

# A Basic Outline Of Iprs Laws With Cyber Law: An Indian Perspective

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## Abstract

Intellectual Property Rights i.e., IPRs is an advance or developed form of the legal concept 'right'. It is completely of civil nature. Meaning to say that it protects rights of individual legal person or a group of persons as well as it determines or fixes the legal duty of others towards the intellectual property right's holder. In another word, IPR deals only with the civil rights and duties. Only under exceptional circumstances there are penal statutory provisions. But, because of such exceptional circumstances the basic nature of IPRs could not be said to be penal.

Cyber law is the name of that set of rules/norms or provisions that does not only protect the rights of persons rather it also deals with the criminal aspect of the legal system. Because of the emergence of e-form of human life or say digital tool/devices use and dependency of life, Cyber law has made space in all most every aspect of human life.

IPRs and cyber law are two different and distinguish steam of law but there are so many connecting factors between IPRs and Cyber Law that it creates a kind of confusion to law-beginners.

This paper is designed to explore the basic understanding of IPRs and cyber law firstly as independent set of law and then to find out all connecting threads that fused IPRs and Cyber law with each other.

**Key Words:** Intellectual Property Rights, Copyright, Trademark Rights, Domain name, Industrial Property Rights, etc.

## Introduction:

The emergence of information technology [IT] has overhauled the human activities and hence life. It has marked its effects on every aspect of human life. Law, being one of the subjects is said to be the radius of the circle of social science studies. Now, the way cyber law has affected the human personal and social life, could be said that it is the cyber law that is the radius of the legal studies circle.

Though cyber law does not connect with all forms of IPRs but the way it connects, it could be said that it has made a fusion state of intellectual property rights along with industrial property rights.

Broadly intellectual property rights could be categorised into three classes. The first one;

protection for industrial property encompasses patents for inventions and protection for confidential information [trade secrets]. Secondly; comes protection for form and appearance, through copyright, design and moral rights. Thirdly, the law includes protection for image and reputation, through the tort of passing off and trade mark registration.

The theme of cyber is the reflection of the actual fact in virtual form. Meaning thereby; whatever has been a subject matter of legal purview, could not discontinue so just because the form has transformed from actual to virtual. For if a defamatory statement has been made by someone on his/her personal social profile/blog, such statement does not become outside the domain of judicial train just because it has not been made by one person to another

face to face or through any material form like writing on paper etc. If the statement is defamatory, it shall be subject matter of judicial trial irrespective of the fact that it has made on a webpage.

Therefore, if an intellectual property has been created by any person then just because such intellectual property has been mundanely depicted via digital tool or e-form, does not deprive the creator of such IPR to be protected by the given system of law.

One side there are various class and sub-classes of intellectual properties and another side the spread and depth of cyber law is wide enough in comparison to IPRs, this is pertinent to analyse whether cyber law is connected with all types or categories of IPRs? If yes; then how and if No; then what are those specific types of IPRs that is directly or indirectly connected with cyber laws and makes a fusion of IPRs and Cyber law as well as those classes of IPRs too wherein cyber law has no connecting factor? This paper is an effort to define, analyse and describe the meaning, concept and impact factor of cyber aspects over the intellectual property rights.

After dealing with conceptual part of subject matters like IPRs and cyber law, this paper will describe the connecting factors between intellectual property laws and cyber laws from the perspectives of Indian legislations like different intellectual property rights' protecting legislations viz. The Copyright Act, 1957, The Trademarks Act, 1999, The Patents Act, 1970, The Designs Act, 2000, The Geographical Indication of Goods (Regulation & Protection) Act, 1999 and The Protection of Plant Varieties & Farmers Rights Act, 2001 and for the Cyber law The Information Technology Act, 2000 along with Amendment of 2008.

**Research Methodology:** This study is based on the doctrinal research design wherein the research method is analytical and descriptive. The data and literature used for this paper is primary as well as secondary. The primary data used for this research work is legislations passed by Parliament of India and referred/cited anywhere in this study while secondary data used are various books, e-journals and websites.

**Significance & Scope:** Both of the laws dealing with intellectual property rights and cyber related legal issues and challenges are a

bit more technical and emerging in comparison to the root legal concepts emanating from jurisprudence and directly connected with the immediate interests and interactions of human. Moreover, even books written by Indian authors on IPR subject matters are plainly mention the legislative provisions without a keen interpretation and construction of those provisions with an elaborative approach. In fact, there are very few books on IPR that deals the intellectual property rights from the jurisprudential and legal philosophical aspects. Therefore, this paper is an effort to analyse, discuss and describe the intellectual property rights legal discourse along with its cyber law connectivity.

This paper would be worthwhile for beginners of intellectual property laws and cyber law.

Under this study only those specific intellectual property laws would be discussed in detail which has connection with cyber laws.

### **Intellectual Property Laws- An Overview:**

As the term 'intellectual property laws' itself is of self-explaining nature that connotes that law/s deals with intellectual property. The objective of law is to protect the rights of the owner or possessor over the property owned or possessed by her/him.

But, the problem lies with the nature of the intellectual property that generally intellectual properties are not in concrete form alike properties in physical form. For example, if a person is owning a car or house, this car or house is property of that person and if this car or house has been sold to another person, the owner of this car or house would not only deliver the legal documents of this property to the purchaser but also deliver the possession of this car or house. The nature of the corporeal properties is as such that at the same time two different persons could not be exclusive individual legal owner. Therefore, if the property of one person is found in the possession of someone else without the free consent of the real owner, then it is too easy to recognise and prove that who could be the real and legal owner of this property. Mere possession does not hold someone as the legal owner of any corporeal property. To acclaim the ownership over any corporeal nature of property, it is legal mandate that there must be

the combination of possession and title over the contended subject/property.

But; it is not so in the case of intellectual property because of the nature of it. Therefore, to prove the real and legal ownership over the intellectual property is a bit technical and difficult in the area of law. For example, if Mr. 'A' who is a poet has shared orally his poem to Mr. 'B' one of his known, prior to composing it on a paper or in soft form. Now, it happens that Mr. 'B' has published this poem on his social media blog in his own name. Now; when Mr. 'A' is coming to know about this publication, he is trying to prove that he is the real and original poet of this poem and he had shared orally this poem to Mr. 'B'. Therefore; Mr. 'A' has the copyright rights over this poem. But, because of the nature of intellectual property i.e. incorporeal and intangible, it is almost impossible to prove that Mr. 'A' is the real composer of the poem publically published by Mr. 'B' because whatever legal mandates are required to get protected copyright rights under the intellectual property laws are being fulfilled by Mr. 'B', not by Mr. 'A'. It has become more difficult after the emergence of digitalization of professional working because now a days authors or composers don't have raw or initial manuscript through which they could prove that under what process and time they have developed their impugned work which will obviously not be with the copyright rights infringer. This is just one example. The same circumstances may be with other form of intellectual properties as well.

Therefore; it is pertinent to understand the basic concept of the intellectual property rights which is protected under the intellectual property laws.

### **Intellectual Property rights:**

The entire set of intellectual property rights on the bigger level could be stratified into two categories. The one is copyright and another set is industrial property rights. Actually, the characteristics of copyright right is different from other forms of intellectual properties.

Copyright includes an immense economic as well as cultural field, extending to the raw material of the arts, education, information, entertainment, broadcasting and the media and design world. One contrast distinction should be made in relation to the different types of work which fall within the copyright umbrella. Works may be divided into two classes: first ,

the authors' rights- literary, dramatic, musical and artistic works, which fall within the ambit of the Berne Convention; and secondly; 'neighbouring or 'related rights'- such as sound recordings and broadcasts, which can be described as the carriers of the authors rights.

While, rest of the intellectual property rights may be covered under the umbrella of industrial property rights namely trademark rights, patent rights, Geographical Indication of Goods rights and Plant Varieties & Farmers Rights, and trade secrets etc.

### **Sources of Intellectual Property Law in India:**

The sources of intellectual property law in India are both i.e. national as well as international. India has been member of several IPR treaties and conventions which dictate procedural and substantive matters dealing with intellectual property rights. The Trade Related Aspects of IPR Agreement, 1994 (TRIPS) has created another pivotal strata of international intellectual property materials. Further; it was established by the World Trade Organisation [WTO] in 1995 as a result of the Uruguay Round of Multilateral Trade Negotiations.

**International Sources:** There are various international treaties, conventions, accords and Protocols relating to intellectual property rights protection signed or ratified by the government of India such as Paris Convention for the Protection of Industrial Property, 1883 which was adopted by India in the year 1998.

The Berne Convention, 1886 which is meant for the protection of Copyright rights and interests. India has been the signatory member of this convention. Then another one is World Intellectual Property Organisation [WIPO] Convention, 1967 which is a multiparty treaty. India joined WIPO in 1975.

Then there is the Nairobi Treaty, 1981 which was signed by India in the year 1983. This treaty relates to the protection of the Olympic symbol.

The Budapest Treaty, 1977 is a treaty on the recognition of the deposit of micro-organisms relating to patent procedure. India has signed it on December 17, 2001.

There are many more which has been signed and ratified by India like Madrid Agreement relating to international registration to marks and then a Protocol relating to the Madrid Agreement, 2013, Patent Cooperation Treaty,

1970, Trade Related Aspects of Intellectual Property Rights [TRIPS], 1994, and WIPO Internet Treaties, 1986 i.e. WIOP Copyright treaties as well as WIPO Performance & Phonogram Treaty, 1996. These treaties are called as WIPO internet treaties because of the emphasis it put on the protection of rights in the digital environment. Above mentioned all international treaties and conventions are the base for the intellectual property laws in India.

### **National Sources:**

There are multiple legislation till now in passed by Parliament of India dealing with intellectual property rights protection, regulation and exceptions.

Currently the following legislations passed by Parliament of India is dealing with the different nature of intellectual property rights such as: The Press and Registration of Books Act, 1867, The Copyright Act, 1957, The Patents Act, 1970, The Architects Act, 1972, The Press Council Act, 1978, The Trade Marks Act, 1999, The Geographical Indication of Goods Act, 1999, The Designs Act, 2000, The Semi-Conductor Integrated Circuits Layout-Design Act, 2000, The Information Technology Act, 2000 The Protection of Plant Verities & Farmers Rights Act, 2001, The Biological Diversity Act, 2002, etc.

It seems from the list of legislation enacted by Parliament of India that all possible efforts have been made to protect the interest and rights of the intellectual property holders. Now, one thing is markable at this point that the nomenclature of above mentioned legislations that is the national sources of intellectual property laws in India is of self-declaratory nature. It refers that which particular legislation would address the particular IP grievances that is called specific intellectual property rights' infringement issues. For example; The Copyright Act, 1957 conveys that if a copyright of any author or assignee or neighbour would be infringed, then the dispute would be addressed according to the definition and provisions given under this Act along with other corresponding copyright rights protecting legislation namely The Press and Registration of Books Act, 1867 as well as The Press Council Act, 1978.

In the same way, The Patents Act connotes that patent rights related legal disputes would be addressed according to the Patents Act, 1970,

so on and so forth. Meaning thereby; the list of the national sources of the IP laws in India shows that how the one IPR differs from the other type of IPRs.

### **Cyber Law: An overview:**

Today the world is learning over the fast-developing information technologies where everything depends on the electronic devices and internet. The electron gadgets together with internet has created and developed a virtual but real world and this world is precisely termed as 'Cyber World'. But; what is noticeable is that cyber world is not something distant or exclusive of actual world i.e. material world rather it's a kind of shadow of the real world. In other word, the cyber world exists together with the material or actual world and so continues functioning with the real world. Since cyber world is reflection as well as co-existing of real world simultaneously, it is full of anti-elements and evils like real world. The reason behind is that either real or cyber world, both runs by human beings. There may be an objection at this point by saying that cyber world could be run even by a robot. Then this objection would be set aside by saying that even a robot is the creation of human mens rea along with actus reus factors.

In nut shell, whatever wrongs and crimes are committed in actual form in the society, the emergence of cyber world has multiplied these possibilities. The umbrella and accessibilities of cyber world is immense and profound in comparison to real world. For example, in real world one person could be present at one particular place at a particular time while in the cyber world one person can be present even in his/her absence. Best example is the CCTV cameras and spyware.

Since this research work is all about cyber law and IPR connecting issues, therefore, skipping the crime and commerce aspects of the cyber world and mainly focusing only with the IPRs issues and challenges in the emergence of cyber world.

**Fusion of IP Laws with Cyber Law:** As previously it has been discussed that IP laws protects the original and novel idea as well as expression of idea. Under copyright law, it's not the idea which is protected as intellectual property right rather the expression of idea. While; rest of the IPRs are protected on the

basis of idea or creation itself i.e. original and novel idea either as product or procedure. Therefore, what is the most pertinent to understand for application of cyber law over intellectual property rights is that neither the entire cyber law is applicable over the IPRs nor the all sets of IPRs could be protected by cyber law because it's totally depends upon the individual intellectual property right whether there is any change to be affected by the application of any cyber tool. For example, under intellectual property law, copyright right is protected for the expression of idea. This expression could be published in either way that is orally in any public place, in hard copy or in soft copy format like on any social-electronic medium. Therefore, the nature of copyright is such that it could be easily infringed not only in real forms but also in cyber forms. It may be the case that the expression of idea of someone published in hard format may be published on cyber space in his/her own name without any acknowledgment or referencing of the real author. Because of such possibilities, the cyber law has connection with the IP laws in matters of copyright rights protection. Copyright rights are being infringed by the emerging cyber space uses; where the publication and sharing of electronically copied files have the vulnerability to yield too speedier without any intellectual and financial investments.

**Copyright & Cyber Law:** Hyper-linking is a big issue relating to copyright protection in the era of digitalization. A balance of interests is prejudiced during the process; viz. rights of the copyright owner and the cyber flow of information available and reachable 24\*7 by any one from any corner of the globe. It could not be regulated because this easy accessibility and fast reach is the sine qua non for the cyber space existence.

A legal issue in regard to deep linking emerges while reading Sections 14 and 51, Indian Copyright Act, 1957, whereby it is not clear as to the exact stage when the reproduction of the copyrighted work is actually being committed. Nevertheless; section 14 of Copyright Act, 1957 envisages such provisions wherein copyright rights protection under cyber space has been properly enumerated. Section 14 simply explains the meaning of the term 'copyright' wherein the various lists have been given holding that what could be copyright of the author and to what extent an author can

assign his/her IP rights along with other provisions, section 14 (a) (i) says that to reproduce the work in any material form including the storing of it in any medium by electronic would be amounted to be copyright. Next to it, Section 14 (b) says that in the case of a computer programme, —(i) to do any of the acts specified in clause (a) of section 14 of Copyright Act, 1957, (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer, programme: Provided that such commercial rental does not apply in respect of computer programmes where the Programme itself is not the essential object of the rental. (c) in the case of an artistic work, —2[(i) to reproduce the work in any material form including—(A) the storing of it in any medium by electronic or other means; or (B) depiction in three-dimensions of a two-dimensional work; or (C) depiction in two-dimensions of a three-dimensional work; so on so forth there are many such provisions that reflects that how IP law of India has been framed in such a way to cope up with the cyber era to protect the Copyrights rights of creator.

Section 51 (a) (ii) Copyrights Act, 1957 says that exclusive rights of copyright are vested with original author and anything contrary to it will constitute a copyright infringement. This legislative provision, in the absence of any express provision determining liability/ies of internet service provider (ISP), would be constructed as an expression 'any place' and 'permits for profit' where ISPs allow server facilities to stockpile user data at their business locations and make available for broadcast for making profit through charging for services and advertisements.

Information Technology (Intermediaries Guidelines) Rules 2011 and Section 79 IT Act, 2000 grant conditional safe harbour from liability of the online intermediaries, though keeping it open for interpretation on their liability under any other civil or criminal Act. IT Act 2000 makes an intermediary non-labile for any third-party content hosted on its site. The 2011 Guidelines provide a diligence framework to be followed by intermediaries to avail the exemption granted in Section 79 IT Act, 2000. This makes it important for proactive judicial interpretation depending on the facts of each case.

In *Super Cassettes Industries Ltd. vs. Myspace Inc. & Anr.*, the Hon'ble Court held, that "the

intermediary liable for allowing viewing and sharing images over the intellectual property ownership of Super Cassettes. The case pronounced judicial activism by granting precedence to the Indian Copyright Act, 1957 over the safe havens of IT Act, 2000, through reading Section 81 of the IT Act 2000 in conjunction with and over Section 79 of the IT Act 2000."

### **Trade Mark Rights & Cyber Law:**

Trade mark protects goodwill associated with a product or a service. A trade mark may be a design, letter, brand, heading, label, ticket, name, signature, word or numeral separately or in combination to denote the uniqueness quality of a good or a service. Trade Marks Act 1999, defines the legal term 'trademark' as, "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, their packaging and combination of colours."

Therefore, trademark to be protected as an IPR is required to be unique and distinguish. Infringement of trade mark rights as IP right happens when confusion and dilution of the mark occurs. Such confusions commonly occur because of two reasons. The one is the likelihood of confusion and another one is initial interest confusion. These are the grounds to test whether the mark could be registered as trademarks or not.

Now coming to understand how infringement of trade mark rights could be occurred in the cyber world. As the name itself saying that if a particular letter, sign, shape, etc. is used for the identity of symbolism reflections of a trade or business purposes, that is termed as trademark and the person, institution or organisation who is user thereof claim IP rights thereon. The cyber space has widened the business and market kingdom for consumers as well as businessmen by providing the option of e-commerce. With respect to trade marks infringement as IP rights under the cyber space frequently occur in the form of domain name.

To understand about domain name; it is pertinent to understand about Internet Protocol (IP) address. An IP address could be termed as a unique name reflecting of a device or a local network, allowing data to be transferred.

So, domain-names are used to get identify online portals. Actually the domain names are

of same significance in cyber world as of trade marks in real world.

Unlike a trademark, a domain name can be obtained by simply purchasing and registering it. The registry, when registering a mark, does not prohibit anyone from purchasing one that is deceptively similar to a registered domain name or even one that is in existence as a trademark. That is to say, a first come first serve basis system.

This, however, is subject to legal action. The action of purchasing a domain name in bad faith and attempting to profit from the others identity is known as cybersquatting, and is often the main source for infringement. Although this is heavily discouraged, this practice has become more common in the recent years. Similarly, one will be held accountable for passing off one's trademark even when the goods or services in question are different in nature than as protected law. Such an argument was relied upon by the defending counsel in Yahoo!, Inc. vs Akash Arora & Anr. The counsel submitted that, "the trademark laws in India relate to goods and, therefore, the provisions of Indian Trade Marks Act are not applicable to the facts and circumstances of the present case which deals only with goods'. The court, however, passed an ad interim injunction in favour of the plaintiffs' thereby restraining the defendants from further passing off as the plaintiffs' mark." For infringement of IP rights of domain name-holders, although Trade Mark Act, 1999 does not talk expressly and there is no specific enactment in this regard.

A domain name may appear at first to meet the definition of a trademark, but the examination of the statutory definition given under section 2 of the Trade Mark Act, 1999 shows that it's not so. A trade mark is a mark or name that is identified with a product or service. A domain name is though not a product or service but it is associated with either or both for goodwill of that product or service. Therefore, a domain name is not itself a trademark but a domain name may be a company's expression of its trade mark. The use of a trade mark in a domain name is equal to using the trademark on a billboard or in advertising.

### **Conclusion & Suggestions:**

Intellectual property rights in the era and highly advanced especially in the matters of technology is too much keen to be infringed and

the most important thing that it may be the case that the owner of intellectual property is not aware about his/her IP rights infringement in cyber world if the owner is not cyber friendly. For example if a person is author of a best sellers and this author has given his/her exclusive right to publish to a publisher but only in hard format. Suppose; this author is not cyber or digital tool friendly. In this situation if without the written consent of this author the publisher is publishing the contents of the bestselling novel in e-format and getting good subscription amount. In this situation the IP right of author is getting infringed but because this person is unaware about his/her novel e-contents, would be deprived of the profit sharing from the subscription. Therefore, this is too pertinent to understand and to be aware about how to protect IPRs in the cyber world. To get cyber friendly is no more an option. This is the need of time especially from the perspectives of commerce, crime and IPRs protecting copyright rights. After copyright rights, the risk of IPRs infringement associates with Trademark and then the design rights. Though there are legislative provisions in India to protect copyright infringements but not for other IPRs protections.

Domain name issues are still unaddressed as there are no specific legislative provisions under Trade Mark Act, 1999 or any other legislation. Same with design rights related issues in the cyber world.

As with the emergence of internet and availability of electronic device and dta showing the preferences of online shopping by Indian consumer and customers, it is need of time that government of should make an express and clear law protecting the domain name as trade mark rights.

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