Intellectual property and the Internet

By putting in place a well-crafted IP management programme, companies can maximise the benefits of and handle the challenges posed by the Internet

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The Internet has revolutionised the way in which individuals and companies do business. Today, companies make billions of dollars by operating purely online.

Both internet resources and users are increasing at a fast rate, and there is no reason to assume that this trend will tail off, especially as developing countries become increasingly internet enabled. Websites must respond with the appropriate content in order to serve these growing demands now and into the future.

By recognising the limitations of the Internet with respect to IP rights, a company can begin to craft an internet-reliant IP management programme that maximises the benefits, while circumventing the now-obvious shortcomings.

The challenge of IP information management continues to drive the development of search and analysis tools capable of distilling relevant information from the expanding ocean of information and data available on the Internet. However, the existing search and analysis tools for the IP community remain quite primitive.

This chapter considers some of the issues pertaining to intellectual property – more specifically, copyright and trademarks – and the Internet. It also looks at areas to which rights holders should pay particular attention in order to protect their IP rights effectively.

Copyright and the Internet

Digital technology enables the transmission and use of protected materials in digital form over interactive networks. The transmission of text, sound, images and computer programs over the Internet is already common, and as the technical constraints of narrow bandwidth begin to disappear, this will soon be the case for the transmission of audiovisual works such as films. Materials protected by copyright and related rights, spanning the range of information and entertainment products, will constitute much of the valuable subject matter of e-commerce.

Given the capabilities and characteristics of digital network technologies, e-commerce can have a major impact on copyright and related rights, and in turn the scope of such rights can affect how e-commerce will evolve. If legal rules are not set down and applied appropriately, digital technology has the potential to undermine the basic tenets of copyright and related rights. The Internet has been described as “the world’s biggest copy machine”.

The older technologies of photocopying and recording allow mechanical copying by individual consumers, but in limited quantities, requiring considerable time and resulting in a copy of a lower quality than the original.

T Series v MySpace

Myspace, a website used by artists to upload their music, was involved in a legal battle against one of India’s biggest recording companies, T Series. T Series discovered that many of its songs were being uploaded for free – a clear violation of Section 51 of the Copyright Act. However, Myspace argued that since it

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was an intermediary under Section 79 of the Information Technology Act, it was exempt from liability.

Any intermediary can claim exemption under Section 79 of the Information Technology Act, which states as follows:

1. *An Intermediary must not be held liable for third party content, information or data hosted by it if:*
   - *the function of intermediary is limited to providing access to a communication system;*
   - *the intermediary did not initiate the transmission;*
   - *the intermediary did not select the receiver of the transmission;*
   - *the intermediary did not select or modify the information contained in the transmission; and/or*
   - *the intermediary observed due diligence while discharging his/her duties under this Act.*
2. *The Intermediary did not conspire, abet, aide or induce the commission of the unlawful act.*
3. *The Intermediary has never had the knowledge of, nor has it been sent a notice to remove the objectionable material, nor has it failed to remove it on request.*

The court concluded that Myspace had infringed T Series's copyright because it had knowledge of the infringing activities taking place on its website and had anti-infringement mechanisms in place, which clearly showed that it knew that infringement activities took place on its website. The court also concluded that since T Series had approached Myspace with the list of titles in which T Series had copyright ownership, and such titles had been uploaded for free onto My Space, Myspace was clearly aware and had specific knowledge of the infringement. Thus, this constituted infringement under Section 51 of the Copyright Act.

Domain names

Domain names are the most important form of intellectual property on the Internet. According to the Supreme Court of India, a domain name has all of the characteristics of a trademark. The country-code top-level domain (ccTLD) for India is '.in' and it is essential that companies and brands protect their domain names in the '.in' category. The '.in' ccTLD is governed by the IN Domain Name Dispute Resolution Policy (INDRP), which is similar to the Uniform Domain Name Dispute Resolution Policy.

In order to transfer a domain name from a cybersquatter, the complainant must prove the following three elements:

- The respondent's domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights.
- The respondent has no rights or legitimate interests in respect of the domain name.
- The respondent's domain name has been registered or is being used in bad faith.

There have been various cases in which multinational companies and brands –

including Yahoo!, Schlumberger and Rediff – have had their domain names registered by cybersquatters.

Schlumberger

Recently Schlumberger's '.in' ccTLD was found to be in the possession of an individual in China. Schlumberger filed a complaint with the '.in' Registry under the INDRP and the arbitration panel delivered a judgment in its favour. The panel found that:

- the respondent's domain name was identical or confusingly similar to that of Schlumberger;
- the respondent had no rights in the domain name; and
- the domain name was being used in bad faith.

The panel ordered the domain name to be transferred to Schlumberger.

Satyam

Satyam Infoway Ltd v Sifynet Solutions Pvt Ltd (2004(3) AWC 2366 SC) is the only domain name case to date to be decided by the Supreme Court of India.

The court held that Satyam Infoway was the prior user of the term 'Sify', and had established a reputation and goodwill through that name. However, that term was deceptively similar to the name 'Sify', used by Sifynet Solutions, and the public recognised the name for both undertakings. This created a likelihood of confusion and resulted in the possibility that consumers could be misled as to the origin of the goods and services.

The Supreme Court brought the dispute under the purview of the Trademarks Act and observed that a domain name has all of the characteristics of a trademark.

Yahoo!

The first Indian case to deal with a domain name dispute was *Yahoo! Inc v Aakash Arora* (78 (1999) DLT 285), in which the defendant launched a website that was nearly identical to the plaintiff's renowned Yahoo! website, and provided similar services. The court ruled in favour of the trademark rights of US-based Yahoo! Inc and against the defendant, which had registered the domain name 'YahooIndia.com'. The court observed that "it was an effort to trade on the fame of Yahoo's trademark. A domain name registrant does not obtain any legal right to use that particular domain name simply because he has registered the domain name, he could still be liable for trademark infringement".

Rediff

In *Rediff Communication v Cyberbooth* (2000 PTC 209) the Bombay High Court observed that the value and importance of a domain name make it akin to a corporate asset of a company. In this case the defendant had registered the domain name 'radiff.com', which was similar to 'rediff.com'. The court ruled in favour of the plaintiff.

Tata

In another case the defendant registered a number of domain names bearing the name 'Tata'. The court held that domain names are not only addresses, but also company trademarks, and thus are equally important (*Tata Sons Ltd v Monu Kasuri* 2001 PTC 432).

Anticipating online trends to manage intellectual property

The Internet is a medium that demands planning, attention and integration.

The corporate community must embrace the Internet as a means of competing in a global marketplace, and must develop an awareness of the potential global benefits and effects of using the Internet, regardless of a company's regional strategy, operations and decisions. The expanding commercial and IP protection opportunities must be balanced with increased exposure to infringement claims, an increase in the requirements to be fulfilled and costs involved in asserting IP ownership globally, and a higher standard of practice in prior art citation and clearance.

It is incumbent on every growing company to develop an economic and business strategy that covers patents, trademarks and branding, copyright and defensive and offensive intellectual property. Typically, this calls for the appointment of an IP manager or specialist whose job it is to get up to speed on the fast-moving online IP landscape.

The government and its policy makers should plan for a continued rise in the number of patent and trademark applications, and need to understand the financial and operational impact of accelerating IP activity. Without implementing a next-generation IT infrastructure, within a few years most patent offices will be faced with the near-impossible task of managing an out-of-control, traditional paper-based system. It is imperative that a long-term plan be developed, and that a budget commitment be obtained to ensure the vitality of the patent system and to maintain the requisite quality standards in light of the burgeoning volumes of prior art data.

Without implementing a three-to-five year budget plan to develop an automated IP database, as well as search, analysis and workflow management systems, patent offices will be unable to meet the growing demands of rights holders.

It is also important to have employees dedicated to the harmonisation of patent systems with emerging standards, insofar as this is practical, possible and within long-term budgets.

It is recommended that the majority of the budget and efforts be dedicated to exclusive content. Since many websites continually monitor the Internet for IP-related resources and keep their hypertext links current and active, it is a poor use of money for a company to develop its own directory of internet resources. Without frequent updating, this will become dated and even obsolete, and will likely contain broken links when websites change their addresses.

Increasing the quality of patents remains one of the biggest goals of patent offices around the world. Efforts towards establishing internet-based universal filing, search and prior art citation access systems continue. However, even with the harmonisation of 75% of the world's patent offices, for quite some time a substantial amount of relevant prior art data will remain unincorporated into any standardised system. Therefore, harmonisation efforts will not obviate the need for sophisticated tools, policies and rights of access in order to evaluate the millions of non-patent art citations that remain outside of any standardised data management system.

Comment

Within the next few years, the Internet will evolve into an international trade network built on a global IP backbone, with an increased emphasis on trade rather than intellectual property – following the time-proven axiom that IP protection is valuable only if it is responsive to market and commercialisation opportunities. This responsive movement towards commercialisation can be seen through the increased number of domain name cases, whereby rights holders have become more proactive in protecting their rights (eg, the US six-strike copyright enforcement programme). IP rights and the means of protecting them are themselves of little value without first claiming market opportunity or commercial value. Typically, intellectual property responds to new markets rather than creating them.

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