E

WIPO/INT/SIN/98/2
ORIGINAL: English
DATE: April 1998

THE REPUBLIC OF SINGAPORE

WORLD INTELLECTUAL PROPERTY ORGANIZATION

WIPO SEMINAR FOR ASIA AND THE PACIFIC REGION ON THE INTERNET AND THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with
the Ministry of Law,
the Attorney-General's Chambers,
the National Science and Technology Board,
the Singapore Productivity and Standards Board

and
the Singapore Trade Development Board
of the Government of the Republic of Singapore

Singapore, April 28 to 30, 1998

I. THE INTERNET AS A CHALLENGE FOR INTELLECTUAL PROPERTY PROTECTION AN INDIAN PERSPECTIVE

Document prepared by Mr. T. C. James, Under Secretary, Department of Education, Human Resource Development, India

The Internet system is spreading fast in India. Videsh Sanchar Nigam Limited (VSNL), a public sector undertaking responsible for providing all international telecommunication services from India to other countries, introduced Internet services on a commercial scale on August 15, 1995. Before then, specific groups had the privilege of accessing Internet, but the total number of users was under 10, 000. Today the number of Internet users in India is close to 150, 000 and is growing daily. The Internet has already caught the imagination of people. The demand for Internet connections in India, as per a survey conducted by the National Association of Software Companies of India (NASSCOM), is estimated to be as follows:

Year	No. of Connections
1998	450,000
1999	800,000
2000	1,500,000
2001	3,500,000
2002	8,000,000

The present number of Internet users in India may be a small fraction of the total Internet users in the world, but, as put by the Executive Director of NASSCOM in a recent article, "if the western world is riding high on the information superhighway, India has begun its attempt to be on the Net, by at least creating its own information super footpath."

With the growth of the Internet, issues of intellectual property rights (IPR) protection are also likely to come to the fore. As of now, the country is busy with infrastructural development for the spread of Internet so that the demand is met, and, within a few years, Internet reaches every nook and corner of the country. Development of high-speed national telecommunications backbone and provision of adequate telephone lines are priority issues. Nodes have been erected in over two dozen cities in different parts of the country to facilitate Internet services. With a view to enhancing access to this sophisticated and fast medium of communication network, the government has decided to permit private companies to provide Internet services. With the entry of private Internet service providers, very soon India should become a leading Internet user in the world, as it had happened in the case of cable television service. The increased use of Internet would mean a greater challenge to IPR protection than at present. While Internet is poised for a quantum leap in the country, it will be premature to suggest practical solutions to the intellectual property right problems of Internet, as experiential knowledge of such problems is very limited. Intellectual property rights issues are already there but they are more in the realm of theory than of praxis.

The copyright law is the most potent instrument presently available for tackling the IPR issues on the Internet. The Indian Copyright Act, originally enacted in 1957, was comprehensively amended in 1994. With these amendments, it has become a forward looking piece of legislation and the general opinion is that the amended Act is capable of facing the copyright challenges of digital technologies including those of Internet. By removing certain restrictive clauses and phrases, and by expanding the definitions of works like cinematograph films (motion pictures) and sound recordings (phonograms) to include such works in 'any medium' within their purview, the Act has adapted itself to the digital era. It, however, depends on how case laws develop when IPR issues of Internet are taken to the court.

One of the basic copyright issues in Internet is determining the border between private use and public use. Like all copyright laws of the world, the Indian Copyright Act also makes

a distinction between reproduction for public use and private use. Reproduction for public use can be done only with the right holder's permission, whereas a fair dealing for the purpose of private use, research, criticism or review is allowed by the law. This distinction gets eroded with the ability of an individual to transmit over the Internet any copyrightable work to myriads of users simultaneously from the privacy of his/her home and users being able to download simultaneously a perfect copy of the material transmitted, in their homes. Fading away of the thin line that divides the public and private territories, many feel, calls for a new set of norms in copyright.

The Internet has put on their heads some of the traditional concepts. A case in point is that of publishing. With the advent of the industrial revolution and the age of mass production, publishers of books and music had made their entry. They have become such a presence that writers could not think of a world without them. The Internet is a medium which, as distinct from books, removed the middleman between a writer and his/her reader. The author can put his/her work on the Internet and the reader can access it directly. If printing press had given birth to publishing industry, the Internet, by empowering every writer to be his/her publisher, has sounded a warning bell, if not the death knell, of that industry. This raises the question whether making a work available on Internet is 'publication' or not. According to the Indian Act, 'publication' for purposes of copyright means "making a work available to the public by issue of copies or by communicating the work to the public." This definition, by virtue of its non-restrictiveness, can be construed as covering electronic publishing and, thereby, 'publication' on the Internet. It may, however, take a few years before electronic publishing in India really makes a big mark.

Whether communication over the Internet is 'communication to the public' is still an unsettled issue. The Indian Act has an exhaustive definition of 'communication to the public.' The Act says, " '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 issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available." This definition is considered broad enough to encompass communication over the Internet within its fold. If the courts adopt this view, the Internet service providers in India will have a hard time sorting out copyright over the content of the Internet.

Distribution right poses another problem. Like in most copyright laws, in the Indian law, the distribution right also gets exhausted with the first sale. As of now, a student can freely sell a second hand textbook or a library can circulate among its members books it purchased. In the Internet, distribution gets entangled with reproduction since no copy can be distributed without reproduction.

The right of reproduction presents certain fundamental problems over the Internet. This arises out of the basic nature of Internet transmission. Reproduction takes place at every stage of transmission. Temporary copying (known as caching) is an essential part of the transmission process through Internet without which messages cannot travel through the networks and reach their destinations. Even when a user only wants to browse through, temporary copying takes place on the user's computer. Coverage of the temporary reproductions was a hotly debated issue in the World Intellectual Property Organization (WIPO) Diplomatic Conference of December 1996 and still remained inconclusive. When a reproduction takes place in the course of authorized use of the work and whose purpose is

solely to make the work perceptible or where the reproduction is of a transient or incidental nature, should it be restricted? In the Indian law, reproduction has to be in a material form but includes "storing of it in any medium by electronic means." Case laws are yet to clarify whether the reproductions taking place in the Internet communications come under the purview of the right of reproduction given by the law and until that is done, opinions will vary on temporary reproduction and permanent reproduction and on the legality of the temporary reproduction. It will be interesting to see whether the courts will introduce the concept of economic relevance of a reproduction to bring it within the purview of the right of reproduction granted by the Copyright Act.

Perhaps the most significant issue from the angle of copyright enforcement is that of liability. For one, there is the issue of liability for acts that take place in the course of transmission of a legal (as distinct from an infringed) copy of a work. As already mentioned, the issue depends a lot on the interpretation that the judiciary takes of various rights given by the law. In case the judiciary takes the view that reproduction, etc., that occur in transit are violation of a copyright, then questions will arise as to fixation of liability. Who is to be held responsible? The party who dispatches the work or the party who receives it or the Internet service provider? The answer will not be easy to find out. The other issue is of communication over the Internet of a clearly infringed copy of a work. The moot point in this issue is whether an Internet service provider be held liable for the copyright infringement made by a subscriber even though he is not aware of the subscriber's action. While describing copyright offence, the Indian Copyright Act makes the stipulation that the infringement or abetment of the infringement has to be made "knowingly" by a person. It is possible that by virtue of the expression 'knowingly' an Internet service provider, who may not have any awareness about the copyright infringement by the subscriber, may be absolved from liability and escape punishment.

This, however, raises another question. Even if the Internet service provider is not punishable under the Indian law, he may incur liability under the national law of another country. Since Internet is truly global and is no observer of national boundaries, how are we going to regulate this? The networks are spread all over the world and a message or information travels through any number of countries before it reaches its final destination. The Internet service provider may not have any liability in the country of origin and in the country of destination but may have liability in some country in transit. This is a truly global issue. In the seamless world of Internet, the enforcement of national IPR laws which are bound by territorial jurisdictions throws up issues not easy to solve. This is an area where there is an urgency for international harmonization of laws; otherwise the threat of liability in certain countries may compel the Internet service provider to scrutinize the material being transmitted for copyright clearance, and, thereby, delaying the whole process. This could make the World Wide Web a 'World Wide Wait,' as one author put it humorously. The attempt should not be to hamper the flow of information but to speed it up. Each major technological development means a paradigm shift and the Internet is no exception. New norms may have to be evolved to fix liabilities on the right persons; a facilitator of Internet service may not necessarily be an abettor of copyright infringement.

There are areas where differences in cultural perspective may have a bearing on the appropriateness of the material being transmitted over the Internet. Many literary, artistic and cinematographic expressions, which are accepted in the western society, may not be acceptable in more traditional societies like the Indian society. In the case of books, music, artistic pieces

and cinematographic films, a national government can exercise certain controls over them; even in the case of broadcasts and telecasts this is possible to a great extent. In the case of Internet communication how are we going to do this? It is not possible on the Net to have policing at the national boundaries. Controlling and filtering the information that flows through the Internet have many practical difficulties. The Internet is too large and amorphous for any regulation. When one seals off an infringing site, a hundred such sites may crop up in different places. The amount of information on the Internet is huge and located not in one country but all over the globe. It is not really feasible for any government to censor it. Censoring is possible when sources of information are limited. There is a major difference between the mass electronic media like television and radio, and the Internet. In the former, there is one broadcaster and several viewers or listeners, whereas in the latter, an enormous number of 'netizens' are inputting information and accessing it simultaneously. What kind of technical devices can regulate the complex matrix of Internet whose every user point is also a production point?

Even if it becomes technologically feasible to have control over bits and bytes traveling to and from a country, through a system of tollgates or gateways, the desirability of doing so in the Internet is open to question. It raises questions of privacy and brings us back to the issue of the distinction between public use and private use. Should governments control the cyberspace or is it a private space of the users? The Internet, as it has evolved, is the equivalent of participative democracy in the information world. In principle, every user has equal access to all material on the Net. So also, he/she can put in any material he/she wants to on the Net. It is a world that lets "hundred flowers bloom." Should this input-access freedom be limited by government control? Will it not be a restriction on the right to freedom of speech? On the other hand, should cultural and moral traditions of a country be allowed to be swept away in the chaotic overflow of Internet? Discussion on intellectual property right issues on the Internet cannot ignore these cultural and moral questions, as IPRs cannot operate in a cultural and spiritual vacuum. "The Internet has changed from a playground for like minded libertarians to a workplace and social space for millions" (Amy Herman). This would mean the rules of the game have to change, but that change should be gradual and the new norms should evolve over time. Be that as it may, the answers to the questions raised are not easy to find.

There are other smaller but important issues also. For example, the right over the domain names. Domain names are valuable commodities as substantial business is conducted on the Internet. As of now the domain names get registered on first-come, first-served basis, without going into the legal claim of the applicant over the name. This, perhaps, is not a desirable situation as it is apt to get misused. In the case of certain cultural and educational institutions with unique characteristics, use of their names as domain names by others may lead to confusion and may deceive customers. Whether trademark law can be applied to domain names and, if so, to what extent, needs to be examined. An alternative is to have a domain number system, but that has certain inherent deficiencies, as a number does not give any clue to the nature of the site.

The range of issues that Internet poses for intellectual property right protection makes one wonder whether copyright laws would be sufficient to meet the challenge or whether we should go for a *sui generis* system of intellectual property right protection. In fact, there is a universal trend to think in terms of *sui generis* forms of protection to meet the new technological challenges. Thus there have been designer laws for intellectual property in

industrial designs, plant varieties and in integrated circuits. Databases and folklore are in line for getting *sui generis* protection. While the copyright laws have, over the decades, shown much flexibility in accommodating new forms of creation, there still is much rigidity in them. The idea-expression dichotomy is central to the copyright doctrine and, hence, copyright does not protect the ideas, methods and functional characteristics. A *sui generis* form will naturally have a lot more flexibility in its scope, level and term of protection. But then it presupposes a willingness to experiment, a willingness to let the law evolve through a process of trial and error.

The Internet poses two basic challenges for an intellectual property right administrator: what to administer and how to administer. The first challenge will be met only when a general consensus is achieved over the IPR issues in the Internet. Some of the major issues are highlighted in the preceding paragraphs. The IPR administrator's special challenge is how to balance the rights of different players on the Internet like the content providers, the service providers, the access providers and so on. This has to be done without jeopardizing the free flow of information and at the same time ensuring that the genuine economic interests of the creators of intellectual property are not adversely affected. The IPR rights on the Internet are dependent on this. Once the IPRs on the Internet are decided, then the challenge for the IPR administrator is how to enforce them in the most cost-effective manner.

While there are no two opinions about protecting intellectual property rights on the Internet in the interests of creators, the enforcement of the rights over this medium is likely to be quite cumbersome given the highly sophisticated nature of the technological device. The enforcement measures are also likely to necessitate expensive and advanced electronic devices. After all, "the answer to the machine is the machine" and every new machine tends to be costlier than the previous one. Will the cost of the measures become so prohibitive that developing countries will get pushed out of the Internet? Will the intellectual property right enforcement on the Internet lead to a division of the world into the information rich and the information poor? These kinds of questions will have to be addressed when one considers the IPR challenges of Internet.

The Internet is still in a nascent stage in India. Most of the issues raised in this paper are possibilities and have not come up in practice. It is, however, necessary to look into them in depth and find solutions in the interest of faster growth of the Information Superhighway without adversely affecting the interests of copyright owners. What we have to look for is the golden mean between the public interest and the interest of the creators and disseminators of copyright works. At the same time we have to ensure that the new IPR norms will not lead to a widening of the chasm between the developed and the developing countries.

[End of document]