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NOVEL CHALLENGES PERTAINING TO INTELLECTUAL PROPERTY LAWS DURING AND POST CORONA DUE TO DIGITALIZATION AND VIRTUALIZATION

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Abstract

Innovation and creativity are amongst those essential characteristics which distinguish human beings from other species

– By Authors

COVID-19 was unexpected and swiftly spread; there was no opportunity for preparation. To keep the entire system functional during quarantine, the digitalisation was only option. Digitalisation during and after COVID-19 increased reliance on online platforms. Due to a lack of anticipation and preparation, the system needed to be better equipped to be implemented meticulously, properly, effectively and in an organised manner. The offline library and resources were not available. Online resources are very costly for genuine individual users, given the scope of availabilities of infringed copies of resources available on several social media and websites free of cost. These all make the user addicted to using the infringed copy. Now, post-COVID, these all are creating giant problems and loss to the owner of the resources.

Not only academic resources but other resources like movies, videos, lectures, web series etc. are easily available on the online platform. The investigating officers also face several issues in tracking the sources and real infringers due to a lack of effective mechanisms. When the administration blocks any site, the infringer creates a new mirror site with similar content by manipulating a few alpha numerous terms in the domain name. To tackle this hardship, the judiciary has developed the mechanism of dynamic injunction, by which the judicial orders the

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injunction on all existing and future mirror sites in a single order. However, this needs to be implemented regularly in the judiciary. There are more problems also which need to be tackled. Another new trend is sending fake legal notices to extort money from naïve online users. All persons cannot be legally updated and have legal knowledge. How to tackle these problems and take control of the breaches of the digital platform? How can we make this digitalization more effective? These are the problems which will be discussed in this paper.

Keywords: IPR Post-Covid; Digitalization; Mirror Site; Fake Legal Notice, Dynamic Injunction

Introduction

Innovation and creativity are among those essential characteristics which distinguish human beings from other species. As we know, the ability and skill to speak, hear, taste, see, the feeling of hunger, pains, etc., are inherent and God-gifted to human beings. Similarly, the sense and ability of innovate, think, absorb, analyse, express, etc. are also inherent and god-gifted, which starts developing at the stage when human beings are in the womb, i.e., even before birth. The evolution of humans from Australopithecus afarensis to Homo sapiens is due to these inherent abilities and senses only.³ So, by being human to get the protection of innovation, creation and these abilities are human rights to every human being. The positive enhancement, motivation and promotion of innovation, creation and expression are the human duty toward the society consisting of human beings.

The novel coronavirus is not only a novel virus but also brings down novel challenges in this contemporary time. Novel in the sense of new and unfamiliar challenges. Challenges are novel for the health or economic sector and almost all sectors, including the legal industry. In this article, the author will ponder one of the novel challenges in the legal field of IPR infringement due to digitalisation and virtualization.

Social distancing is only the most effective tool for the containment of corona plight. Which subsequently compels the whole system to one and last alternative i.e., digitalisation and virtualisation. This was the best amongst all the worst alternatives available to keep the function of the whole system active and efficient as much as possible. However, due to a lack of anticipation and preparation, the plan needed to be better equipped to be implemented

³ J Anat, *A Natural History Of The Human Mind: Tracing Evolutionary Changes In Brain And Cognition*, National Center for Biotechnology Information, (Jan.13,2022 09:20 AM) https://www.wipo.int/wipo_magazine/en/2018/si/article_0005.html.

meticulously, appropriately, effectively and organised. Due to this unorganized *modus operandi*, this best alternative (digitalisation) is schlepped with many irresistible evils. Due to the lack of library access and authorized digital supply of resources to scholars, and the giant violation of Intellectual Property rights to owners at the mass level in the domain of Copyright and the Internet. The tendency to unauthorised access and sharing of e-books, PDFs of books and resources, multimedia work, and cracked software by creating rogue, cracked and pirated web portals and apps enhanced to the manifold. These are all available on social media, YouTube, local websites etc... The unforeseen, unprepared and precipitated virtualisation and digitalisation elevate the demand for digital resources but create the scope of availabilities of these all-unauthorized digital resources, either free or at a minimal cost. These addictions to using unauthorised resources are enhancing, and once they prevail, it will be arduous, even impossible, to control or deplete by the present system. In a nutshell, the issue of data piracy and other IPR violations on digital platforms is sky-rocketing and needs immediate attention with strict laws with strict implementation and *modus operandi*, Otherwise, it will be a great hindrance and fatal for innovation and creation in human beings because as earlier also mentioned that the innovation and creation are amongst those important characters which distinguish human beings from other species.

Intellectual property rights play a crucial role in international trade in the modern period. In the present digital age, there is a greater possibility of creative ideas being taken without the permission of the author permission. The necessity for robust IP legislation contributes to the entire economy of the particular state. For their economic benefit, people will strive to copy a unique concept or the creativity of others. As a result, it is critical to protect IP assets before a third party infringes upon them.⁴ IP protection is available to anybody, regardless of the kind or size of their firm. As a result, proper IP protection action must be taken after analysing the company's needs and conditions. As time passed, the significance and value of these inventions became clear. The commercial aspect began to play a significant influence in these compositions.

Novel Challenges in Academic and Research Sector: Post digitalization and virtualization

As already discussed, the novel Corona is not only a novel virus but brings downright novel (new and unfamiliar) challenges in this contemporary time also. Social distancing is only the most effective tool for the containment of corona plight. Which subsequently compels the system to

⁴ John C. Doyle David L. Alderson, Lun Li, Steven Low and Ors., *The "robust yet fragile" nature of the Internet*, National Center for Biotechnology Information, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1240072/>.

virtualize the academic system. Virtualization and digitalisation were best among all the worst alternatives available not only for edifying students but also for protecting the careers of vulnerable students during the era of digitalisation. But as we already discussed, due to lack of anticipation and preparation, the system needed to be better equipped to implement meticulously, properly, effectively and in an organised manner. Due to this unorganised *modus operandi*, this best alternative is schlepped with many irresistible evils. Due to the higher cost and lack of library access and authorised digital supply of resources to scholars, its upshot is the giant violation of the Intellectual Property right to owner at the mass level in the domain of Copyright and internet, Multimedia Work, Software, social media, etc.

So, challenges are novel for the health or economic sector and almost all sectors, including the legal and academic sectors. But if we plunge into the whole digitalization and virtualization process, it will be vast. So, in this, we are cramped to dwell only on new challenges of IPR infringement due to the virtualization and digitalisation of only some sectors like the academic and legal systems.

Effects in academic sector

Due to the higher cost and lack of library access and authorised digital supply of resources to scholars, almost all institutions, including reputed institutions and their scholars, are bound to unauthorised supply of scanned and PDF copies of books, paid journals, website access, print out and other resources either in excerpt or in whole. Also, the vast numbers of paid books, resources, newspaper journals etc., are easily primarily available on local websites in pdf/digital formats, which all are gross violations of copyrights at a mass level and lead to immense financial loss to owners or creators of those protected documents and resources.

Recorded lectures of reputed professors and faculties of renowned institutions are being shared unauthorizedly on social media, primarily through telegram, local platforms and other sites like YouTube, Google Drive etc. Almost all popular newspapers are available on local websites free of cost without the permission of the publisher in an unauthorised manner.

Due to the lack of resources and libraries available to the scholars and paucity of money and also due to the non-providence of e-library (as there was no preparation as situations were so unanticipated and sudden). The tendency and culture of using copied or cracked software are emerging agilely. The cracked key and copied version of desired and even costly software are

available easily on many local websites, which causes more significant losses to the bona fide owner. The ways of cracking, copying, using, etc., are also available on websites, especially on YouTube.

These addictions to using unauthorised resources are enhancing, and once they prevail it will be arduous, even impossible to control or deplete

So, digitalization and virtualisation opened the windows of a giant range of violations of copyrights to media, entertainment, communication, advertisements and education. This easy access to resources is a significant concern of copyright infringement. Copyright is one of the most important Intellectual Property Rights. Due to digitalisation and virtualisation, it becomes easy to copy, replicate and sell the creation of the owner without paying or taking authorization from the owner or creator. It is arduous and onerous to trace and detect these infringements.⁵ This has posed a giant menace to the rights of the copyright owners or creators. Special attention is needed to some more special strict laws with strict interpretation for the protection of these rights and the protection and stimulation of creativity and innovation. Otherwise, it will be a great hindrance and fatal to innovation and creation in human beings. As already said, Innovation and creation are essential characteristics distinguishing human beings from other species.

Judicial challenges

As we know, the sudden outbreak of novel coronavirus took the entire globe by storm. The raucous it created, and the aftermath it left on the economy and social life were not just enough; it also impacted the working of government organs. To be more specific, here we will understand the impact of a pandemic on the Judicial functioning of Intellectual Property Cases. Judicial functioning is relevant to be discussed in the IPR cases because of the lack of intellectual property creation and innovation in India. If recent data are to be believed, India and other third-world countries rank poorly in the intellectual property index and contribute significantly less to the global market in terms of innovation. The slow and ineffective judicial interference in such cases could further lead to the dipping of IPR development in India.

The present virtual court regime has temporarily replaced the physical court system. If critics are to believe, the virtual court system is the best possible alternative one could ask for in place of the

⁵ Frederick Mostert, *The Global Digital Enforcement Of Intellectual Property*, World Intellectual Property Organization,, https://www.wipo.int/wipo_magazine/en/2018/si/article_0005.html .

physical court system. However, the present court system poses likewise apprehension on the quality of arguments presented and the justiciability of the verdicts passed, even if we choose to talk specifically about the IPR cases. Another matter of concern is the judicial delay. While the courts were suspended during the first wave, the period of limitation to file any necessary pleadings, appeals or applications was threatened to expire. However, the dates were extended for the same.⁶ There were IPR suits of commercial relevance, which required urgent hearings. The slow-paced virtual hearings need to be more effective for such critical matters. The copyright cases where infringement is done on a more significant note seek urgent passing of injunction suit. Also, the date of interim orders, other injunction suits or arrangements are extended indefinitely. This is a matter of concern and requires urgent attention because it is causing irreparable loss to the concerned parties. The plaintiffs who seek damages in the trademark and copyright matters are at a massive failure because of the lingering coronavirus crisis.

The quality of verdicts passed and orders enforced is another matter of concern. The lack of technical efficiency and an inevitable circumstance to which professionals were unaccustomed has left the fraternity in splits. Many practitioners expressed their dissatisfaction with the new virtual court regime.⁷ No proper time slot is allotted, and the frequent disconnection makes it difficult for IP attorneys to present their cause proactively. Further, the absence of physical appearance has resulted in an indifferent and apathetic court culture that cannot comprehend and introspect the arguments from both parties.⁸ It is no news that complex copyright infringement cases and trademark usages require due diligence and meticulous presentation of minute facts, which is a deciding factor in such cases. The virtual court culture needs to improve that level of court interaction.

The increasing trend of choosing alternative dispute resolution may benefit simple disputes related to IPR matters. Still, the complex issues that count for most pending IPR cases cannot be judiciously resolved by the virtual ADR hearings.

Another disadvantage is the security concern owing to the alarming rise in online cybercrime cases. The Indian courts are using third-party platforms like Vidyo, Cisco, Webex etc., keeping

⁶ In Re: Cognizance For Extension Of Limitation, (MANU/SC/0946/2021).

⁷ Varij Sharma and Jyotika Thakur, *India: Covid-19 and the Revamping of the Indian Legal System*, Mondaq <https://www.mondaq.com/india/operational-impacts-and-strategy/1068670/covid-19-and-the-revamping-of-the-indian-legal-system>.

⁸ Ibid.

the privacy and confidentiality of data shared at risk.⁹¹⁰ Data, facts and product procedures are something crucial for IPR-related matters. The numerous innovations, inventions and various literary and artistic works seeking copyright or trying to get damages out of the infringement matters are at higher risk. The virtual hearings for matters related to trade secrets involve sharing some minute and crucial confidential matters, which are exposed to higher chances of getting into the public domain. The copyright matters are again at the risk of meeting the same fate.

Next in a row is the challenges faced at the global level regarding IPR matters. The urgent call for TRIPS waiver for mass vaccination around the globe, pending global suits for patent and trademark registration of vaccine, splurge of competing products and ads related to coronavirus prevention have brimmed the international media. Many believe that waiver is not a way to deal with the current situation as it would only lead to duplication of products and manufacturing of ineffective products due to a lack of technical know-how. Also, the private manufacturers and business world are working relentlessly and diligently to manufacture effective vaccines and other practical stuff, and waivers could only discourage such initiatives. Others believe that the IPR restrictions will hamper the mass vaccination drive. The WTO dispute settlement body and its members are split over deciding all such matters.

So, our judicial system can only skip this crisis and the alarming need to reschedule and resettle the mechanism of providing justice, but the challenges are in hoards. Our judicial system is already grappling against the odds with poor connectivity, techno-inefficient staff lines and a lack of proper guidelines about the virtual filing of applications and suits.

Menace of fake legal notice for infringing IPR by unauthorized person to extort money

Another major challenge the judiciary faces is the increasing social media fraud in the name of copyright infringement. While most of the online frauds are spam-based, like money fraud, bank account fraud, and online gift fraud, there is another kind of media fraud, which is not a regular one. It looks like a legal notice warning the users over copyright infringement¹¹ and is an example of a case where the law itself is used as a weapon for malice. Such fake infringement

⁹ Lalltaksh Joshi, *Courts Adopting Video Conferencing: A Welcome Change*, Live Law <https://www.livelaw.in/columns/courts-adopting-video-conferencing-a-welcome-change-154488>.

¹⁰ Circular for Creation of Login ID-VIDYO Application for Video Conferencing, District and Sessions Judge, Tis Hazari Court, Delhi, <https://delhidistrictcourts.nic.in/Circulars/March20/8aapril.pdf>.

¹¹ Cyber Crime and Copyright: How Hackers Are Using False Infringement Notices as Social Media Scams, *The National Law Review*, <https://www.natlawreview.com/article/cyber-crime-copyright-how-hackers-are-using-false-infringement-notices-social-media>.

notices aim at hacking one's social media account and corrupting their system, fetching personal and bank details of an individual. Sometimes it also defraud money by creating fake terror in the minds of law-illiterate users for the strict and stern legal action. These social media scams are so severe that they look like an original notice. In a few cases, users could be directed to the real Instagram copyright section to avoid suspicion. The increased social media engagement because of the COVID-19 times has only escalated such violations, and now it is up to the judiciary on how better they could tackle it.

Dynamic injunction: A judicial tool.

As in the contemporary era, especially during the coronavirus period, social distancing is only the most effective way to curb the coronavirus pandemic. Digitalization is the best amongst all worse alternatives left to almost all systems including the private corporate, government machinery, legal education system, to perform daily work, duties, chores, etc. However, due to lack of anticipation and preparation, the plan needed to be better equipped to implement it meticulously, properly, effectively and in an organised manner. Due to this unorganised modus operandi, this best alternative is schlepped with many irresistible evils. So, the novel Corona is not only an unknown virus but also brings down new challenges in this contemporary time. Challenges are novel for the health or economic sector and almost all sectors, including the legal industry. Due to this tendency and culture of using copied or cracked software, websites are emerging agilely. In other words, the issue of data piracy is skyrocketing. To curb data piracy, the judiciary has developed the scope of Dynamic Injunction in the case of *Tata Sky Ltd. v. Youtube Llc and Ors.*¹² and *Utv Software Communication Ltd. ... v. 1337X*.¹³

Generally, in the case of digital piracy, the court granted an injunction to block the website to protect the rights of the content creators. However, that action could be more effective in protecting the rights of content creators because the infringer quickly finds an alternate way to achieve its goal. They adopt the way of rouge websites. When the ISPs block a particular URL, a mirror link is created by which anyone can access that blocked URL. The exact contents can be accessed easily in another way. This eludes the purpose of website blocking injunction, ultimately the rights of creators remain unprotected. So, this giant infringement needed a new and effective modus operandi for the court to curb the menace of data piracy. One of the modus operandi evolved by the court is of the dynamic injunction. This is the most contemporary way to curb this

¹² Tata SKY Ltd. v. Youtube LLC and Ors. (MANU/DE/2035/2016).

¹³ Utv Software Communication Ltd. ... v. 1337X. (MANU/DE/1244/2019).

jeopardy of resurfacing pirated websites. It is an ineludible tool for the issue where the blocked website may reappear, or give a redirecting website or where any new websites with minor modification or by adding one alphanumerical letter/number to the URL name and with the same contents an identical website gets created by the infringer. The Singapore High Court also coined the term dynamic injunction in locus classicus of *Disney Enterprises, Inc. v. M1 Ltd.*¹⁴. In which the court granted the dynamic injunction to the copyright owner of many cinematographic films.

The dynamic injunction covers blocking not only the primary websites which infringe the rights but also all subsequent and existing mirror, rouge, resurfaced, and other websites which are identical and contain similar infringed contents relating to the subject matter of the case. In this, the owner/creator notifies the ISPs of all the additional domain names/URLs with identical contents or gives access to the same websites, subject matters of the prime injunction. So, it is the dynamic way to curb the all-stratagem alternative used by the infringer(s). So, digitalisation and virtualisation opened the windows of a giant range of violations of copyrights to media, entertainment, communication, advertisements, digital piracy, etc. This digital piracy is a great concern, especially for copyright infringement. Copyright is one of the most important Intellectual Property Rights. Due to digitalisation and virtualisation, it becomes easy to copy, replicate and sell the creation of the owner without paying or taking authorisation from the owner or creator. It is arduous and onerous to trace and detect these infringements. This has posed a giant menace to intellectual property rights. Special attention is needed to some more special strict laws with strict interpretation for the protection of these rights and the protection and stimulation of creativity and innovation. Otherwise, it will be a great hindrance and fatal to innovation and creation in human beings. Innovation and creation are among those essential characteristics which distinguish human beings from other species. The scope and application of dynamic injunction is in intense need of enhancement and improvement with an adequate legal backbone.

¹⁴ *Disney Enterprises, Inc. v. M1 Ltd* (MANU/SGHC/0009/2018).

Conclusion and Suggestions

During the coronavirus plight, social distancing was the best and most effective mechanism to preclude the mass population from the spread of corona. The prolonged duration compels the entire system to adopt the digital *modus operandi* to keep the system in the process as well as possible, especially for the academic, research and legal sectors. But, the unforeseen, unprepared and precipitated virtualisation and digitalisation enhance the demand for digital resources. But, due to the availability of pirated and infringed versions of the resources on various websites and social media like telegram, WhatsApp, YouTube etc., the tendency of infringing the IPR has been intensified to manifold. The Xerox, pdf, pirated versions of books, resources, newspapers, apps, software, and videos are circulated on various platforms, which upshot the enormous economic loss to the owner of the contents and the giant violation of their IPR at the mass level.

The dilemma of the legal sector is that there is great hardship in tracing the actual infringer and sources, and the arduous process of legal proceedings is another big challenge. Traditional legal proceedings like injunctions and specific proceedings need to be fixed. Suppose the injunction is granted against infringement by the same or the other person. In that case, similar content is shared on the mirror website or through other channels and platforms. In most cases, the infringers are in vast numbers and at the mass level, initiating legal proceedings against the issue is tough. Another major challenge the judiciary faces is the increasing social media fraud in the name of copyright infringement. The fake legal notice is sent to legally illiterate users for the infringement of IPR by any third party by hacking the social media accounts to defraud amounts.

So, there is a vital need for new, modern and more technical law and legal machinery to tackle this problem. The judicial creation is like a dynamic injunction, and other technical *modus operandi* needs to be brought into the regular legal process. To protect innovation and creations, there is an urgent need for strict laws with strict implementation to handle the present situation.
