The Long Arm Jurisdiction of Courts Regarding Copyright Law in India

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The aim of the article is to expound the scope of territorial jurisdictional powers of the courts, tribunals or other authorities constituted under various enactments and dealing with copyright violations in India. A holistic approach has been adopted so that real space and online copyright violations can be appropriately dealt with. The article further suggests a possible course to deal with violations occurring outside India through the mode of information technology and having an adverse effect on the copyright of the concerned person residing in India.

Keywords: Jurisdictional issues, cyber space jurisdiction, online copyright issues

Jurisdiction is an aspect of state sovereignty and it refers to judicial, legislative and administrative competence. Although jurisdiction is an aspect of sovereignty, it is not coextensive with it. The laws of a nation may have extra-territorial impact extending the jurisdiction beyond the sovereign and territorial limits of that nation. This is particularly so where the medium of Internet is used which recognizes no sovereignty and territorial limitations. The Indian jurisprudence regarding jurisdiction over Internet is in its early stages and is developing and maturing in a systematic manner. The existence of Internet has eliminated the safeguards traditionally available for the protection of various rights, including the copyright. This has given rise to the jurisdictional problems for all the countries of the world. The countries all over the world, realizing this problem, have resorted to the only available method of dealing with this problem, i.e., by harmonizing their domestic laws with the various international treaties and conventions. This, however, has not completely eliminated the jurisdictional problems, but moderate success has been achieved by exercising the “long arm jurisdiction” by the municipal courts of foreign countries. This need for long-arm jurisdiction is particularly felt in cases of violations of various intellectual property rights, including the copyright. The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral
agreement on intellectual property. Part III of the agreement sets out the obligations of member governments to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced by foreign as well as national right holders. These procedures should permit effective action against infringement of intellectual property rights. These procedures should be fair and equitable, simple and cheap without entailing unreasonable time limits or unwarranted delays. Besides, these should allow for judicial review of final administrative decisions. There is no obligation to put in place a judicial system distinct from that for the enforcement of laws in general, or to give priority to the enforcement of intellectual property rights in the allocation of resources or staff.

**Jurisdictional Issues in India**

The rights conferred by the copyright law can be enjoyed and protected only if the same can be enforced through the court of law. The enforcement of these rights presupposes the existence of jurisdictional capacity in the courts, tribunals or other authorities trying the matter. This jurisdictional capacity can arise in relation to the violations in real space, and cyber space (online issues).

**Real Space Jurisdiction**

In India, the real space violation of copyright is taken care of by Section 62 of the Copyright Act, 1957 (hereinafter referred to as the Act). The analysis of the section reveals that its scope is much wider than the jurisdictional ambit of Section 20 of the Civil Procedure Code (CPC). The Act provides a wider jurisdictional power to the courts to try the matters pertaining to copyright violations as compared to CPC, 1908 because Section 62 prescribes an ‘additional ground’ for attracting the jurisdiction of a Court over and above the 'normal' grounds as laid down in Section 20 of the Code. Secondly, Section 62 (2) starts with a non-obstante clause which will give an overriding effect to this Section in case there is any inconsistency between this section and the provisions of CPC. Lastly, the expression ‘include’, as used in Section 62(2), shows that it is capable of accommodating not only the traditional jurisdictional mandates, but also those requirements which may arise in future due to change in technology and other circumstances. It is presumed that the Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow changes ever since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is, nevertheless, to be construed in accordance with the need to treat it as a current law.

The object and reason for the introduction of sub-section (2) of Section 62 was not to restrict the owners of the copyright in exercising their rights, but to remove any impediment from their path.
The relevant extract of the report of the Joint Committee published in the Gazette of India dated 23-11-1956 which preceded and laid the foundation for Section 62(2) said: “In the opinion of the Committee many authors are deterred from instituting infringement proceedings because the court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new sub-clause (2) accordingly provides that infringement proceedings may be instituted in the district court within the local limits of whose jurisdiction, the person instituting the proceedings ordinarily resides, carries on business, etc”. Thus, the convenience of the copyright owner has been considered by the legislature in its true perspective because, in the absence of this provision, the copyright owners would be indifferent towards copyright violations. The cumbersome, expensive and time consuming process, which normally precedes while invoking civil jurisdictions, has been done away with.

The question of territorial jurisdiction of the court to deal with copyright infringement was considered by the courts on several occasions. The courts have given the jurisdictional aspect a wider and liberal interpretation, which has resulted in empowering the courts with the long-arm jurisdiction over the offenders. In Caterpillar Inc v Kailash Nichani\(^{11}\), the Delhi High Court held that Section 62 of the Copyright Act makes an obvious and significant departure from the norm that the choice of jurisdiction should primarily be governed by the convenience of the defendant. The legislature in its wisdom introduced this provision laying down absolutely opposite norm than the one set out in Section 20 CPC. The purpose is to expose the transgressor with inconvenience rather than compelling the sufferer to chase after the former. Similarly, in Exphar SA & Anr v Eupharma Laboratories Ltd & Anr\(^{12}\) case, the Supreme Court has observed that the jurisdiction for the purposes of Section 62 is wider than that of the Court as prescribed under the Code of Civil Procedure, 1908. Section 62(2) cannot be read as limiting the jurisdiction of the District Court to only those cases where one or more persons instituting the suit or other proceedings actually and voluntarily reside or carry on business or presently work for gain. It prescribes an additional ground for attracting the jurisdiction of a Court over and above the 'normal' grounds as laid down in Section 20 of the Code. Further, the appellant No 2 carrying on business within the jurisdiction of the Delhi High Court is certainly ‘a person instituting the suit’. The Division Bench went beyond the express words of the statute and negatived the jurisdiction of the Court because it found that the appellant No 2 had not claimed ownership of the copyright of the trademark, infringement of which was claimed in the suit. The appellant No 2 may not be entitled to the relief claimed in the suit, but that is no reason for holding that he is not the person who has instituted the suit within
the meaning of Section 62(2) of the Act. Furthermore, the appellants' plaint said that the cease and desist notice was sent to the appellant No 2 at its office in New Delhi and in that notice it was alleged that the appellant No 2 had infringed the copyright of the respondent No 2. Now a cease and desist notice means that the recipient is alleged to have infringed the rights of the sender of the notice to the copyright and as a result of such alleged infringement the recipient is liable to institution of civil and/or criminal proceedings. It is a threat. The plaint said that this threat was received within the jurisdiction of the High Court, a fact which was sufficient to invoke the jurisdiction of that Court. A cease and desist notice in a copyright action cannot, particularly in view of Section 60 of the Act, be termed to be a 'mere' notice. Such a threat may give rise to the right to institute a suit to counter such threat and to ask for relief on the ground that the alleged infringement to which the threat relates is not, in fact, an infringement of any legal right of the person making such threat.

These decisions of the courts point towards the commitment of the Indian judiciary to resolve the jurisdictional problems associated with copyright violations. The courts in India have recognized that infringement of copyright will be dealt with stringent and punitive tempers. The courts have construed liberally the provisions which confer jurisdiction upon the courts. The interpretation given by the apex court to Section 62(2) is a step in the right direction, which can be made more effective if it adopts a holistic approach and combines various jurisdictional powers to do complete justice. This is more so when the jurisdictional problems have trans-border ramifications and simultaneously involves a course of action in more than one country. This situation is generally faced when the medium of Internet is used to infringe the copyright. Thus, the contours and requirement of cyber space jurisdiction are totally different from real space jurisdiction, though both of them can be combined in appropriate cases to do the complete justice.

**Cyber Space Jurisdiction**

The Internet is a paradox. It is everywhere, yet it is nowhere. It is ‘a worldwide entity whose nature cannot be easily or simply defined’. The ease with which computers can transfer and exchange digital information on the Internet has caused concern among intellectual property owners, especially copyright owners. The information technology allows the computer users to easily and secretly transform the copyrighted materials into digital form and store them in their computer memory. Once a user digitized information, he can easily upload it to the Internet. Once the information is available on the Internet anyone in the world with Internet access can download, modify, and distribute it. Thus, in an instant, a copyrighted work can potentially lose its value and significantly suppress an author’s incentive to create new material.
Thus, with the advancement of information technology, copying, modifying, and distributing of copyrighted materials have become very simple and difficult to trace. The copyright owners are now at the mercy of a technology that has raced ahead of the law. Because the Internet ‘is a cooperative venture not owned by a single entity or government’, there are no centralized rules or laws governing its use. The absence of geographical boundaries may give rise to a situation where the material legal in the country where it is posted will violate the laws of another country. This process is further made complicated due to the absence of a uniform and harmonized law governing the jurisdictional aspects of disputes arising by the use of Internet. The ‘theories’ under which a country may claim prescriptive jurisdiction are based on the:

(a) ‘objective territoriality’ when an activity takes place within the country,
(b) ‘subjective territoriality’ when an activity takes place outside the nation’s borders, but the ‘primary effect’ of the action is within the nation’s borders,
(c) nationality of either the offender or the victim,
(d) right to protect the nation’s sovereignty when faced with threats recognized as particularly serious in the international community in exceptional circumstances.

In addition to establishing a connecting nexus, traditional international doctrine also calls for a ‘reasonable’ connection between the offender and the forum. Depending on the factual context, courts look to such factors, as whether the activity of individual has a “substantial and foreseeable effect” on the territory, whether a ‘genuine link’ exists between the offender and the forum, the character of the activity and the importance of the regulation giving rise to the controversy, the extent to which exceptions are harmed by the regulation; and the importance of the regulation in the international community. The traditional jurisdictional paradigms may provide a framework for analyses of cases arising in cyberspace.

**Online Copyright Issues in India**

The reference to online copyright issues can be found in the following two major enactments: the Copyright Act, 1957, and the Information Technology Act, 2000.

**Copyright Act, 1957 and Online Copyright Issues**

The judicial power of a State extends to the punishment of all offences against the municipal laws of the State by whomsoever committed within the territory. It also has the power to punish all such offences wherever committed by its citizens. The general principle of international law is that every person, be it a citizen or foreigner, who is found in a foreign State is subjected to, and is punishable by its law, otherwise the criminal law could not be administered according to any civilized system of jurisprudence. Thus, if the copyright of a person resident in India is violated by means of Internet, then the courts in India have a jurisdiction to take note of the
same by virtue of Section 62(2) of the Copyright Act, 1957. This is more so if any of the ‘jurisdictional theories’, as mentioned above, is attracted in a particular case. It must be noted that the laws in India do provide a jurisdiction to take action even if only a small part of the action has arisen in India. Thus, the moment a copyrighted work stored in a computer located in India is violated, the courts in India will have the jurisdiction to provide suitable remedies. The courts are also free to combine this jurisdictional power with the provisions of the Information Technology Act to do complete justice. The ultimate protection from online copyright violation can, however, come only from the provisions of the Information Technology Act.

**Information Technology Act, 2000 and Online Copyright Issues**

The following provisions of the Information Technology Act, 2000, are relevant to understand the relationship between copyright protection and information technology:

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

(b) If any person accesses or secures access to a computer, computer system or computer network or downloads, copies or extracts any data, database or information from it including information or data held or stored in any removable storage medium without permission of the owner or any other person who is in charge of it, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected which is deterrent enough to prevent copyright violation.

(c) While adjudging the quantum of compensation, the adjudicating officer shall have to consider the following factors: (i) the amount of gain or unfair advantage, wherever quantifiable, made as a result of the violation; (ii) the amount of loss caused to any person as a result of the violation; and (iii) the repetitive nature of the violation. Thus, if the copyright is violated intentionally and for earning profit, the quantum of damages will be more as compared to innocent infringement.

(d) A Internet Service Provider (ISP) will not be liable under this Act, rules or regulations made thereunder, for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. A ISP, under section 79, means an intermediary and third party information means any information dealt with by a ISP in his capacity as an intermediary.


The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force\textsuperscript{22,23}.

The provisions of Section 1(2) read with Section 75 empower the courts with a ‘long arm jurisdiction’ which is absolutely necessary for meeting the challenges posed by the information technology. The enforcement of these provisions is, however, a difficult and tedious task. The power becomes more aggressive with the support of the overriding provisions of Section 81 of the Act. Thus, jurisdictions available under other laws will give way to the provisions of the Act in case of conflict and inconsistency. This is so because of two reasons. Firstly, a statute, which is later in point of time and contains a non-obstante clause\textsuperscript{24}, will prevail over any other inconsistent law for the time being in force. Secondly, the Information Technology Act being a ‘special law’\textsuperscript{25}, covering the matters pertaining to information technology, would prevail over all other inconsistent and conflicting laws. It must be noted that the first effort of the court is to reconcile two conflicting laws and if reconciliation is possible then the court gives a harmonious interpretation to the provisions of both the enactments. In case it is not possible to reconcile two conflicting and inconsistent provisions, then the court invokes the non-obstante clause of the special Act to give effect to the provisions of that special Act. Thus, the Information Technology Act, being a special Act, which is later in point of time, would prevail over the jurisdictional procedures mentioned in other enactments. In case there is no conflict or inconsistency between various jurisdictional powers, there is nothing that restricts the courts from combining them together to meet the ends of justice. It must be noted that by incorporating the long arm jurisdiction, India has not taken any revolutionary and extraordinary step, but has acted in accordance with the well accepted practice all over the world, particularly in the United States of America. In fact, the enactment of the Information Technology Act, 2000 is due to the mandate of the United Nations Commission on International Trade Law (UNCITRAL), to which India is a signatory. This means that the provisions of the Act are in conformity with the well established and accepted international standards and norms. Thus, the courts will have the jurisdiction to deal with online copyright issues. In fact, even in the absence of these provisions, the courts in India have the power to incorporate well-accepted international rules and principles if they are in conformity with the municipal laws and are not in conflict with them. In \textit{Gramaphone Company of India Ltd v Birendra Bahadur Pandey}\textsuperscript{26} case, the court observed that the comity of Nations requires that rules of international law may be accommodated in the Municipal law even without express legislative sanction provided these do not run into conflict with Acts of Parliament. But if conflict is inevitable, the latter must yield. There is a presumption that Parliament does not assert or assume jurisdiction which goes
beyond the limits established by the common consent of nations and statutes are to be interpreted, provided their language permits, so as not to be inconsistent with the comity of nations or with the established principles of international law. But this principle applies only where there is an ambiguity and must give way to a clearly expressed intention. If statutory enactments are clear in meaning, these must be construed according to their meaning even though they are contrary to the comity of nations or international law.

It must be noted that, by virtue of sections 1(2), 75 and 82, the Act applies to offences or contraventions committed outside India as well. The Act applies to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India. Thus, if a person violates the copyright of another, which is stored in electronic form in a computer located in India, then such person would be liable to be tried under the copyright laws of India.

At this stage it would be apposite to note the interpretation given by the Apex Court of India to the expression ‘import’ under Section 53 of the Copyright Act, 1957. The Supreme Court in Gramaphone Company of India Ltd v Birendra Bahadur Pandey observed as follows: “The question is what does the word import' mean in Section 53 of the Copyright Act? The word is not defined in the Copyright Act though it is defined in the Customs Act. But the same word may mean different things in different enactments and in different contexts. It may even mean different things at different places in the same statute. It all depends on the sense of the provision where it occurs. Reference to dictionaries is hardly of any avail, particularly in the case of words of ordinary parlance with a variety of well-known meanings. Such words take colour from the context. Appeal to the Latin root will not help. The appeal must be to the sense of the statute. We may look at Section 53 rather than elsewhere to discover the meaning of the word ‘import’. We find that the meaning is stated in that provision itself. If we ask what is not to be imported, we find the answer is copies made out of India, which if made in India would infringe copyright. So it follows that ‘import’ in the provision means bringing into India from out of India. In interpreting the word ‘import’in the Copyright Act, we must take note that, while positive requirement of the Copyright Conventions is to protect copyright, negatively also, the Transit Trade Convention and the bilateral treaty make exceptions enabling the transit State to take measures to protect copyright. If this much is borne in mind, it becomes clear that the word ‘import' in Section 53 of the Copyright Act cannot bear the narrow interpretation sought to be placed upon it to limit it to import for commerce. It must be interpreted in a sense which will fit the Copyright Act into the setting of the International Conventions. Therefore, the word ‘import' in Sections 51 and 53 of the Copyright Act means 'bringing into India from outside India',
that it is not limited to importation for commerce only, but includes importation for transit across the country. The interpretation, far from being inconsistent with any principle of international law, is entirely in accord with International Conventions and the Treaties”.

This decision of the Supreme Court can safely be applied to online copyright violations and contraventions. The accessing of a computer located in India and violating the copyright of the person concerned by distributing or otherwise dealing with the same can safely be regarded as importing or exporting of the infringed copyrighted material, as the case may be, via the medium of information technology. A person may upload the infringed copyrighted material on the Internet and any person using a computer, computer system or computer network located in India may have access to the same. The moment such material is downloaded in India, it will constitute an illegal import of the copyrighted material. Such uploading will also constitute an ‘import into India’ of the infringed copyright material if the same is done through the mode of creating a program which prompts the computers located in India to download the same. Further, the importation of infringed material is not limited to importation for commerce only, but includes importation for transit across the country. Thus, even if the ultimate destination of the infringed material is not India, but still the wrongdoer can be punished if, during the transit, any computer, computer system or computer network located in India has been used. Similarly, when a person residing outside India downloads a copyrighted material stored in a computer, computer system or computer network located in India, then it will constitute ‘an illegal export’ of copyrighted material from India without the approval of the owner.

It must be noted that the peculiar features of the Internet makes it highly vulnerable to the jurisdiction of courts all over the world, since it is a well knit network of computers involving computers located in all the countries of the world. Further, there is nothing in the law, which restricts the courts to combine two provisions of different enactments for rendering complete justice in the facts and circumstances of the case. Thus, the provisions of Sections 1(2), 75 and 81 of the Information Technology Act, 2000 read with Section 53 of the Copyright Act, 1957 can provide a viable solution to the jurisdiction problems of all sorts. These provisions get strength also from the well-accepted ‘jurisdictional theories’, which are uniformly followed in almost all the countries of the world.

Conclusion
The jurisdictional issues, particularly those relating to online violations of copyright, are not easy to handle. The legal system of each nation reacts differently to these violations. At the international level various treaties and reciprocal arrangements have been adopted to deal with these violations of copyright. These will definitely help in providing strong and effective copyright protection to their owners. The ultimate success of these laws and arrangements
would, however, depend on the pro-active role played by the judiciary of the respective nation. If the judiciary, recognizing the need of the hour, takes copyright violations seriously, then the chances of their future violations become nominal. Fortunately, the Indian judiciary has recognized this fact very well and is protecting the interest of the copyright owners in the most apposite manner, which is clearly reflected in the judgments given by it from time to time.

References
1 Dalal Praveen, E-commerce and jurisdictional issues in India (Under Publication)
2 The concept of ‘long-arm jurisdiction’ signifies that the laws of a sovereign State have extra-territorial operations if an act or omission has produced an adverse affect within the territory of that country
3 The Trade-Related Aspects of Intellectual Property Rights
4 India is a member party and signatory to TRIPS Agreement
5 The expression ‘jurisdictional capacity’ is limited only to ‘territorial jurisdictional capacity’ for the purposes of this article
6 The concept of real space signifies that the act or omission occurred in a physical form and without the use or involvement of means of information technology
7 The concept of cyber space signifies that the act or omission occurred due to the use of information technology (Internet), which generally is intangible in nature
8 Section 62 reads: “Jurisdiction of court over matters arising under this chapter
(a) Every suit or other civil proceeding arising under this chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.
(b) For the purpose of sub-section (1), a ‘district court having jurisdiction’ shall notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, ‘include’ a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personal works for gain
9 Infra note 24
10 The expression ‘includes,’ means that an inclusive, and not exhaustive, option is given by the legislature to meet the future challenges. If the expression ‘means’ is used, then it signifies that the subject matter is exhaustive in nature
11 2002 (24) PTC 405(Del)
12 2004 (2) Scale 589
14 Shulman Mary Ann, Internet Copyright Infringement Liability, 27 Golden Gate University Law Review, 555,558, Spring 1997
15 Dawson Cherie; Creating borders on the Internet- Free speech, the United States and international jurisdiction, Virginia Journal of International Law, 44(2) 2004
16 Ajay Agarwal v U.O.I, All India Reporter (AIR) 1993 SC1637
17 Section 43(a)
18 Section 43(b)
19 Section 47
20 Section 79
21 Explanation to Section 79
22 Section 81
23 Dalal Praveen, The glimpse of copyright law in India (Under publication)
24 A non-obstante clause is a clause, which provides an overriding effect to the provisions of a particular statute over the provisions of any other law for the time being in force. This clause generally starts with the words “Notwithstanding anything contained in any other law for the time being in force” and then it gives a final say to that provision in case of inconsistency or conflict with any other provision
25 A law can be classified as a 'general law' or as a 'special law'. A general law is a law, which covers a field generally. For instance, the Indian Penal Code, 1860 is a general law dealing with some basic offences of general application. On the other hand, the Information Technology Act is a special law as it deals with matters (including certain specified offences and contraventions), which are peculiar to that Act only. In case of a conflict between a general law and a special law, the special law will prevail if the matter of controversy falls under that special law.

26 AIR 1984 SC 667

27 AIR 1984 SC 667

28 ‘Uploading’ is the process in which the subject matter in concern is put on the Internet with the intention that any interested person can have access to the same with a choice to download and remit it further.

29 The process of downloading involves storing of a material posted on the Internet on a local computer. It must be noted that, generally, materials posted on the Internet contain a caution that it is protected by the national copyright law and the international treaties and conventions. If such a material is downloaded without proper authorization, then it will constitute copyright violation.