



I P BULLETIN

Vol. II (02), July-Dec 2021, pp. 12-22



COPYRIGHT INFRINGEMENT IN CYBERSPACE: SCRUTINIZING THE PROSPECTIVE PROGRESSION

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INTRODUCTION

The past century has witnessed various inventions that has changed the landscape of the world and has helped people perform their task with better efficiency and effectiveness. Either the invention of the computer, or the mobile phone, technological development has created a better platform to transform the lives of the people. But, among all, one invention that stands apart from every other invention is arguably the internet. The internet services has helped people form a better communication and enhanced lifestyle across the borders. Either buying of groceries, or availing medical services, everything is just a click away. Further, internet has provided an august platform for artists to showcase their talent and draw attention towards the innovative and insightful ideas of the people. But, looking towards the other side of the coin, the widespread use of internet has also created a grey market where a product or any material could be copied and replicated, thus compromising the originality and rights of the owner. The massive outreach of internet services has made an original product vulnerable as it can be illegally copied and used to bleed out revenue from the owner. For instance, a song uploaded by any singer could be copied and re-uploaded upon various other platforms. Not even restricting the fraud upon internet services, the song could be copied in hard disks or CDs and then sold to the people to create illegal revenue and damage the intellectual property rights of the owner of the song. Increase and development of technology has helped people live with a better lifestyle, where machines and technological advanced programs have enhanced the

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efficiency of their work, but it has further added fuel to the issue of infringement of copyright in the digital environment. Thus, an amicable solution needs to be adopted to stop the illicit relation of internet and intellectual property rights, which dents the revenue of the owner and infringes its rights.

INFRINGEMENT OF COPYRIGHT OVER INTERNET

The internet has been a boon for many people, but a bane for copyright owners. Earlier, copyright infringement was afflicted by plagiarising the material of the owner, and then selling it at a lower rate in the market. This dented the revenue of the copyright owners as the plagiarised product might be sold for relatively lesser price than the original product, thus reducing the revenue of the owner. Not even printed materials, photographs and newspapers can be copied and sold in the grey market. But, as mentioned before, the introduction of internet has added much fuel to the already herculean problem. With as many as 4.66 billion or roughly 60 percent of the population of the globe active on the internet, copyright infringement has become more rampant than ever.² For instance, a song when uploaded on internet gains a lot of viewership during first few days of uploading it. But, copying and re-uploading of the song on other or same platforms can drastically deter the revenue which could have been generated from the legitimate means.³ The following is just a narrow description of copyright infringement through internet, as modern forms of internet infringement can be through framing, linking, caching and many others. Among the modern type of online copyright infringement, framing and linking are the most prominent kind of infringement that harms the resources and revenue of the copyright owners.

WHAT IS FRAMING?

Framing is a process wherein the user is able to visit the contents of a particular website while it is framed to any other website. A website can be divided into several frames or sections, where information can be provided to the users. Framing is a common practise in website creation and content surfacing assisting in providing different kind of information to the user under on the same web page, but is paradoxical to the theory of copyright.⁴ Supposedly, if A

² Joseph Johnson, *Global Digital Population as of January 2021*, Statista (Feb. 23, 2022, 01:15 PM), <https://www.statista.com>.

³ Debbie Egel, *Copyright Infringement in the Music Industry*, Symphonic Blogs (Feb. 23, 2022, 03:45 PM), <https://blog.symphonicdistribution.com>.

⁴ Lavanya, *The Concept of Framing*, Legal Service India (Feb. 25, 2022, 02:00PM),

develops a website dedicated to the availability of slots of covid vaccines in its neighbourhood, and in its website the information is provided to the user through a frame which connects it directly to the government portal. Now, the information provided to the user shall be through the government portal, but due to framing of the same it would be received to the user through the website of A. Though the process of framing is technologically gleaming as it provides different kinds of information to the user under the same web page, but the process hinders the user from visiting different web pages, thus depreciating the revenue of the web pages.

Framing is a common practise which is followed everywhere around the globe. The process is also not an impediment if permission of framed web pages is sought before being framed. While adjudicating the case of *Washington Post Corporation v. Total News*⁵, the southern district court of New York struck down the practise of framing. In the present case, Total News, a website providing news to the user framed different news articles over its web pages without seeking the permission of the same. The court while dealing with the issue stated that the following was blatant infringement of copyright and must be prohibited to protect copyright owners.

WHAT IS LINKING?

There are several ways through which information can be transmitted to the user. Apart from framing, linking is one of the prominent ways of providing information to the user. While surfing through the internet one may come across hyperlink texts which transmit the user to any website or portal.⁶ The following transmission is possible due to the process of linking. Linking can be of two types- surface linking and deep linking. Surface linking is providing the access of another webpage through the web page of the one, accessed by the user. Whereas, deep linking refers to providing direct access to the internal page of a website, through another web page. Surface linking is providing direct access to the web page but deep linking bypasses the web page and provides access straight away into the internal page of a website. Links are often highlighted or attractive texts appearing on the website which form a quintessential part of the internet services. They provide easy access to different source of information and put together the internet into an addictive and engaging platform.

<http://www.legalservicesindia.com>.

⁵ No. 97 Civ. 1190 (PKL).

⁶ *Linking to Copyrighted Material*, Digital Media Law Project (Feb. 25, 2022, 07:20PM), <https://www.dmlp.org/>.

Though surface linking may not be considered a muddle as it only provides links to the web page of another websites, but deep linking complicates the issue as it transmits the user into the internal web page of another website. For instance, a user may look for cameras to buy on the internet.⁷ While searching for it the user may come across several websites which offers information about the same. Now, surface linking of any of the website may take the user directly to the user to the page of the website offering information of different cameras, but deep linking the website shall take the user directly to a specific product or a specific set of product, bypassing the web page of the website offering information on cameras. The revenue over internet is availed by calculating the amount of traffic received over the website. Surface linking of a website shall not hinder the traffic received on the website; rather it shall help in increasing it. But deep linking a web page shall drastically hinder the traffic received on the website, thus impairing the revenue.⁸

Several countries has strictly dealt with the issue of deep linking where it has been frowned upon and termed illegal. While dealing with the case of Sky v Reddit, the Court of Session of European Union prohibited the use of deep linking. In the present case, Sky owned an art channel, whose links were provided by a user on Reddit.⁹ Though Sky had itself uploaded the content online on its application, the court stated that the material was not free and open for use, since the app required the user to accept the terms and conditions of the app, and thereby access the material. Thus, providing links of the app over Reddit was blatant infringement of copyright of the material uploaded by Sky. The following was termed as infringement since the traffic or revenue which was supposed to be generated through the app, was first provided through Reddit. Thus, in a way, Reddit was diverting the traffic from their application to another, which legally should have been diverted provided to Sky. Further, in Warner & Sony Music v. TuneIn, the English Court of Appeal put forward that providing link of music to the public through radio channels was also infringement of copyright. In the particular case, Warner & Sony Music sued TuneIn, an online radio aggregator, as the latter was providing links of music to the users without any permission from Warner & Sony Music. The court stated that TuneIn should provide for license fees before providing links as though the people

⁷ Himanshu Sharma, *Legality of Metag-ing, Linking and Framing*, Mondaq News Letters (Feb 26, 2022, 07:40 AM), <https://www.mondaq.com>.

⁸ Richard Stim, *Linking, Framing and Inlining*, Nolo (Feb 26, 2022, 10:20AM) <https://www.nolo.com/legal-encyclopedia/linking-framing-inlining-30090.html>.

⁹ Sky UK Ltd. v. Alex Cherrie, Court of Session CSOH 36.

of UK were acquainted that the music of Warner & Sony were accessed through the links of TuneIn but, anyone from foreign country shall not be acquainted of the same, which would result in crippling the traffic and harming the generated revenue of Warner & Sony Music.¹⁰ The following judgment was made on the lines that TuneIn was providing links of music and thus extracting revenue which belonged to Warner & Sony Music. The user used to access music through TuneIn and not from the official website of Warner & Sony Music, which ultimately reduced the traffic on the websites of Warner & Sony Music.

LIABILITY FOR INFRINGEMENT OF COPYRIGHT

The liability of infringement of copyright is also a major issue in online infringement. Reading section 14¹¹ and 51¹² of the Copyright Act concludes that reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public could amount to copyright violation. But ascertaining liability in an online copyright infringement is a tricky business since the information or the copyright work is not reproduced rather transmitted to the public through a link or a frame. Such as, in the case of framing the owner of the website never reproduces the copyrighted material available online nor produces any pirated version of the copyrighted information, rather it provides an invitation to visit the original website through the frames of its own website. In this scenario, the user is the only person who copies the product but is innocently unknown of this fact that the information is provided through different browsers.¹³

But, the process of framing might be a violation of copyright according to section 14(a) (vi) of the Act, as the following section mentions about the right of adaptation only to the owner of the copyrighted work. During framing, the original website's components are changed to the framed website, and hence the final components of the framed website are different from the parent, i.e. the framing website. Thus, difference or adaptation of the copyright product shall infringe the copyright of the owner. Not even statutory rights under Section 14, framing even compromises moral rights of the owner of the copyright. According to Section 57(1)¹⁴, the author can claim ownership over its work, but framing compromises the ownership of the work

¹⁰ [2019] 11 WLUK 6: LTL.

¹¹ Copyright Act, Section 14.

¹² Copyright Act, Section 51.

¹³ Astrid Arnold, *Linking & Framing- When Does it Infringe Copyright*, Mondaq News Letter (Feb 26, 2022, 08:00PM), <https://www.mondaq.com>.

¹⁴ Copyright Act 1957, Section 57.

as the user is never acquainted about the owner of the source of information. Unlike linking, where the URL of the website changes after browsing through the link, framing does not change the URL of the website, thus it is hard to trace the owner of the information.

Similarly, the process of surface linking shall not be a concern for infringement of copyright, but deep linking needs to be addressed as it hinders the traffic of the website which results in loss of revenue to the website. Again, looking with the lens of Section 14 and 51 would portray deep linking not as reproducing any copyrighted work but as transmitting the information to the user. It is ultimately upon the discretion of the user to access the information and dive into the web of internet services. Despite the drawbacks, it would be worthwhile to mention that linking helps in engaging the user and communicating the copyrighted work to the people. As per Section 2(ff)¹⁵ of the Copyright Act, communication to public refers to “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 work regardless of whether any member actually sees, hears or otherwise enjoys the work so made available.” The following definition may be extended to linking as it helps in communicating information to the public through the means of display. But, the situation complicates during the process of deep linking as on one hand it is essential in dissemination of the information, but on another it infringes the copyright of the owner.¹⁶

The outcome of the judgment from UK and US makes it evident that the process of deep linking has been frowned upon as it deters the revenue of the owner of the website, but the situation is not clear in India. Though warning regarding copyright infringement can be added to the websites, but it shall be of no avail until the user is not aware of the online infringement. Further, realizing that the final consumption of the information is enjoyed by the user makes the situation even worse as the user is benefitted with quick and easy access to information, transmitted either through framing or linking. Even the present laws concerning copyright can be extended to prevent online infringement, but for that infringement needs to be addressed to the court. Since the user is not aware of the kind of infringement prevailing over the internet only multinational companies with tonnes of turnovers address their concern to the court. In India as the matter never reaches the court, the jurisprudence revolving around the present issue

¹⁵ Copyright Act 1957, Section 2.

¹⁶ Raman Mittal, *Online Infringement Liability*, Vol. 46, Journal of Indian Law Institute, 288, 305-312 (2004).

has not yet evolved. Also, such as framing and linking, there are a few other form of infringement such as caching and inlining which are yet not explored in detail by the judiciary or any other international forum. The continuous rise in technology also opens the gate for any other and new form of infringement which may harm the rights of the author. With the rapid development in technology, information can be transmitted over the internet through any other means. Perhaps, the recent development of metaverse proves that internet is a vast ocean with change as the only constant. With all these development of technologies, the ways in which infringement can be afflicted seems non exhaustive. Thus, the dilemma still covers the air over online infringement of copyright.

INTERNATIONAL CONVENTION VIS-A-VIS COPYRIGHT INFRINGEMENT

Several international conventions have been adopted to cater the issue of infringement of intellectual property. The protection of intellectual property rights is not only needed, but also a necessity. The original work of an author needs to be protected to prevent any kind of loss of revenue to the author and also to promote originality and creativity. But, the territorial nature of copyright law makes it difficult to prevent cross border infringement of copyright. Bilateral agreement and several regulations among countries needed to be strengthened to prevent any kind of cross border infringement to the author. Seeking a uniform system for preventing the same, Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) was adopted in 1886 which ensured that the rights of the authors were well protected in the signatory countries. Apart from Berne Convention, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) was also adopted in 1961. The two conventions revolved around the basic need of protecting the artistic work of the author.

With the rise in internet services, the entire world is now turned into a global village where a person can effectively communicate with another person, while both being miles apart. But, as established before, rise in internet services further triggered the rise in infringement of copyright. Technological enhancement and increase in commercial development has further fuelled the already prevalent problem of online infringement of copyright. With the last amendment in the Berne Convention dating back to 1971, the conventions seem not only outdated but also futile as no regulation explicitly relates to infringement in the digital environment. Thus, two new treaties, i.e. WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT) were enacted to culminate online infringement.

The two treaties enumerate several provisions from the Berne and Rome Convention, while also adding significant provisions to cater to the “digital agenda”. Such as, the right of reproduction of work is incorporated as Article 1¹⁷ in WCT and Article 7 and 11 in WPPT¹⁸, where the same is derived from Article 9 in the Berne Convention. On the other hand, the WPPT provides for the same right of reproduction of the work as Article 7 and 11 of the Berne Convention. Though the scope and application of the right of reproduction of work is not explained in the treaties, but the statements rolled out in the conferences held makes it clear that the reproduction rights are also available in the digital environment. Apart from right of reproduction, the treaties also mentions about the right of transmission and distribution. One of the most quintessential features of the treaties is that it provides exemplary right of transmission of original work, explicitly to the author. The WCT, as well as the WPPT provides the right of transmission of work exclusively to the author, which was lacking in the Berne Convention. While the Berne Convention only catered to cinematographic works, Article 6(1) of WCT entrusted the right of distribution of the work only to the author. Further, Article 6(2)¹⁹ also provides that rights of the distribution can be exhausted by the author in any legal and competent way. Thus, the treaties are fully equipped with different rights to protect the work of the author in digital environment.

ISSUE OF JURISDICTION

Internet is a vast ocean of content and material which can be accessed from anywhere in the world. The penetration of internet services is increasing every day since as many as 4 lakh²⁰ new users are added each day to the captivating web of internet services. But, the vast ocean is even perilous as fraud and malpractices are prevalent and easier through internet. A person may commit a crime of copyright infringement in one country while accessing internet through another. Copyright infringement of a tangible material such as in books, newspapers or journals shall have no difficulty in deciding jurisdiction, but several issues might crop out while dealing with jurisdiction of copyright infringement. Firstly, issue might arise as where to file the suit, either in place where the copyrighted material has originated or the place where the material has been infringed. The common principle of law suggests that the suit is filed at a place where

¹⁷ WIPO Copyright Treaty, Article 1.

¹⁸ WIPO Performance & Phonograms Treaty, Article 7.

¹⁹ WIPO Copyright Treaty, Article 6.

²⁰ Mahmudul Hasan, *Mobile & Internet Users in 2021*, The Daily Star (Feb. 27, 2022, 10: 25 AM), <https://www.thedailystar.net>,

damage is afflicted, but this principle cannot be applied to digital environment as cross border shall make it impossible for an author to file a suit in another country. Even the Berne Convention in Article 5.1 directs the member countries to grant similar rights to foreign authors as are granted to the national authors²¹, but the scenario changes altogether due to Article 5.2 as it mentions about the member country to protect the rights of the foreign author in case of any infringement, based upon the country's national laws. This again raises the dilemma about infringement of copyright as the country shall apply its own rules while dealing with infringement which might not be just to the foreign author. Even a slight difference in law between two countries can raise difficulties regarding remedy available for infringement.²²

Secondly, conflict of laws among countries is major drawback in resolving copyright infringement as the laws might be different in different countries. For instance, the protection of a literary work granted to an author in India extends to the life span of the author plus 60 years, while in US and UK the following right extends to life span of the author plus 70 years.²³ Though the copyrights laws of the countries might be in consonance to the Berne Convention, but the intricacies of the respective laws might be different, which plunges the situation of online copyright infringement under deep waters. The WCT and WPPT adopted by the WIPO are regulations mentioning explicitly about the different types of right of the author that are available to the author. But the major drawback is the non binding nature of these treaties. Though the two treaties and even the Berne Convention puts forward that national laws of the member country should be in consonance to the them, but the non binding nature of the treaties as well as the convention turn the situation back to square one.

Even if jurisdiction of dispute and conflict of law is settled, the financial expense and feasibility to sue an infringer seems dull as multinational companies and well established authors can file suit to protect their rights, but struggling authors and low revenue companies can hardly sue an infringer at an international forum. Though treaties and conventions are adopted with an aim to protect novel creating and promote originality in the cyber space, but the ground reality seems different as several problems still bug the digital environment and makes it impossible for an author to protect its work.

²¹ The Berne Convention for the Protection of Literary and Artistic Works, Article 5.

²² S. S. Rana, *Internet and the Determination of Jurisdiction in the Case of Trade Mark Infringement*, Mondaq News Letter (Feb. 27, 2022, 11:50AM), <https://www.mondaq.com/>.

²³ Aniket Agarwal, *Deciphering Jurisdiction in Online IP Infringement*, SCC Blog (Feb. 27, 2022, 02:00 PM), <https://www.sconline.com>.

THE WAY AHEAD

It cannot be denied that rise in internet services has helped people across the world to grow in wealth and enhance their current lifestyle. Above all, the internet can be a great knowledge transmitter to help people gain more knowledge about their surroundings. But, the rise in internet services has undeniably pushed the copyright owners into a corner. As discussed above, online form of infringement cannot be ascertained and limited to a few because development in technology might outsmart the legal forums and leave the copyrights owners stranded. Even if an arduous effort is undertaken to enlist the different type of digital infringement, the problem might still not end then and there as the issue of the jurisdiction proves to be a huge hurdle in accessing justice. Nevertheless, even if the issue of jurisdiction is resolved and an international forum is established to put an end to the dispute, diverse laws of the countries and non binding nature of the treaties turns it unviable. Thus the following issues turns out to a never ending loop where ultimately loss is inflicted to the owner of the copyright.

While looking towards the problem from a different lens, it is hard to digest that the ultimate infringer of information available on the cyber environment is the user. It is upon the discretion of the user to access information from the internet from legal or illegal means as it becomes impossible to prohibit infringement in spite of the several well thought and regulated conventions. Further, the governments all across the world should address the issue of online infringement by strengthening the copyright law and amalgamating it with the IT laws of the respective countries. For instance, in India the Information Technology Act, which was last amended in 2008 lacks any substance regarding cyber infringement. The following law should be in consonance with the copyright act so as to minimize any kind of infringement and promote creativity by protecting the rights of the copyright owners. Also, internet service platforms such Google and Youtube should strengthen their policies regarding piracy which shall drastically decrease infringement in the cyberspace.

The primary objective of internet was to provide access to data and information to people all across the globe. Either advancement of science and medicine, or enhancement of commerce, internet becomes the root catalyst, pumping every task undertaken. Undeniably the internet has been a tremendous tool of development for people around the globe, but the same benevolent tool has proved to be a headache for copyright owners. The incompetence of the international regulations has further exposed the gruesome problem. But, appropriate efforts

in the rights direction can help solving the problem and providing some relief to the copyright owners. Thus, collective effort of the government and the users should be put in to stop infringement of copyright in the digital environment, so as to promote creativity and novel work of the author.
