

# Challenges for Intellectual Property Rights in the Digital Era



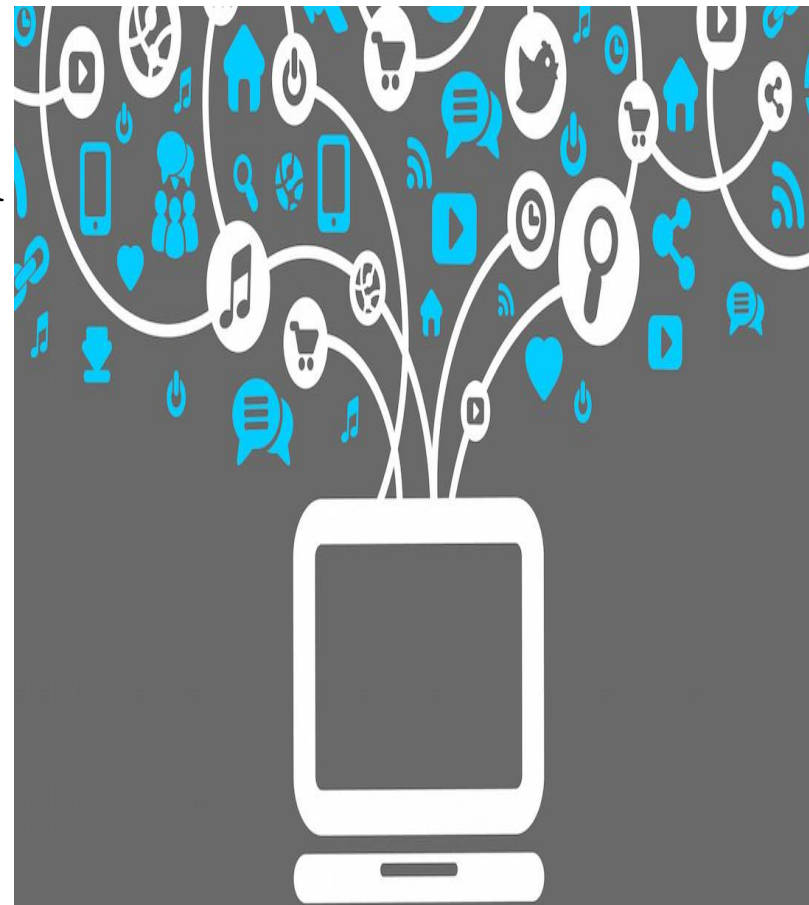
PRATHIBA M. SINGH  
Judge, Delhi High Court  
November 3, 2019

# DIGITAL AGE

- Also called the information age – is the period commencing from 1970, which saw the invention of the first computer;
- Shift from an economy based on industrialization to one on information technology;
- Widespread use of technology, not only for work, but in all walks of life;
- There is great simplification of daily menial tasks, especially in the last 20 years;
- Technology touches everything now

# EVOLUTION OF THE INTERNET

- Origin dates back nearly 50 years to the American military research for effective communication through Arpanet;
- Since then, undergone more than just a name change;
- Statistics show that over 4.208 billion people use the internet;
- No longer merely a means of communication;
- Economies run and countries govern through the internet





## INTERNET



- Communication – email, social networking websites;
- Ecommerce – Amazon, Flipkart, Snapdeal;
- Financial Transactions – PayTM, PayPal;
- Governance – MCA21, Registrations for various government services;
- Entertainment – Netflix, Spotify, YouTube
- Research – Google, Yahoo, Bing;
- News – e-newspapers and e-magazines;
- Education – Byjus, Duolingo



**NETFLIX**

# GROWING E-COMMERCE

- Defined as – commercial transactions conducted electronically on the Internet;
- Draws on technologies such as electronic funds transfer, mobile commerce, internet marketing, online transaction processing, data collection, etc.;



# IP DISPUTES RELATING TO ECOMMERCE

- IPR issues in e-commerce pose a challenge;
- Both original and counterfeit products are available online through same channels;
- Purchase of counterfeit product – the full link from-
  - placing order,
  - making payment,
  - delivery taken,
  - photographs of the product,
  - physical product (if produceable before the Court) should be filed along with the affidavit of the person purchasing the same. Filing of someone else's affidavit may result in non-acceptance of the evidence.

# INTERMEDIARY LIABILITY

- Section 79 of the Information Technology Act, 2000 – an intermediary is not liable for third party generated content;
- This exemption is qualified by Section 79(2) and 79(3) of the Act;
- Exemption from liability would not apply if the platform is an active participant or is contributing, in any manner, to the commission of the unlawful act;
- The Intermediary Guidelines, 2011 also in place.
- There is no one settled position on the intermediary

## SECTION 81 OF THE ACT

- IT Act to have overriding effect over any other for the time being in force in India, if the concerned statute is in any way inconsistent with the provisions of the Act;
- Proviso – nothing in the Act could however, restrict a person from exercising any right conferred under the Copyright Act, 1957 and the Patents Act, 1970



# *Shreya Singhal v Union of India*

## *[AIR 2015 SC 1523]*

‘Actual knowledge’ as contained in Section 79(3) means a court order. The Supreme Court held as under:

*“122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not.”*

# COPYRIGHT DISPUTES

- Copyright issues could be various kinds:
- Copyright Infringement
- Plagiarism and copying of information;
- Piracy and counterfeiting;
- Infringement of broadcasting rights;



*MySpace Inc. v. Super  
Cassettes Industries Ltd. 236  
(2017) DLT 478*



- A judgment of the Division Bench of the Delhi High Court.
- Dealt with uploading of music on myspace.com, and copyright infringement;
- Single Judge held MySpace liable for secondary infringement;
- Division Bench was considering only this limited point in the appeal
- The question was whether MySpace had constructive knowledge of the infringing activities of its users;
- Court held that to impute liability on the intermediary, it had to have “actual knowledge and not general awareness”

# Order against Rogue Websites

- ***Department of Electronics and Information Technology v. Star India Pvt. Ltd. [R.P.131/2016 in FAO (OS) 57/2015 decision dated 29<sup>th</sup> July, 2016]***
- Dealt with live telecast of cricket matches;
- Court held that the rogue websites i.e., hosting predominantly infringing content could be blocked completely;
- Only URL blocking was not deemed sufficient

# DESIGNS

- ***Kent Systems Ltd. v. Amit Kotak 2017 (69) PTC 551 (Del)***
- Single Judge of the Delhi High Court had to consider question of liability of an intermediary for design infringement;
- Court held that the intermediary cannot be imposed with a general obligation to monitor content on its website;
- It merely is obliged to remove infringing content upon being notified of the same;
- Requirement to do such screening would unreasonably restrict their right to do business.



# TRADEMARK

- Trademark disputes on the internet could be of the following kinds:
- Trademark infringement and passing off;
- Sale and purchase of pirated and counterfeit goods/services;
- Domain name disputes;
- Meta-tagging;
- Purchase of keywords;
- Unlicensed advertising;



## The Internet and Jurisdiction Issues

Due to the cross-border nature of the internet, and the multi-national operation of intermediaries, various questions may arise as to the nature and extent of injunction orders that are liable to be granted. Can Indian courts direct intermediaries to block/disable access to content *globally*?

This is the question that arose in *Swami Ramdev v Facebook & Ors. CS(OS) 27/2019 (Decided on 23<sup>rd</sup> October, 2019)*, which concerned content which was alleged to be defamatory, and was disseminated through the YouTube, Facebook and Twitter platforms

*Swami Ramdev and Anr. v Facebook & Ors.*  
*CS(OS) 27/2019 (Decided on 23<sup>rd</sup> October,*  
*2019)*

- The Plaintiffs filed a suit alleging defamation, seeking injunction and damages against Facebook, YouTube, Google, Twitter and Ashok Kumars. The uploader of the video, which was alleged to be defamatory, was anonymous. The said video paraphrased a book titled *Godman to Tycoon – the Untold Story of Baba Ramdev*, excerpts of which had been held to be *prima facie* defamatory by a Id. Single Judge of the Delhi High Court in CM (M) 556/2018.
- The Defendant platforms, while agreeing to block access to the impugned content for the India domain, objected to blocking the same globally.



# Findings

- “...in order to avail of the exemptions provided under Section 79(1) and (2), the intermediaries have a duty to “expeditiously remove or disable access”. The intermediaries have to remove or disable access to “that material”. The said material would be the information or data “residing in or connected to a computer resource”. What would be the material to which access is to be disabled or expeditiously removed? The answer to this is in the 2011 Rules. Under Rule 3(2), the information or data which constitutes “that material” would be ‘the material or information that is grossly harmful, harassing, blasphemous, defamatory... or otherwise unlawful in any manner whatsoever’. Thus, the access would have to be disabled to any material or information which falls in any of these categories from (a) to (i). If a material or information falls in this category, upon receiving a Court order, the intermediary has to remove expeditiously or disable access to the same.”

# Findings

*From which locations is the removal or disabling to take place? The answer to this is again in Section 79(3)(b). The removal or disablement to the offending material has to take place “on that resource”. What constitutes “that resource”? It is a computer resource in which the “information, data or communication link” is “residing in” or is “connected to.”*

...

*Thus, if any information or data has been uploaded or is residing in a computer resource i.e. a computer network, the information or data which has to be removed or disabled from that very computer resource or network. The computer resource in the initial part of the Section is the same computer resource as used in the later part of the Section. The latter resource cannot be a sub-set or a species of the former. It has to be the entire computer resource which was initially connected when the uploading of the information or data took place. Thus, if an information or data has been uploaded on a computer network, the platforms would be bound to remove it and disable it from that computer network completely. Any other interpretation of Section 79(3)(b) would not give proper meaning to the use of the words “that material” and “that resource”.*

# Findings

*“The act of uploading vests jurisdiction in the Courts where the uploading takes place. If any information or data has been uploaded from India on to a computer resource which has resulted in residing of the data on the network and global dissemination of the said information or data, then the platforms are liable to remove or disable access to the said information and data from that very computer resource. The removal or disabling cannot be restricted to a part of that resource, serving a geographical location.”*

# Findings

*“Orders of Courts are meant to be implemented fully and effectively. While the Defendant - platforms are raising issues in respect of comity of Courts, conflict of laws and the right of freedom of speech and expression under Article 19(1)(a), what is to be borne in mind is also the rights of privacy, the right of reputation of a citizen, national security, national integrity, threats to sovereignty, etc. The balance is always hard to seek, however, Courts can only endeavour to strike the balance. Ld. counsels for the parties have rightly raised various concerns on both sides. This Court has to implement the statute in its letter and spirit.”*

## *YouTube v. Geeta Shroff [FAO 93/2018 (Decided on 17th May, 2018)]*

In this case, a ld. Single Judge of the Delhi High Court considered an offensive post, which was removed from the India domain, but not from the global platform. The Court observed as under:

*“The Court would note that it was never the case of Google that the contents of the offending post had been uploaded from a place outside India. It held that the contents have been uploaded from India, hence they were ordered to be removed from the internet so as to restore the position as it was prior to the uploading of the contents. The impugned order went on to hold that the contents which were uploaded from India, if transposed outside the jurisdiction of the country, cannot be said to be beyond the jurisdiction of India, and it could well be blocked or removed following the path by which it was uploaded. The Court is of the view that in the first instance, the injunction order dated 04.06.2015, which has not been challenged, has attained finality. It holds that on the basis of the pleadings and/or lack of denial from Google that the offending post had been uploaded from India, Google was required to remove it so as to restore status quo ante.”*

However, YouTube’s appeal was ultimately dismissed as withdrawn.

## Anonymous Defendants

- Recently, in *Subodh Gupta v. Herdscene & Ors. CS(OS) 483/2019 Order dated 18th September, 2019*, a ld. Single Judge of the Delhi High Court, in the context of defamatory content, vide order dated 18<sup>th</sup> September, 2019 restrained an anonymous defendant by the name of “Herdscene” from posting any content related to the Plaintiff on its Instagram account. Instagram was also directed to furnish the particulars of the person/entity behind the said Instagram account in a sealed envelope.
- Google was also directed to remove certain URLs to defamatory content from its search results

# Intellectual Property and Competition Law

- The debate between IP and Competition law is a delicate balance
- Recently, the interplay between IP and Competition Law has been discussed in several cases –
  - SEP cases (FRAND licensing)
  - Copyright cases (JCB, T-Series)
  - Monsanto (Seeds)
  - Automobile parts (some copyright issues, confidential information)
  - SabMiller (Franchising)
  - Microsoft (Copyright licensing)
- Issue of jurisdiction arises when CCI is knocked at for overlapping issues



**THANK YOU!**