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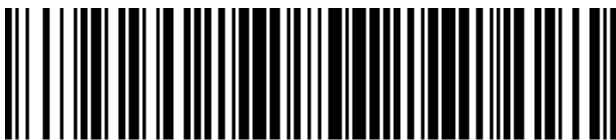
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Challenges in E-Commerce Platforms: A Strict IPR Perspective

Varsha Ratnam

INTRODUCTION

“The internet has been the revolutionary technology of the new millennium, empowering consumers and businesses alike with blessings of connectivity.¹ It is not surprising that the Internet is full of deception and confusion. The Internet makes it very easy and convenient for consumers to be fooled at the same time it makes it very hard for them to inspect and interrogate. Ecommerce websites are known for being unreliable for a multiplicity of goods and there is a common belief that people must avoid buying of expensive items through the online mode and keep it limited to only the buying of cheap goods through such a mode. But that is not the reality for many others. We see people buying expensive mobile phones, laptops, televisions through online websites with little or no qualms. While e-commerce has its own set of problems, issues and challenges, the one problem the researcher is inclined to deal with in this paper is the breach of intellectual property laws in e-commerce.

E-commerce has been a great way to interact with millions and provide for them with not much waste of time and energy, this has also pulled in many more competitors into the market. The ease of such a market has another problem to tackle: How many websites can be copied off by other emerging companies without even being noticed?

Some of the main questions to be dealt are: Just because an item is uploaded online and is easily available, it does not mean its openly allowing other companies to copy their ideas, vision and hard work. The internet is wonderful for promoting your business, but as Ecommerce increases, there’s a risk that others can copy either the features, or content, of your website.

HISTORY OF DIGITIZATION AND ITS CONNECTION WITH INTELLECTUAL PROPERTY

Originally, Internet did not support a two way communication or any human interaction. It was meant for providing information to the user on anything from its loaded database. For example, if one were to search for the details of a law firm in New York, the search would return a web page with information about the firm, its practice areas, the attorneys, their profiles etc. In other

¹ Kotler & Armstrong 2004:72

words, it was a unidimensional world with no window for interactive functionality.² However, time evolve and so did the Internet with the inception of high speed data and broadband which allowed sharing of music, pictures, videos. This has allowed more and more businesses to conduct their activities online and even perform electronic transactions. The benefits seemed too good to true, as a result of which more businesses started adopting the online mode of business. The online world consisted of everything- books, banking, music, social networks, education etc. What began with one competitor in the field ended up with many competitors in the same market. So consumers don't have just one music downloading website but a couple of others to choose from and in the process of that a customer's taste also improves with respect to what has been offered over time. A music website facing competition with 5 other websites will entice the consumers in ways such as: Better and friendly interface, more songs, packages, language options to choose from. It is these factors and more algorithms adopted by music websites to entice their customer. It is also to be noted that what satisfied the customer back in 2010 may not be relevant anymore in 2020.

Therefore, Web 2.0 changed the way the Internet had been hitherto understood and used.³ Therefore, it is safe to say that there is constant innovation, creativity. Such changes are necessary but could often encroach onto another's rights. Intellectual Property law deals with concerns relating to trademark, designs, patent and copyright. All aspects of intellectual property are concerned with technological changes: trademarks and domain names, copyright and related rights, patents, enforcement of rights and dispute resolution.⁴ Different parts of websites will be covered by different wings of IPR. Such as: technical tools of a particular site may be protected by patent, a software programme will be protected by copyright and logos are to be protected by trademarks.

² CIO-Midmarket, 'Bulletin Board System', retrieved from <http://searchciomidmarket.techtarget.com/definition/bulletin-board-system> on 21st May,2015

³ Ajeet Khurana., 'Ecommerce and Intellectual Property What Intellectual Property Means in the Context of Ecommerce', retrieved from ecommerce.com/od/eCommerce-Trends-and-Issues/a/Ecommerce-And-Intellectual-Property.htm on 14th August, 2014

⁴ Ficsor, M., 'Slides: Relevance of Exhaustion of Rights in the Digital Environment', ALAI Conference on Dissemination and Management of Works of Authorship on the Internet, in Cartagena, September 2013, retrieved from <http://www.alaicartagena2013.com/index.php/congress/papers> on 8th May, 2015

IPR AND E-COMMERCE CONNECTION

According to 1979 Convention Establishing the World Intellectual Property Organization (WIPO), intellectual property includes the rights relating to Literary, artistic, scientific works, inventions, performances, Trademarks etc.⁵

This section, we shall look into Copyrights and how it is influenced and attacked by e-commerce websites.

a)Copyright: The legal protection automatically given to original literary, dramatic, musical or artistic works; sound recordings, films, and broadcasts; databases; and computer programs. Therefore, the music, books, software that we find on online platforms are subject to copyright protection. Even the software that the e-commerce website use is a copyrighted work. However, the ease of Internet facilities have made it easier to get quick and convenient access to copyrighted work and also counterfeit it. In *Play Boy Enter Inc v/s Frena31*: Playboy magazine content was downloaded by a user without seeking permission and uploaded to a bulletin board system. The company alleged that this was a copyright infringement and the US court upheld the same saying that “the exclusive right of distribution was infringed by customers of defendant. This creates an obligation on the bulletin board operators to ensure that its system is not being used to display and download copyrighted materials by its customers”.⁶

Indian case law: *Himalaya Drug Company v. Sumit*: *Where Himalaya*, the plaintiff, is an Indian company that deals with making and manufacturing of herbal products and medications. A herbal database was prepared and posted on their website for marketing. This database was copied by an Italian infringer on his own website without any due permissions. Himalaya sued the infringer claiming that the database was their own original literary content and will be within the ambit of Indian Copyright Act. The infringing database was available to everyone including the plaintiff's own customers in Delhi. Recognizing this as a copyright infringement by e-commerce website the High Court of Delhi granted an injunction against the defendant restraining it from continuing the infringement.

⁵ Overview of Intellectual Property Rights and the TRIPs

⁶ 839 F. Supp. 1552 (M D Fla 1993)

b) Patent: A patent is a set of exclusive rights granted by a sovereign state to an inventor or assignee for a limited period in exchange for detailed public disclosure of an invention. An invention is a solution to a particular technological problem and is a product or a process.⁷ The invention should meet some criteria to obtain patent protection.⁸

A Famous case in this regard is that of the Amazon and Barnes and Nobles tussle over ‘One click Payment’ technique. Amazon had patented its technique of one click payment option where a customer could easily buy a product without having to add it in a cart. This technique was adopted by Barnes and Nobles called “Express lane” and Amazon filed for patent infringement. The same was allowed by the Court granting an injunction against the action of Barnes and Nobles. However, this patent protection only extends in U.S and not in European Union. On more recent events, in 2018, IBM filed against Groupon and claimed that they had used the patented e-commerce technology without licensing it. IBM won the case and was awarded \$83 million for the patent infringement. IBM lawyer John Desmarais argued in front of a jury in federal court in Delaware that “Groupon infringed on eCommerce patents that had been licensed previously to Amazon, Facebook and Google for \$20 million to \$50 million for each company. Most big companies have taken licenses to these patents, which Groupon failed to.”

Trademarks: Trademark is one of the most important features of the TRIPS agreement, which is defined as, “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings”⁹ Features like signs, names, numerical, colours etc. are included within the definition. That is to say that Flipkart’s unique yellow symbol will always remind customer of Flipkart and not of its competitor Amazon. This is the power of a trademark. A consumer is directly reminded of a product, its quality, its services and its reputation. Therefore, it becomes very important for a company to protect its image through its trademark but needless to say, this has been often violated by another. Some of the examples are:

⁷ WIPO Sub-Regional Workshop on Patent Policy and its ... (n.d.). Retrieved from http://www.wipo.int/edocs/mdocs/patent_policy/en/wipo_ip_skb_13/wipo_ip_skb_13_t_8 Patenting Software - WIPO. (n.d.). Retrieved from http://www.wipo.int/sme/en/documents/software_patents.htm

⁸ <https://www.reuters.com/article/us-ibm-groupon/groupon-to-pay-ibm-57-million-to-settle-u-s-patent-dispute-idUSKCN1MB3DB>

⁹ Trade Related Aspects of Intellectual Property Rights (TRIPS)

1. Flipkart had to pay a hefty price to Marc Enterprises for releasing its own brand of Electric Appliance called MarQ. The Delhi Patiala House Court passed a judgement restraining Flipkart from selling the product MarQ upholding the claim that it purportedly infringes on the respondent's trademark.¹⁰

2. High Court of Delhi has held the group 'MAKE MY TRAVEL' guilty of infringing the trademark of 'MAKE MY TRIP'. The court acknowledged that the trademark was deceptively and conceptually similar and thus amounted to 'passing off'.¹¹ Make my Trip is an established travel website known for its online travel bookings and catering to millions across the globe.

Issues & Challenges of E-Commerce industries with respect to IPR:

The internet has made life easier but with that comes money making opportunities as businesses don't want their ideas and secrets to be stolen. Businesses will go to any extent to keep the secret ingredient of what makes their company and rightly so. This is what evokes the question- 'How far can IPR support and protect a company which is dealing online'. Keeping in mind, of course, that internet is actually a very fragile portal where materials find one place to another in seconds and reach millions in the very same second. The international development of information technology has made online transmissions easy and therefore making copyright infringement fluid and therefore we need to incorporate for such measures through our legal framework.

The Information Technology Act, 2005 has provided enough provisions to hold e-commerce websites liable for their actions and the ITA, 2005 is very inclusive in its approach but still there are some specifications that have been left out such as how to punish a cyberspace copyright infringer and the proceeding regarding the same. Copyright laws have well defined punishments but there is still ambiguity in its relation with e-commerce website. A structured guideline on the same would be benefitted by all. The society must be educated on the necessity of Copyright protection to prevent any unauthorized use. Hence, barring a few important aspects, the copyright Act 1957 & the Information Technology Act meets the challenges posed by the internet.

Copyright Act does not directly protect infringement over internet but we can find a reference in Section 2(o) which defines 'Computer Database'. Therefore, even if a provision has not been explicitly provided to this extent the fact that it can be covered under Section 2(o) and is within

¹⁰ m/s Marc Enterprises pvt. Ltd. Vs Flipkart pvt. Ltd.

¹¹ Make My Trip (India) Private Limited v Make My Travel (India) Private Limited (CS(COMM) 889/2018)

the meaning of 'literary works' is worth noting. Further the TRIPS agreement and Berne Convention, the requirement of originality in selection or arrangement of the contents of the database is required to attract copyright protection. However, a major flaw still remains that the Indian Copyright Act is unable to include and provide for unauthorized distribution and use of work over internet and therefore, it may be hard to hold e-commerce companies liable for the same, especially the lesser known ones for the infringement of Copyright.

Coming to the question of patents, E-commerce websites like Amazon had an idea and vision of a digital market back in 1997 and since then it has filed several patent applications protecting the same and therefore, has realised the importance of Patent Protection in their website. Patent of e-commerce and the developments within it make absolute sense in the backdrop of continuous innovation and competition in the relevant market sector. This vision is very important and anyone who didn't anticipate the Intellectual Property Infringement is inevitably pushed out of the market despite their efforts and hard- work. Taking this example, we can see how Ericsson acquired Patents way back in 1990s. It had an idea that there will be other players in the market and they could benefit from such a Patent. And this calculation worked correctly in their favour. Micromax, a small player, fell into the Ericsson trap by inadvertently infringing on their patented technology. This caused Micromax a major loss, wherein the Court decided that it will have to pay 1% of its revenue to Ericsson every year. This shows how a vision goes a long way.

Trademark has often been infringed in the online world and not surprisingly. Chances are that most of them go unnoticed. It is the most core part of any business and could harm a company because of another company's copy of trademark. Therefore, the main issue that lies with trademark infringers of e-commerce will be to catch hold of the infringer himself. The chances of the infringer disappearing into thin air after causing major damages are not just high but almost close to absolute. Therefore, tracking the infringer is a main problem. Especially, in a country like India, where not everyone is educated and literate, a poor man's work could be easily ripped without his knowing and his lack of resources might leave him unable to track. Jurisdiction is another closely connected problem with this. Problems like parallel importing – which means 2 e-commerce selling the same product increases chances of counterfeiting. Further, selected brands have to be sold by strictly the Trademark owners instead e-commerce websites sell them and consumers buy without the knowledge that it is not authorised to make such a sale. Some cases in

Europe expressly support the trademark owners,¹² however, most Trademark laws are silent on such illegitimate actions by e-commerce websites.

CONCLUSION & SOLUTIONS FOR SMARTER INDIAN E-COMMERCE BUSINESSES

E-commerce in India is flourishing because of Information Technology Act, 2000 but all is not perfect in that regard. Any legal system needs to advance with the society and evolve with it. The ITA is well endowed with laws that protect consumers from frauds but the question is how futuristic is it in this regard? E-commerce websites are dominant players and IPR is still a very elusive concept in the online world as its not only hard to punish but also hard to spot in the first place. Some of the issues have been highlighted above and the researcher suggests the following solutions:

1. All the Indian laws pertinent to Copyright, Trademark, Patent have very minimal concentration on online breach. E-commerce websites have been thoroughly ignored. Given their current growth, it is suggested that the legislators immediately revise the laws with respect to e-commerce websites.
2. Maintain a system of Watch Notices. Patent holders like CyberGold pay consumers to report any infringement they notice online. This reduces the burden on company and an active incentive for the consumer to look out for infringements.
3. 'Intellectual Property Vision', a vision every growing company must have in order to succeed in the future. It requires an active foresight that protecting patent now can lead to smooth business years ahead. This is exactly an idea correctly captivated by Amazon and in pursuance of this Amazon has filed patent application for every step such as delivery process, transport etc. This will ensure an edge over their competitors like Flipkart, Snapdeal if and when granted.
4. Problem of tracking can only be solved when all websites are made to rigorously follow procedures including collecting details of AADHAR or PAN card of the website owners to hold them liable in case of any infringement. The ease of creating a website and deleting it with no trace outsmarts the humans and legislations need to govern this area too.

¹² Copad SA v. Christian Dior couture SA

5. The main problem of counterfeiting and parallel imports can be solved by issuing exclusive license to the e-commerce to deal with the brand and making it known to the public. So that, people know ONLY, for example, Amazon can sell Reebok shoes and if Flipkart and Snapdeal are selling it, then it could be a possible sham.

6. Jurisdiction may be a never ending process as companies are located in different parts of the globe and accessing the area/ location of the crime may be beyond our understanding. Therefore, an online system of dispute resolution and redressal may be beneficial.

Once these issues and challenges are eliminated a more robust system of IPR and ITA will evolve making a stronger union that supports both consumers and businesses and also detests any kind of fraudulent activities.