP to locate the material, information to contact the complaining party.

The Statute does not define what constitutes direct financial benefit. But the legislative history of the DMCA implies that an OSP would not be considered to be receiving a "financial benefit" where the OSP receives a monthly subscription fees paid both by the infringers and non-infringers.<sup>149</sup> It is also unclear as to what constitutes sufficient "right and ability to control" the infringing activity.

#### **d. Referral or Linking to Infringing Material**

Section 512 (d) provides safe harbor to a service provider in cases where it refers or links users to an online location containing infringing material by using location tools including a directory, index, reference, pointer or hypertext link.<sup>150</sup> However, to avail of this safe harbor the service provider needs to fulfil certain conditions:

- a. does not have actual knowledge that the material is infringing
- b. is unaware of the facts and circumstances from which infringing activity is apparent
- c. does not receive any financial benefit directly attributable for any infringing activities for which it has the right and ability to control, and
- d. upon being properly notified of the infringing activity or otherwise gaining knowledge or awareness of the same takes expeditious steps to remove or disable access to the infringing material.<sup>151</sup>

Since Section 512 (d) does not refer to framing as an information location tool it is unclear whether framing will fall within this safe harbor provision, though framing is

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<sup>148</sup> Section 512 (c) (iii), DMCA, 1998.

<sup>149</sup> Jonathan Friedman and Francis Buono, "Using the Digital Millennium Copyright Act to Limit the Copyright Liability Online," downloaded from [www.richmond.edu/jolt/v6i4/article.html](http://www.richmond.edu/jolt/v6i4/article.html).

<sup>150</sup> Section 512 (d), DMCA, 1998.

<sup>151</sup> Ibid.

accomplished by linking.<sup>152</sup>

#### **e. General Requirements for Limitation Liability**

Apart from meeting the requirements of one of the specific safe harbors the service provider has to satisfy the provisions laid down in Section 512 (i) to be eligible for limitation of liability. Under this section the service provider has to adopt, and to reasonably implement, and inform subscribers of a policy which terminates the account of repeat infringers for the determination in appropriate circumstances of subscribers who are repeat infringers. Further it is required that the service provider must not interfere with standard technical measures used by copyright owners to identify and protect copyrighted works that have been developed "pursuant to a broad consensus of copyright owners and service providers."<sup>153</sup>

The provisions under Title II of DMCA dealing with online liability limitation of service provider has got mixed reviews in the legal community. According to one view the DMCA is a reasonable compromise between service providers and copyright holders and would help in fostering Internet activities as it relieves the service providers from policing the Internet for infringing material. The contrary view is that the DMCA gives an unfair advantage to the service providers in copyright disputes as the onus of policing has fallen on the copyright holders.<sup>154</sup>

However, the DMCA has set standards in finding a solution to the challenges posed by digital technology and copyright even though the precarious balance between the rights of the copyright holder and that of the user seems to have undergone a change.

### **VII. Copyright in the Digital Era: Challenges before India**

The introduction to the<sup>155</sup> Information Technology Act, 2000 sums up the challenges India is facing in the digital era. According to this, though "digital technology and new communication systems have made dramatic changes in our lives" we are

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<sup>152</sup> Friedman and Buono, n.148.

<sup>153</sup> Section 512 (i), DMCA, 1998.

<sup>154</sup> Friedman and Buono, n.148.

<sup>155</sup> "Introduction," Information Technology Act, 2000.

sceptical; about the legal implications of such changes on online activities carried on by us in our day to day lives.

India legislated its own Copyright Act in 1957. In doing so it repealed the then existing colonial act enacted during British times. The Act was subsequently amended in 1984, in 1994 and most recently in 1999 to comply with the provisions of the TRIPs Agreement. However, these changes do not take notice of the advent of the Internet and its implications and to that extent, are overtaken by events. Hence, there is an urgent need to reformulate the Indian Copyright Act in the light of changes by the adoption of the two WIPO Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT).

### **A. Provisions of WCT & WPPT and Indian Copyright Act**

Both the WCT and the WPPT grant some new rights to the copyright holders in the context of technological changes. The new rights can be outlined as rights of distribution, rental, and communication to the public. Apart from these rights the WCT and the WPPT extended the traditional right of reproduction to the digital environment. Other provisions which are common to both the treaties and need to be addressed by India are provisions relating to limitation and exception and protection and enforcement of rights.

#### **1. The New Rights**

As stated above the WCT and the WPPT grant some new rights to the copyright holder while the right of distribution and commercial rental are evolved to address the problems emanating from new market practices, and the right of communication to the public and reproduction have been evolved to address the problems emanating from the digital transmission.<sup>156</sup>

##### **a. Right of Distribution**

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<sup>156</sup> N. S. Gopalakrishnan, "The WIPO Copyright and Performers and Phonogram Treaties: Implications for India," *The Academy Law Review*, Vol.21 (1997), p.5.

Article 6 (1)<sup>157</sup> of the WCT and Articles 8 (1) and 12 (1)<sup>158</sup> of the WPPT grants the authors and performers the exclusive right of distribution of their works though sale or other transfer of ownership. However, these provisions do not recognise importation right which deals with the right of the author to prohibit importation of legally produced copies in another country. However, Articles 6 (2) and 8 (2) of the WCT and the WPPT respectively, provide that the Contracting Parties are free to have specific provisions in their domestic legislation to clarify the principle of exhaustion of right after which importation can be allowed.<sup>159</sup> An Agreed Statement to Article 6<sup>160</sup> of WCT provides that distribution applies to permanent copies like printed materials and not to materials in electronic media which are intangible in nature, or materials in the memory of computer.

The Indian Copyright Act has not specifically recognised the right of distribution for authors, performers, and Phonogram producers. It is generally understood that the right of publication under Section 14<sup>161</sup> includes the right of distribution as well. No specific provisions for performers are there in our Act. The Copyright Act specifically prohibits the importation of infringing copies into India under Section 51 (b) (iv).<sup>162</sup> So the right of importation is not recognised in India.

The issue of right of importation came up for consideration before the Delhi High Court in the *Penguin Case*.<sup>163</sup> In this case the plaintiff (Penguin) had given a distribution license to the defendant (Messers India Book Distributors) to import books from England. Contrary to the agreement, the defendant imported books from the US. By relying on the meaning of publication and also the definition of infringed copy, it was argued that the exclusive right of reproduction and publication prohibit a person from

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<sup>157</sup> Article 6 (1), WIPO Copyright Treaty deals with the right of distribution and provides the authors of literary and artistic works with the exclusive right of making available to the public of the original and copies of their works through sale or other transfer of ownership.

<sup>158</sup> Article 8 (1) and Article 12 (1), WIPO Performances and Phonograms Treaty make similar provisions as Article 6 (1), WIPO Copyright Treaty for performers and Producers of Phonograms respectively.

<sup>159</sup> Article 6 (2), WIPO Copyright Treaty and Article 8 (2), WIPO Performances and Phonograms Treaty makes provisions for the exhaustion of rights of distribution of the rights of authors and performers respectively.

<sup>160</sup> Agreed Statement Concerning Articles 6 and 7, WIPO Copyright Treaty, 1996.

<sup>161</sup> Section 14 of the Indian Copyright Act deals with the meaning of Copyright.

<sup>162</sup> Section 51 (b) (iv) of the Indian Copyright Act provides "copyright in a work shall be deemed to be infringed when any person imports to India any infringing copies of the work."

<sup>163</sup> *Penguin Books Ltd., England v. M/s. India Book Distributors*, AIR (1985), Delhi, p.29.

importing and selling legally obtained books from a country not specified in the distribution license. The Court accepted this argument and held that:

While publication generally refers to issue of public, importation for the specified purpose may be a necessary step in the process of issuing to the public, and therefore of publishing. It appears to us that the exclusive right of Penguins to print, publish and sells these titles in India would extend to the exclusive right to import copies into India for the purpose of selling or by way of trade offering or exposing for sale the books in question.<sup>164</sup>

The Court rejected the defendant's argument that importation of a lawfully published work is not an infringement under Section 51 and held that

It is also an infringement of a copyright knowingly to import into India for sale or hire infringing copies of a work without the consent of the owner of the copyright, though they may have been made by or with the consent of the owner of the copyright in the place where they were made. In America, the subject books were lawfully published, it is true. But they cannot cross the borders of India without infringing the copyright of the exclusive licensee.<sup>165</sup>

In so doing the Court did not give vent to the monopoly effect on the market while prohibiting importation.<sup>166</sup> The 1994 Amendment to the Act has, also not specified importation right. As per the new provisions the right to resale is provided for items like computer programs, cinematographic films and sound records.<sup>167</sup> Since the question of importation is a policy matter it should be addressed by legislature and not by Court to prevent the recurrence of Penguin like decisions. Considering the importance of the matter, India need to make to make the matter clear through legislation by making

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<sup>164</sup> Ibid., p.37.

<sup>165</sup> Ibid., p.37.

<sup>166</sup> Gopalakrishnan, n.155, p.9.

<sup>167</sup> Sections 14 (b) (ii), (d) (ii) and (e) (ii), the Indian Copyright Act provides "to sell or give on hire, or offer for sale or hire," computer program, cinematographic film and sound recording "regardless of whether such copy has been sold or given on hire on earlier occasions."

changes in Section 52<sup>168</sup> and providing that importation will not be an act of infringement of copyright.<sup>169</sup>

## **b. Right of Rental**

The right of commercial rental was recognised for the first time in the TRIPs Agreement in Articles 11 and 14 (4).<sup>170</sup> These two Articles contain rental rights to computer program, cinematographic works and works embodied in Phonograms. Article 7 of the WCT<sup>171</sup> and Articles 9 and 13<sup>172</sup> of WPPT have incorporated similar provisions and have put limitations and obligations akin to TRIPs.

The amendments made to the Indian Copyright Act in 1994 did not incorporate provisions of Article 14 (4) of TRIPs. Though the rental right was extended to computer programs, cinematographic films and Phonogram records, the rights have not been granted to the authors of the work embodied in Phonograms or to the performers.

Section 14 (a) (iv)<sup>173</sup> of the Act recognises the rights of authors literary, dramatic, and musical works to incorporate their works in sound records. Similarly, section 38 has recognised the right to fix unfixed performance of performers in the sound record.<sup>174</sup> However, the authors of artistic works have not been given the right to incorporate sound recordings under section 14 (c). This shows that the system of equitable remuneration is not in practice in India and we need to amend Section 14 (a) to recognise the right of commercial rental for literary, dramatic and musical work embodied in sound recordings. Article 38 need to be amended to provide rental rights to performers. This will make the authors of the sound recordings to share the royalties from commercial rental of sound records with the authors and performers. Section 14 (b) has not exempted computer

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<sup>168</sup> Section 52 of the Indian Copyright Act provides a list of acts which are not considered to be infringement of Copyright.

<sup>169</sup> Gopalakrishnan, n.155, p.10.

<sup>170</sup> Articles 11 and 14 (4) of the TRIPs Agreement grants the authors of literary and artistic works with the exclusive right of rental.

<sup>171</sup> Article 7, WIPO Copyright Treaty, 1996.

<sup>172</sup> Article 9 of the WIPO Performances and Phonograms Treaty deals with the rental right of the performers and grants the performers the exclusive right of authorising the commercial rental to the public of the original and copies of the performances fixed in Phonograms. Article 13 provides the same for the producers of Phonograms.

<sup>173</sup> Section 14 (a) (iv) of the Indian Copyright Act provides that in the case of literary, dramatic or musical work not being a computer program-to make any cinematographic film or sound recording in respect of the work.

<sup>174</sup> Section 38 of the Indian Copyright Act deals with performers right.

programme where the programme itself is not the essential object of the rental and hence changes in this regard are also needed.<sup>175</sup>

### **c. Right of Communication to the Public**

Article 8 of the WCT<sup>176</sup> and Articles 10 and 14 of the WPPT<sup>177</sup> contain provisions dealing with the new right of communication or making available to the public of their work through wire or wireless means.

Section 14 of the Indian Copyright Act provides for the right of communication to the public of all copyrighted works.<sup>178</sup> Through the 1994 amendment a new sub clause 2 (ff) was added to the Copyright Act which defines "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such works regardless of whether any member of the public actually sees, hears, or otherwise enjoys the works so made available."<sup>179</sup>

This provision does seem to cover electronic communication as envisaged in these treaties. So the rights granted to authors and producers of phonograms by the WCT and the WPPT are taken care of by this provision and no changes need to be made.<sup>180</sup>

Regarding performers the right of making available to the public of their fixed performance is not recognised in Section 38. The definition to communication in Section 2(ff) which also does not include performance as it is confined to "works" as defined in Section 2 (y)<sup>181</sup> which does not have performers under its categorisation. So an amendment is needed under Section 38 and Section 2 (ff) to correct this anomaly.<sup>182</sup>

The provisions made under Article 8 of WCT and Articles 10 and 14 of the WPPT raised questions of the liability of service providers. An Agreed Statement to

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<sup>175</sup> Jagdish Sagar, "The Copyright Act, 1957 in the Digital Era," *Paper Presented at National Seminar on Challenges of Internet/Cyber Law and Enforcement of Copyright Law*, March 2001.

<sup>176</sup> Article 8, WIPO Copyright Treaty, 1996.

<sup>177</sup> Article 10 and Article 14 of the WIPO Performances and Phonograms Treaty gives the producers of Phonograms the "exclusive right of authorising the making available to the public" of their Performances and Phonograms respectively, "by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them."

<sup>178</sup> Section 14, Indian Copyright Act, 1957.

<sup>179</sup> Section 2 (ff), Indian Copyright Act, 1957.

<sup>180</sup> Gopalakrishnan, n.155, pp.17-18.

<sup>181</sup> Article 2 (y) defines works "means any of the following works, namely - (i) a literary, dramatic, musical or artistic work, (ii) a cinematographic film, (iii) a sound recording.

<sup>182</sup> Sagar, n.174.



Article 8 of WCT provides that service provider will not be liable for violation of rights unless the Act has facilitated in providing access to infringing material. So it gives ample scope to national legislation to make provisions to exempt service provider from liability in situations enumerated above. To meet this eventuality, modifications are called for to Section 52<sup>183</sup> of the Copyright Act.

#### **d. Right of Reproduction**

As discussed in the preceding sections, the Diplomatic Conference attempted to extend the right of reproduction to the digital environment through the provisions made under the Draft Treaty Article 7.<sup>184</sup> This provision tried to extend the right of reproduction to encompass temporary reproduction as well. However, the lack of consensus saw this Article deleted altogether. Instead, it was agreed to retain the same provisions in the WPPT but without extending it to the digital environment by removing the words "permanent or temporary" from the text of the relevant Article. The provisions of Articles 7, 11 and 16 of the WPPT and the Agreed Statement there to clarify that the storage of protected performance or Phonogram in digital form in an electronic medium constitutes reproduction.<sup>185</sup> The WCT adopted an Agreed Statement to Article 1 (4) to deal with the reproduction right in a digital environment. The Agreed Statement provides that the "reproduction right as set out in Article 9 of the Berne Convention and the exceptions there under fully applies in the digital environment, in particular to storage of work in digital form. It is understood that the storage of work in a digital form in an electronic medium comes within the meaning of Article 9 of the Berne Convention."<sup>186</sup>

In the context of India, Section 14 of the Copyright Act grants reproduction right to authors and producers of Phonograms.<sup>187</sup> But this right is not granted to performers dealt by Section 38. So there is a need to amend Section 38 to confer on the performer a

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<sup>183</sup> Section 52, Indian Copyright Act, n.167.

<sup>184</sup> Samuelson, n.26, p.372.

<sup>185</sup> Agreed Statement Concerning Articles 7, 11 and 16, WIPO Performances and Phonograms Treaty, 1996.

<sup>186</sup> Article 9 of the Berne Convention deals with the right of reproduction.

<sup>187</sup> Section 14 (e) provides that "in the case of a sound recording (i) to make any other sound recording embodying it" signifying that producers of Phonograms (sound recording) enjoy right of reproduction.

reproduction right. So far as the liability of service provider is concerned no provision is made in the Indian Copyright Act. So we need to make changes in this regard as well.<sup>188</sup>

#### **e. Obligations Concerning Technical Measures**

Article 11 of the WCT and Article 18<sup>189</sup> of the WPPT had made provisions to prevent tampering with protection measures used to safeguard copyrighted materials. These two Articles are incorporated to facilitate to protect technological measures and provide for remedial measures to deal with circumvention of technological protection.

Under the Indian Copyright Act criminal remedies are provided in Sections 65 and 66. According to Section 65 it is a criminal offence on the part of a person, who knowingly makes or possesses any plate for the purpose of making infringing copies of any copyrighted work. Section 66 provides that the courts while trying cases mentioned in section 65 can order the alleged offender to deliver all infringing copies in his possession to the owner. The definition of "plate" in Section 2 (t)<sup>190</sup> includes "other devices" used or intended to be used for reproducing copies of any work. This definition seems to include devices used for circumvention of effective technological measures. In addition to his, Section 64 empowers a police officer to seize plates without warrant.

The provisions made in these sections may satisfy the obligations concerning technological measures provided for by the WCT and the WPPT. However, clearer provisions in this regard need to be made.

#### **f. Obligations Concerning Rights Management Information**

Article 12 and Article 19 of the WPPT have made provisions to address the issue of infringement of CMI used to protect the interests of copyright holders. Rights management information helps in identifying the work, the owner of any right of the work or information about the terms and conditions of use of the work, etc. But these Articles prohibits alteration or removal of such CMI, and further prohibit distribution,

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<sup>188</sup> Gopalakrishnan, n.155, p.21.

<sup>189</sup> Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, and producers of Phonograms in connection with the exercise of their rights granted by these treaties.

<sup>190</sup> Section 2 (t), Indian Copyright Act, 1957.

importation for distribution of infringed copies of work where the CMI has been removed or altered.

The existing provisions of the Indian Copyright Act do not address this problem and hence new additions in this regard are suggested.

#### **g. Limitation and Exceptions**

Article 10 of the WCT and Article 16 of the WPPT provide for limitations and exceptions to the rights granted to the holders of Copyright so as to benefit the users. These rights follow the three step test in doing so. The ingredients of these tests are:

1. To grant such exemption only in special cases.
2. Which do not conflict with the normal exploitation of the work.
3. Is not unreasonably prejudicial to the legitimate interests of the authors.<sup>191</sup>

As far as India is concerned Section 52 of the Copyright Act identifies the limitations and exceptions to the rights. In the light of adoption of the WIPO Treaties the provisions of Section 52 needs to be modified. In particular in the case of computer programs we need to introduce a fair dealing provision which was removed by the 1994 Amendment to the Copyright Act.<sup>192</sup>

Though India has not ratified the WIPO Treaties, the Indian Copyright Act provides recourse to the holders of various rights granted by these Treaties. Since India is emerging as an Information Technology (IT) superpower and the use of Internet is on the rise we need to make our copyright law in consonance with the development taking place around us or else technology will precede legislation and we might be found on the wrong side.

The preceding sections showed that the world community is waking up to the legal challenges posed by the Internet. Further, we observed that divergence of opinions lie as what should be the limit of protection to be granted to copyright holders. In the light of this, this chapter tried to bring out the development that is taking place in the field of legislation. In a way it attempted to answer the questions raised in Chapter II.

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<sup>191</sup> The three step test is provided in Section 13 of Berne Convention.

<sup>192</sup> Gopalakrishnan, n.155, p.26.

## ***Chapter IV***

### **Conclusion**

## CHAPTER IV

### CONCLUSION

Copyright protection has been the concern of States. Such protection provides incentives to the creators of literary and artistic works and also makes it possible for the public to use copyrighted work. Starting from the invention of the printing press to the era of easier duplication through the use of facilities like photocopying, recording, videography, copyright law has tried to keep pace with technology. However, the advent of digital technology has made a significant impact on the notions of copyright protection. The shift from the analogue medium of producing copyrighted work to the digital medium has brought on newer parameters of protecting copyright. The use of digital technology coupled with the easier way of dissemination through the Internet has made the traditional copyright law wanting in many respects. The traditional concepts of what constitutes reproduction, distribution, public performance have undergone see change in the digitized environment. No longer is it necessary to show that tangible copies of a copyrighted work is to be made to reproduce or distribute such work. Neither is it required to be shown that physical performance of a copyrighted work needs to be done to constitute an infringement of the right of public performance or display. We have entered into an era where these concepts have become obsolete. Instead, we are to deal with a scenario where reproduction, distribution and dissemination of a copyrighted work is not subject to the paradigm of tangible medium. If we think that this is all that needs to be tackled then we will be wronged mistaken newer forms of infringement are to be dealt with.

The wide popularity of the use of Internet has brought in newer variety of violation of the rights of a copyright holder. If, till the other day, no one was paying heed to another person going through a book in a library or book shop, in the Internet environment one has to look out if his act of going through the text of a copyrighted material, known as browsing, is treated as infringement. Similarly, newer terms are in vogue like caching, linking, and framing to categorise infringing activities. Though these activities seem innocuous on the face of it, they have the potential to make a person liable for infringement. In the realm of traditional copyright law, libraries, archives which house the copyrighted work, were exempted from infringement of copyright. But in the Internet environment, the providers of such facilities - the Internet Service Provider - can be made liable for housing copyrighted work. The privileges given to them like fair use, implied license, and enjoyed by the public needs to be redefined in the context of cyberspace.

Another area where the traditional copyright law seems to be lacking in the age of digital technology is fixing up responsibility for violation of copyright. Since the Internet has made it possible for the infringer to conceal his identity, it hence raises the prospect of letting such a person go scot-free. The task of finding the culprit in such a case has become onerous. Adding to this chaos is the issue of finding a proper place to try the culprit and the difficulty of enforcing the judgement. This has led to a situation where cyberspace is seen as anarchy where no law applies. As the Internet provides the easiest way to take a dig at copyrighted work being reflected by the unhindered exchange of copyrighted music and other such works the courts have been flooded with litigation. The various judgements delivered by the courts are also constrained in doing justice to the litigants. The reason being what is fair use for the violator is infringement of copyright for the holder of copyright. This has presented a scenario where technological measures rather than legal remedies have come to the rescue of an owner of copyright. This is seen as the answer to machine is in machine<sup>1</sup> meaning the relative ease of digital copying and online distribution could be checkmated by applying anti-copying technologies. In doing so, the copyright owners could exercise *factual* control over what users can and cannot do with their works as opposed the *mere* right to control that copyright laws provide for.<sup>2</sup> But this approach is contested on the ground that the ability of technology to block uses that are provided for under traditional copyright law would put premium on technology thereby relegating law to the backburner. So we are facing a situation where the relative position of the right holder and user is witnessing changes and the balanced approach provided in traditional copyright law seems to be put to test in the digitized world. The importance given to the use of technological means to protect the work of a copyright holder and thereby giving little avenues for the users to exercise privileges provided for like fair use, exhaustion of first sale doctrine shows that copyright is being treated as a trade based right rather than a legal mechanism for the ordering of social and cultural life. By adhering to the view that technology can be the only means to guarantee rights to copyright holder we are going further from the primary objective of copyright, which is not to reward the labour of authors, but to promote the progress of science and other useful works.<sup>3</sup>

Hence, the need of the hour is to provide a proper balance between the rights of the copyright holder and that of the user so that the equilibrium is maintained in the digital

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<sup>1</sup> C. Clark, "The Answer To the Machine is in the Machine," in P.B. Hugenholtz, ed., *The Future Of Copyright In a Digital Environment*, (1996), pp.139-148.

<sup>2</sup> Kamiel J. Kuelman, "A Hard Nut to Crack: The Protection of Technological Measures," *E.I.P.R.*, (2000), pp.272-273.

<sup>3</sup> P.B. Hungenholtz, "Code as Code, or the End of Intellectual Property as We know it", *Maastricht Journal of European and Comparative Law* downloaded from [http\www.ivir.nl.publicaties/MAASTRIC.Doc](http://www.ivir.nl/publicaties/MAASTRIC.Doc)

environment. This equilibrium is needed all the more because the interests of the holder of copyright and users are inextricably linked to each other. If the creators of a work have interest in the ownership of the works they need wider dissemination of their works to gain benefit out of it. The Internet provides them the opportunity to widely disseminate their works and at the same time provides them access to information to new works. Similarly, users not only have an interest in access opportunities but also a sufficient level of incentive for the authors to produce material. These linkages need to be maintained as any disturbance in equilibrium would raise the prospect of causing harm to these linkages which would in turn lead to a situation where there would be no incentive for either the creator of work or the users thereby, making the proclamation the end of copyright in digitized era, a reality.

Therefore, International organizations and States have sought to address the issue of copyright protection in Internet. The two WIPO Treaties, the WCT and the WPPT deal with the various issues of copyright protection in the Internet. The two treaties were adopted after hectic deliberations in regard to finding a proper balance between the rights of creators and users of copyrighted works. During the Geneva Conference there were no dearth of instances showing that a shift in balance might take place. The developed countries tried their best to scuttle the process of finding a balance and advocated for more rights to the copyright holder. This approach was based on the view that in the digital era, concepts like fair use, first sale doctrine has little applicability. Secondly, they were of the view that users have to be made strictly liable for any act of infringement like making ephemeral copies in the Random Access Memory (RAM) of a computer. The bid to bring temporary reproduction within the purview of reproduction right provides a pointer in this regard. This apart, the move to provide strict control over Internet Service Providers, prohibiting use of devices having potential to infringe copyright thereby making manufacturers liable for infringing activities carried on by the help of such devices, are other such instances. These show that during the negotiation to adopt the WIPO Treaties, there was a move to place the holder of copyright on the high pedestal of protection and to do away with the genuine rights of the users. Though the adopted treaties provide a balanced approach, the views of developed states reflect an ominous trend and the need to stand against such initiatives in the future.

The initiative of the European Union provides ample evidence that the balance is going to be offset. The European Copyright Directive contains strong measures in favour of the copyright holder. It makes temporary reproduction as infringement of copyright. Secondly, the Directive declares that the use of technology defeating devices is illegal and follows the formulation that the manufacturer could be held responsible for the use of their manufactured devices in infringing

activities. In doing this it gives the copyright holder the right to control the activities of a user and proscribes certain conducts which were allowed in traditional copyright law.

The USA, through the Digital Millennium Copyright Act (DMCA) sought to provide more rights to the copyright holder vis-a-vis users. The DMCA represents the stand of the US on copyright protection in Internet. The strong legal measures advocated by the Act goes against the accepted norms of providing a balance between creators and users of copyrighted work. The DMCA emphasises legal action against circumvention of technological measure and prohibits use of devices to defeat the technological measure. This places a premium on technology as the means to protect copyright, and hence has implications for copyright law. Further, prohibition on the use of devices raises the question of survival of fair use and other privileges enjoyed by users. It grants the creators of copyright to monitor each and every activity of users and deviates from the notion that creators have only those rights guaranteed by copyright law.

The legislations adopted by developed states can be viewed as a pointer to the shape of things to come. Since they have provided the creators with enough space to protect his work and have limited the maneuvering capacity of users, they would bargain for the same at the international level. As these countries are witnessing legal battles fought in the courts, which are delivering judgements favouring the copyright holder, the tendency is for a high protectionist regime is on the rise.

So far as India is concerned, we can boast of a comprehensive Copyright Act providing a balance between the rights of different stakeholders. The new Information Technology Act comes as a breather for those concerned about the future of doing business on the Internet and gives a pointer for further legislation regarding the implications of Internet on copyright. India has not ratified the WIPO Treaties and the need of changes in the Copyright Act does not arise at this point of time. However, it is suggested that our copyright law makes provision for the safeguarding of the interests of service provider and takes an appropriate stand on the issue of circumventing technological measures. But in doing so, the equilibrium maintained between the rights of the creator and user need to be preserved.

The study is not an exhaustive one on the subject. Areas not covered by this study and which need further research are:

1. Finding jurisdiction in cases of copyright violation in the net having multiple parties in different states.
2. A comparative study of the legislations adopted by various States and the trend which has been developing in providing rights to both the creators and users of copyright work.
3. The options before the developing country in this milieu.



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