

Data Protection Law in India: The TRIPS Perspective

Praveen Dalal[†]

5, Jagriti Apartments, Sainik Vihar, Rani Bagh, New Delhi 110 034

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The aim of this article is to evaluate the mandates and requirements of TRIPS Agreement, vis-à-vis data protection requirements in India. India is planning to enact a law on data protection and the same must be in conformity with not only the TRIPS Agreement but also with the Constitution of India. An attempt has been made to highlight some issues on data protection in India. These issues are such that, continued ignorance and rejection can result in the declaration of the proposed law as 'unconstitutional'.

Keywords: Data, data protection rights, privacy rights, public international law, TRIPS Agreement, data protection

The expression 'data' is very wide in ambit and scope. It covers not only the personal aspects of individuals but also the commercial aspects. The former is protected in the form of privacy rights whereas the latter is protected as proprietary rights. The privacy rights are protected under Article 21 of the Constitution of India. Similarly, proprietary rights are protected under both the Constitution of India and under various statutes like the Indian Copyright Act, 1957, the IT Act, 2000, etc. Thus, a person has 'data protection rights' under the Indian laws.¹ The expression data protection covers both privacy rights as well as proprietary rights. Each of them, however, gets its meaning from the context in which the right in question is individually used. The former is violated when the personal information regarding individuals is compromised whereas the latter is infringed when they are disclosed or misused without authority.

The law of privacy is the recognition of individual's right to be let alone and to have his personal space inviolate. The term 'privacy' denotes the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he thinks fit. It also means an individual's right to control dissemination of information about himself as it is his own personal possession. Privacy primarily concerns the individual. It, therefore, relates to and overlaps with the concept of liberty. The most serious advocates of privacy must

confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.²

Data Protection and Current Legislation in India

The proprietary rights are safeguarded by both the Constitution of India and various statutory provisions. For instance, Article 21 has two aspects, i.e. a personal aspect of privacy right and a commercial aspect of right to livelihood. Data property³ is an important means of livelihood and the same cannot be taken away except by due process of law. If the same is violated by any person, compensation under Article 21 can be claimed. Similarly, Article 300A of the Constitution⁴ confers a right on all persons to hold and enjoy their properties. Thus a person cannot be deprived of his property save by authority of law. Any violation of this right can be challenged in a court of law. The expression 'property' is of wide amplitude and it includes tangible as well as intangible properties. It is difficult to accept the proposition that a data property is not a property falling within the scope of Article 300A of the Constitution of India. Thus, Article 300A would be violated if the data property of an individual is violated or misappropriated.

On the statutory side, Section 22 of the Indian Penal Code, 1860 (IPC) gives an inclusive definition of the term 'movable property', which includes all corporal properties. The word 'include' in the section indicates that information stored in the form of data on papers and in the computer can be conveniently and safely regarded as movable property, since it is

[†]Email: pd37@rediffmail.com, perry4law@yahoo.com

capable of moving from one place to another. In *R K Dalmia v Delhi Administration*⁵ the Supreme Court held that the word 'property' is used in the IPC in a much wider sense than the expression 'movable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only, when it is used without any qualification. Whether the offence defined in a particular section of IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. Thus, there is nothing that excludes the data property from the definition of property under the IPC.

The Information Technology Act, 2000 defines data under Section 2(1)(o) as: a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer. Similarly, the expression computer database⁶ means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalized manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network. The definitions of data and computer databases, along with their protection and enforcement provisions, are sufficient to take care of data property violations in the cyberspace.

Section 2(o) of the Copyright Act, 1957 provides that unless the context otherwise requires, literary work includes computer program, tables and compilations including computer databases. Thus, the Copyright Act, 1957 also provides protection to data property. The same is obvious if we give a purposive and updating interpretation to the provisions of the Copyright Act. It is true that it is not easy to establish intellectual property right (IPR) protection in data property, but difficulty does not mean lack of protection. It is for the concerned person to prove the same, which is absolutely possible in the present Indian legal system. The present Indian legal system protects sufficiently both the paper based as well as computer based data property.

TRIPS Agreement and Data Protection

The provisions of TRIPS Agreement are the most extensive and rigorous in nature as these protect all forms of IPRs collectively. The present article addresses only the 'data protection' aspect; hence it is confined exclusively to Section 1, i.e. copyright and related rights.⁷ Article 9(1) of the Agreement provides that Members shall comply with Articles 1 through 21 of the Berne Convention, 1971 and the Appendix thereto. The members, however, shall not have any rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.⁸ Thus, although TRIPS utilises Berne as a minimum standard, it deviates from the Berne in two aspects. TRIPS is broader than Berne, in that it protects 'software and databases'; but at the same time, TRIPS is also narrower than Berne, in that it does not require compliance with moral rights provided by Berne Article 6bis.⁹ The member will, however, have to continue to fulfill the existing obligations that Members may owe to each other under the Berne Convention.¹⁰ It means that if two Members of TRIPS Agreement are already extending protection to each other in the form of 'moral rights' of the authors under the Berne Convention, then the TRIPS Agreement will not prevent them from doing so.

The TRIPS Agreement recognises protection of 'data' in Article 10(2) of the TRIPS Agreement. Article 10(2) of the Agreement provides that 'compilation of data' or 'other material', whether in machine-readable or other form, which 'by reason of the selection or arrangement' of their contents constitute intellectual creations shall be protected as such. The Article further provides that such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

A closer perusal of the Article reveals the following facts:

- (1) It is the 'compilation' of data or other material, which is protected under TRIPS Agreement. It must be noted that 'compilation' of a subject matter of copyright is protected under almost all the legal systems. This is also protected in the Berne Convention. Thus, if a data is compiled in a particular manner, the same cannot be used in the similar manner. Further, by using the words 'other materials' the ambit of this Article has been extended to even non-data items.

- (2) The compilation may be either in a machine-readable form or in some other form. The previous category includes storing of data in computers and its parallels, whereas the latter category includes storing of the data in the traditional paper mode. The storing of data property in computers and its parallels necessitates protection of the same in information technology law as well. This may be the reason that the government is planning to amend the existing Information Technology Act, 2000. The proper approach, however, seems to be to incorporate necessary 'explanatory provisions' in the Indian Copyright Act, 1957 and making minor suitable amendments in the Information Technology Act, 2000. In no case, it should be pressed forward through Information Technology Act alone. If a data stored in a computer or its parallels is misused, the provisions of the Information Technology Act can be pressed in to service along with the Copyright Act, depending upon the nature of violation or contravention. At this point it may be noted that the Copyright Act, 1957 already protects 'databases' as 'literary works' under Section 2(o) of the Copyright Act.¹¹ It must be noted that the definition of 'literary work' is 'inclusive' in nature and is capable of encompassing more categories. Secondly, the concept of compilation used in this section is itself inclusive in nature and the compilation of databases is one of them. Thus, the expression 'compilation', as used in Section 2(o), includes at least two forms of compilation. One is compilation for the purpose of conferment of copyright and the other is compilation for the purpose of data protection. Thus, when the Section 13(1) (a) of the Copyright Act uses the expression 'original literary works', it is used not only in an inclusive manner but also in a multifunctional manner. It should not be confused to mean the literary work vis-à-vis copyright only. The inclusive nature of the literary work is permeating the entire Copyright Act and it cannot be allowed to be whittled down while interpreting Section 13(1)(a) of the Copyright Act. In short, the Copyright Act protects original compilations as both copyright and databases. It would be wrong to suggest that copyright and data protection are one and the same thing. These two are different IPR, which are expressly protected not only under the TRIPS Agreement but also
- equally under the Copyright Act. The erroneous treatment of databases as copyright and with similar parameters has created a position where the Indian government is planning to make a separate law for data protection. The present requirement is only to issue an explanatory notification clarifying this position. In fact, the definition of literary work is capable of accommodating other materials as well, which may be non-data in nature. This possibility has been expressly recognised and provided by both the TRIPS Agreement and the Copyright Act.
- (3) The claim for data protection originates only because of the selection or arrangement of the contents by using the intellectual creations. Thus, if there is no intellectual endeavour involved in the selection or arrangement of the contents, then the same may not be protected as data property. The same will, however, still be entitled to the protection of copyright, since the protection is not dependent upon the quality of the contents but their expression as such. It must be mentioned at this point that the claim of copyright is not dependent upon the formality of registration. The moment the contents are expressed in an original manner, the same will get the protection of copyright. If the contents are arranged using some intellectual endeavour, the same can be claimed as either the copyright or as database. It can safely be concluded that all databases are capable of copyright protection but not all copyrightable material qualifies for the data protection. This shows that it is easier to get copyright protection than data protection. This suggestion should not be misinterpreted as suggesting that the copyrightable material can be absolutely devoid of any intellectual shade. It only means that the requirement of 'quality' is more demanding and stringent in cases of data protection than copyright. Thus, the same material may fail to qualify for data protection, but it can be still protected by the copyright. This point is further strengthened by the use of the expression 'as such' in Article 10(2) (ref. 12) of the TRIPS Agreement. Thus, either the work is protected as database or it may qualify for the protection as copyright.
- (4) The protection in the databases is not available for the data or material itself, but it is exclusively available for the intellectual creation in the form of selection or arrangement. Further, the right in

databases is without prejudice to any copyright in the data or material itself. Again, it shows that a person possessing the data has two rights. On one hand, he has a right in the form of databases, which is available in the intellectual creations in the form of selection or arrangement. On the other hand, he has a right in the very data or material itself, which is available to him in the form of copyright. In short, the right to data protection is available only in form and manner of intellectual selection or arrangement and not in the data or material itself, whereas copyright is available in the data or material itself since the same is an expression. Thus, the Copyright Act, 1957 adequately protects both the databases and the copyright equally.¹³

The Needs and Modes of Data Protection

The compelling and much sought out demand for providing protection to the electronic information and data provided by various interested parties has again set in motion the thought process and India is facing a situation where it has to decide whether it should bring new amendments to the already existing IT Act, 2000¹⁴ or to enact a separate law for the same.¹⁵ A law on data protection must address the following Constitutional issues on a priority basis before any statutory enactment procedure is set into motion:

- (1) Privacy rights of interested persons in real space and cyber space.
- (2) Mandates of freedom of information U/A 19 (1) (a).
- (3) Mandates of right to know of people at large U/A 21.

If these issues are sidelined in the zeal of providing data protection then it may have catastrophic results because the law(s) providing for data protection will be vulnerable to the attack of unconstitutionality on the ground of violation of Articles 19(1) (a) and 21 of the Constitution. Thus, the pre requisite for the enactment of any law dealing with data protection is to keep in mind the mandates of these rights.¹⁶

Right to Privacy

The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects (1) the general

law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent for advertising or non advertising purposes or for that matter, his life story is written whether laudatory or otherwise and published without his consent. In recent times, however, this right has acquired a constitutional status.¹⁷ India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 thereof provides for the 'right of privacy'. Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms. Article 17 of the International Covenant does not go contrary to any part of our municipal law. Article 21 of the Constitution has, therefore, to be interpreted in conformity with the international law.¹⁸ Besides, the privacy rights in the cyberspace must also be kept in mind.

Provisions in IT Act, 2000

The following provisions of the Information Technology Act, 2000 reflect India's concern for protection of data and privacy rights of its citizens, as available even against private individuals, in the realm of information technology:

Long Arm Jurisdiction

Section 1 (2) read with Section 75 of the Act provides for extra-territorial application of the provisions of the Act. Thus, if a person (including a foreign national) contravenes the data and privacy rights of an individual by means of computer, computer system or computer network located in India, he would be liable under the provisions of the Act.

Unauthorised Use

If a person makes an unauthorised use of the computer, computer system or computer network of another person by accessing, downloading, introducing computer contaminant, damaging, disrupting, denying access, etc.¹⁹, he will automatically violate the privacy of the owner. Such a person shall be liable to pay compensatory damages not exceeding rupees one crore to the person so affected. Thus, the data and privacy includes the right of an individual to be free from restrictions or encroachments on his person or property, whether these are directly or indirectly brought about by calculated measures.²⁰

Computer Tampering

The data and privacy rights of a person will also be intruded if his computer source documents are tampered with. The person tampering with such computer source documents shall be punishable with imprisonment up to 3 years or with fine, which may extend up to Rs 2 lakh, or with both.²¹

Computer Hacking

If a person causes wrongful loss or damage to any person, by destroying, deleting or altering any data or private information residing in owner's computer resource or diminishes its value or utility or affects it injuriously by any means, he commits hacking and thus, violates the data and privacy rights of the owner. The person hacking shall be punishable with imprisonment up to 3 years or with fine, which may extend up to Rs 2 lakh, or with both. However, an innocent infringer will not be liable if he proves that he committed the act without any intention or knowledge.²²

Network Service Provider's Liability

A network service provider shall be liable for violation of data and privacy right of a third party if he makes available any third party information or data to a person for the commission of an offence or contravention. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.²³ However, a network service provider will not be liable if he proves that the offence or contravention was committed without his knowledge or he had exercised all due diligence to prevent such commission.²⁴

Liability of Companies

Where the data or privacy rights of a person are infringed by a company, every person who at the time of contravention was incharge of and was responsible to the company for the conduct of its business as well as the company shall be guilty of the contravention and liable to be processed against and punished accordingly. However, such person shall not be liable if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.²⁵

These provisions provide sufficient protection against data and privacy rights violations by private individuals. The need of the hour is to issue a notification to the effect that IT Act sufficiently protects data and privacy rights under these provisions. It is commonly misunderstood that there is no strong data and privacy protection under the IT Act.

Freedom of Information U/A 19(1)

The right to impart and receive information is a species of the right to freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information. The State is not only under an obligation to respect the fundamental rights of the citizens, but also equally under an obligation to ensure conditions under which the right can be meaningfully and effectively be enjoyed by one and all. At the same time, Article 19(2) permits the State to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence.²⁶ Thus, data protection rights may be pitted against freedom of information in a given case and the facts and circumstances of each case will govern the position. For instance, Section 8(1) (d) of the Right to Information Act, 2005 provides that notwithstanding anything contained in that Act, there shall be no obligation to give any citizen information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information. Now as a general rule freedom of information will not include the disclosure of data protection information. The same may, however, be disclosed if the larger public interest warrants so. Thus, each case will be governed by its own facts and circumstances. It must, however, be noted that freedoms under Article 19, including Article 19(1) (a), are available only to citizens of India. An alien or foreigner has no rights under this Article because he is not a citizen of India. Thus to confer protection upon non-citizens one has to depend upon and apply Article 21 which is available to all persons, whether citizen or non-citizen.²⁷

The continuous demand on the part of multinational corporations (MNCs) has made it essential to assure them that a proper mechanism for protection of their valuable data exists in India. An indifferent attitude towards this demand may cost valuable foreign exchange and numerous job opportunities. Thus, the assurance of a just and fair data protection law in India is the need of the hour.

Data Protection Principles

Data property is presently protected under the Copyright Act, 1957 and the Information Technology Act, 2000. Thus, to avoid any civil or criminal liability, the following 'data protection principles' must be kept in mind by the private individuals, private organisations, government or its agencies while receiving the data:

- (a) The data should be processed fairly and lawfully.
- (b) The data should be obtained for specific and lawful purpose.
- (c) The data should be adequate, relevant and not excessive.
- (d) The data should not be kept for longer than necessary.
- (e) The data should be processed in accordance with the rights of data subjects, and
- (f) Measures should be taken against unauthorized or unlawful processing.
- (g) It should not be used in a manner not authorised by the holder of the 'data property', etc.²⁸

The accountability and reasonableness requirements of companies have been safeguarded by affixing liability for data property violations under the Copyright Act, 1957 and the IT Act, 2000.²⁹ An interesting aspect of these provisions is that the language used in these statutes is virtually similar. Thus, while interpreting the provisions of a particular statute, support and aid can be taken of the judicial precedents given under other statutes. The accountability, reasonableness and due diligence requirement are incorporated in all the statutes so that the data protection rights of all persons are safeguarded in their widest and truest perspectives. The corporate façade cannot provide a blanket protection from the data violations arising under various statutes, including the Copyright Act, 1957 and the Information Technology Act, 2000. If Indian companies unlawfully and illegally use the data property of the MNCs or other persons, then they can be held liable for the same by lifting the corporate

veil. These provisions will apply, with necessary modifications, to government companies and government departments.³⁰ Thus, the mandates of TRIPS Agreements can be sufficiently enforced and complied within India through the abovementioned Constitutional and statutory mode of enforcement.³¹

Conclusion

The concerns and apprehensions of the MNCs regarding lack of data protection in India are far-fetched and unwarranted. The TRIPS Agreement, the Copyright Act, 1957 and the IT Act, 2000 provide sufficient safeguards for preventing violations of electronic and paper based databases of MNCs. The paper based data, information and details provided by the MNCs will get the protection of 'data property' if the same involves intellectual creations within the meaning of Article 10(2) of the TRIPS Agreement. If they fail to satisfy the requirement of Article 10(2), still they will be protected as copyright. The brightest and the positive aspect of this situation is that even non-data items are also protected, both under the TRIPS Agreement and the Copyright Act, 1957. Similarly, the IT Act, 2000 sufficiently protects electronic data property and there is no need of further amendments. The IT Act, 2000 defines 'data' u/s 2(1)(o).³² Further, the explanation (ii) to section 43 defines and protects computer database.³³ The enforcement aspect of data protection is also adequately covered under the IT Act, 2000. For instance, the IT Act, 2000 provides for both civil and criminal liabilities in the form of contraventions and offenses.³⁴ Thus, the present framework of the data protection regime is sufficient to accommodate the mandates of both the Constitution of India and the TRIPS Agreement. The ultimate solution to any problem is not to enact a plethora of statutes but their rigorous and dedicated enforcement. The courts must apply the existing laws in a progressive, updating and purposive manner. It must be appreciated that it is not the enactment of a law but the desire, will and efforts to accept and enforce it in its true letter and spirit, which can confer the most strongest, secure and safest protection for any purpose. The enforcement of these rights requires a qualitative effort and not a quantitative effort.³⁵ Thus, there should be no hesitation in using the existing provisions to enforce the rights of data protection, which are sufficient from all aspects. If at all the data protection law is required to be enacted in India, it must incorporate the missing links discussed above.

References

- 1 For the purposes of this article, the expression 'data protection rights' has been used synonymously for information and details of every type and is not confined to the protection as available under the regime of Intellectual Property rights alone. It covers both the privacy aspect and the proprietary aspects.
- 2 *Gobind v State of MP*, (1975) 2 SCC 148.
- 3 The expression 'data property' has been used in this article to refer to proprietary rights available *vis-à-vis* data protection. It includes data, computer databases, data having competitive advantage, etc.
- 4 Article 300A provides that no person shall be deprived of his property save by authority of law.
- 5 AIR 1962 SC 1821.
- 6 Explanation (ii) of Section 43, IT Act, 2000.
- 7 As provided in Articles 9 and 10 of the TRIPS Agreement.
- 8 Article 6bis of the Berne Convention confers 'moral rights' on the owners of the copyright, which is not available under the TRIPS Agreement.
- 9 Gin B Elaine, International copyright law: Beyond the WIPO and TRIPS debate, *Journal of Patent Trademark Office Society*, (October 2004), 785.
- 10 Article 2(2) of TRIPS Agreement.
- 11 Section 2(o) provides that unless the context otherwise requires, literary work includes computer programme, tables and compilations including computer databases.
- 12 Article 10(2) of the Agreement provides that 'compilation of data' or 'other material', whether in machine-readable or other form, which 'by reason of the selection or arrangement' of their contents constitute intellectual creations shall be protected 'as such'. The Article further provides that such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.
- 13 Dalal Praveen, The mandates of WTO, <http://perry4law.blogspot.com/2005/05/mandates-of-wto.html>.
- 14 The Act primarily deals with e-governance and e-commerce.
- 15 The proposed amendments are considering the electronic data property only as the paper based data property is sufficiently and aptly covered by the Copyright Act, 1957 as discussed above. In fact, even the computer based data property is also sufficiently protected under the IT Act, 2000.
- 16 Dalal Praveen, Data protection law in India: A constitutional perspective, http://www.ipmall.info/hosted_resources/gin/PDalal_DATA-PROTECTION-LAW-IN-INDIA.pdf.
- 17 *Rajagopal v State of TN*, (1994) 6 SCC 632.
- 18 *PUCI v U O I*, (1997) 1 SCC 301.
- 19 Section 43 of IT Act, 2000.
- 20 *Kharak Singh v State of UP*, AIR 1963 SC 1295.
- 21 Section 65 of IT Act, 2000.
- 22 Section 66 of IT Act, 2000.
- 23 Section 79 of IT Act, 2000.
- 24 Section 85 of IT Act, 2000.
- 25 *State of UP v Raj Narayan*, AIR 1975 SC 865; *P V Narsimha Rao v State*, AIR 1998 SC 2120.
- 26 Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.
- 27 Dalal Praveen, The needs and modes of data protection, http://perry4law.blogspot.com/2005/06/needs-and-modes-of-data-pr_111773529833410003.html.
- 28 Section 69 of the Copyright Act, 1957 and Section 85 of the IT Act, 2000 respectively.
- 29 It must be noted that even for electronic data property, the existing IT Act, 2000 and the Copyright Act, 1957 provide sufficient protection and there is no need of amendments for the same.
- 30 'Data' means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.
- 31 'Computer database' means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network.
- 32 For instance, the clauses (a) to (h) of Section 43 covers the 'contraventions' that are civil in nature whereas Sections 65 to 74 covers 'offences' that are penal in nature.
- 33 Dalal Praveen, Cyber terrorism and its solution: An Indian perspective, *ICFAI Journal of Cyber Law*, 4(1) (2005), 70.