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Impact of IPR in the World of Social Media

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ABSTRACT

This paper aims at understanding the intellectual property laws with the emergence of social media. To what extent social media is powerful and does it hampering the creativity or is it rewarding the creativity. Social media have gone above and beyond and we are all the way surrounded by it remarks the seismic shift in day to day functions of life. This brings the question that whether the content shared on social media is protected under IP laws. It explains the evolution of intellectual property after the introduction of social media. To determine that whether social media is helpful for intellectual property or not? This paper talks about social media and the content shared on social media with reference to intellectual property laws.

Keywords: Intellectual Property, Social Media, Creativity

I. INTRODUCTION

Intellectual property is basically the human intellect and creation of the human mind. The concept behind intellectual property is that the product of human intellect needs to be protected as physical properties are being protected. Intellectual property, according to the World Intellectual Property Organization (WIPO), “refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce. This means that if someone creates something by using human intellect and which has never been created before then that creator has the ownership of that creation and also has the rights of that creation and is legally protected. Intellectual property is the product of the human intellect including creative concepts, inventions, industrial models, trademarks, songs, literature, symbols, names, brands,....etc. Intellectual Property Rights do not differ from other property rights. They allow their owner to completely benefit from their product which was initially an idea that developed and crystallized.² They also entitle them to prevent others from using, dealing, or tampering with their product without prior permission from them.

¹ Author is a student at Renaissance College of Law, Indore, India.

² *What is IPR*, <https://www.dubaicustoms.gov.ae/en/IPR/Pages/WhatIsIPR.aspx>.

II. IPR AND SOCIAL MEDIA

Social media refers to the online interaction of individuals and the exchange of user generated content. According to the Cambridge English dictionary, social media is, "websites and computer programs that allow people to communicate and share information on the internet using a computer or mobile phone". But the question that arises here is the content and information shared on social media protected? There isn't theft from social media? Suppose, for example, Mr A with all his creative mind made the painting and uploaded the same on social media. The question that arises here is that, does that painting is safe from social media theft, and does Mr A Get recognition for making that painting or someone else uses that for their benefit.' This same question arises in the business as well because in today's world social media is the king for almost all business operations, whether it is the marketing of the new product or making opportunities for business everything is done with the help of social media. If we give a close look to today's business operation we find that almost all the business owners use some kind of intellectual property to differentiate their business from the others and this, in turn, becomes their brand name. Thus the social media becomes a vital part of our life and it also calls for inherent problems such as theft of intellectual property. The business owners always have this fear in their mind that their logo, their brand names, etc. should not be used by others like this in turn harms the reputation of the business. Social media becomes the battlefield for the business owners and with some of the grey areas on IP and IT laws; it becomes necessary for the business owners and others to restrict themselves by not sharing the valuable contents on social media. Though the evolution of social media also helps in many ways but it also throws a whole new set of challenges in the IP sector.

III. OVER SHARING IS NEW NORMAL

With the emergence of social media it is very easy and handy to share everything on social media from pictures to ideas. From videos to skits everything can be shared on social media and this is becoming a trend for the youth because social media provide the wide open platform to showcase their work where sky's the limit. 'What's happening?' asks Twitter, 'what's on your mind?' asks Facebook, 'Broadcast yourself', asks YouTube, 'Capture and share the world's moment's' asks Instagram. And we without even giving the second thought post multiple pictures in a week and several instagram stories in a day. With just a click we share our pictures and videos and other original content with the whole wide world. Social media is everyone's favourite place to share their accomplishment, failure, success, political opinion etc. if we give a close look in today's world we find that in present day life people are

busy and they hardly get time to meet with their loved ones and they find social media an easy option to communicate with their loved ones and also to let them know about their accomplishment. It is seen that when because of Covid 19 people are locked in their houses and at the same time many people start small business from their home and advertise it just by posting it on social media helps people to attract the customers But however everyone understands that in today's world over sharing is new normal and everyone in some or the other ways uses social media to post their content without any fear.

IV. INFRINGEMENT OF IPR BY SOCIAL MEDIA

Copying down others' content and posting it by their own name on social media is becoming practice. There are fraud users who use the name of the brands and their photos and display it as their own to invite the customers. Imagine, someone has copied both the ideas and expression of another author's work, they might have copied the poem and trying to pass it off to their friends and family as their own work. This is known as infringement of IPR.

IPR infringement through social media involves copyright piracy like pirated movies and songs, making fake Twitter or Facebook accounts of famous personalities etc. but here come the questions about the role and liability of intermediaries such as search engines, web page, service provider, etc. as this intermediary plays an essential role in this respect. The term intermediary is defined under Section 2 (w) of Information Technology Act 2000 as "any person who on behalf of others with respect to any particular electronic message and means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message." As it is in the hands of these intermediaries to keep or not to keep this infringing content and to sell the password of the Facebook twitter accounts. More recently, in 2020 we have seen Twitter accounts of famous persons get hacked which include people like Joe Biden, Elon Musk, Bill Clinton and Jeff Bezos.³ Which are in the hands of these intermediaries or service providers because they are the one who sell passwords. According to intermediaries' definition given above Social media such as Twitter, YouTube, Facebook, Instagram, MySpace, etc. also comes under the ambit of intermediaries. Now let us see the policies of some of the social media's

Facebook

According to Facebook's clause 2 what you can share and do on Facebook , Facebook can remove any content on its own initiative if it finds that the content is infringing the IP of any

³Ryan Browne, *Twitter says 130 people were targeted in hack that hijacked accounts of Elon Musk, Joe Biden /CNBC. JUL 17 2020*, <https://www.cnbc.com/2020/07/17/twitter-hack-130-people-targeted-in-cyberattack-that-hit-vip-accounts.html>.

third party.

Instagram

As per the terms of Instagram, it suggests the user makes sure only to post content that, if the user is the creator, or rightful owner, or has obtained prior permission from the actual owner prior to posting such content. In the event of any copyright infringement, there is an option for reporting the content. This clearly means that if there is any complaint about copyright infringement Instagram holds the right to remove that content.

Twitter

Twitter also has a similar kind of policy where twitter reserves the right to remove the infringing contents at their own discretion and in addition, they reserves the right to terminate the account of a user who is found to be the repeater.

Youtube

Like Facebook, Instagram and Twitter, YouTube also has a takedown policy, according to YouTube policy if there is any infringement of IP by any third party then the original creator can make a complaint to YouTube, and YouTube reserves the right to remove that content.

As it is very evident that almost all social media platforms have policies to restrict IPR infringement but the question is whether these policies are helpful or not? Are they helping the original creator of the work or they are busy making money with the infringing content. In one of the cases of Suneel Darshan. YouTube LLC⁴, Bombay High Court ruled in favour of the plaintiff against Google and YouTube and the court agreed that the tech giant makes a considerable amount of profit by keeping the infringing content. In this case, the Indian filmmaker Suneel Darshan made the complaint to YouTube as per the policy of YouTube to remove the pirated content but he got fed up with YouTube's ignorance to remove the videos of his copyrighted works and filled the case. Although YouTube argued that they are not directly liable as they are not the one who uploads the video but they are only acting as the intermediary to this. But then the question that arises here is what about YouTube's policy which says that on a complaint from the original creator of the work they will remove the pirated work.

Yet another case Facebook Inc. Surinder Malik & Ors and Instagram LLC V.S Surinder Malik & Ors where the Delhi High Court reiterated that the, while intermediaries like Facebook and Instagram may not perform an active role in posting the infringing content but

⁴MANU/MH/824/2019

they would still be liable if they not take down the content that has brought to their notice. The court further said that if the intermediaries have doubt as to whether the post is violative of IPR then they must inform the original creator so that the original creator can avail all his remedies in accordance with the law.

Though these intermediaries are not the one who infringes the intellectual property but surely they are the carrier to promote the infringement of IP. There is a need that social media should play an active role to pull down the contents which are infringing the IP. In today's world the evolution of social media throws a whole new set of challenges for the IP sphere. And this needs the awareness and from the public at large that they should revert back to the infringement of IPR.

V. ENFORCEMENT OF IPR BY SOCIAL MEDIA

Social media in many ways enforce the protection of IPR. Social media protect the infringement of IPR in several ways such as by criticizing, takedown policies of social media houses. When someone creates something and posts it on social media millions of people see it and at the same time when someone copies that thing it is also visible to millions of people and they start criticizing the fraudsters and give the recognition to the original creator. There are examples that prove that because of social media the original content creator got recognition and their rights. for example, In 2017 singer Frank Ocean wore a T-shirt on New York panorama festival which reads as 'why be racist, sexiest, homophobic or transphobic when you could just be quit' which went viral and it traced that the manufacturer got the 5500 order overnight but later It turned out the quotation on the shirt originated from a tweet sent out in August 2015 by Brandon Male, 18, a student from North Syracuse, N.Y.

Mr. Male was frustrated that he had not been properly paid or credited from manufacturer to use of his quote permission and when it was known to people they start appreciating Mr. Male for such beautiful quote and at the same time criticized the manufacturer for using the quote without the Mr. Male's permission.

Social media also protects the counterfeit goods as this also comes under the ambit of IPR as we know with the increase in innovation and creation there is an expansion of counterfeiting goods. These counterfeit goods may also cause physical illness, injury or even death. Counterfeit goods are basically the replica of a real product and it is done with the intention to take the unlawful advantage and to use the goodwill of the real product. According to a global brand counterfeiting report by research and the market. Total counterfeiting activity for 2017 Amounts to 1.2 billion USD and reached 1.82 trillion USD in the year 2020. When

we talk about counterfeit goods we must know about the policy of ALIBABA which are taking the advanced recourse with the help of social media to combat counterfeiting. ALIBABA adopted the alternative approach to this problem where they , with the help of the U.S and Chinese government, took an initiative where they track and trace the counterfeit goods directly from the digital platform. Alibaba's initiative also borne fruit by sizing counterfeit goods of approximately 1.43 billion and eliminated 417 production racket⁵.

Though social media takes steps to protect the IP law, it is very important for users as well to know, learn and verify the policy of social media before posting anything. When at the time of making an account in any social media it was asked to accept the terms and conditions and 99% of us accepted it without even giving it a read. And then even knowing that everything falls under the public domain we start to upload pictures, videos, and other original content on social media and then turn the blind eye. It can be seen in one of such case of Daniel Morel vs. AFP/Getty Images,⁶ plaintiff posted the images of earthquake destruction pictures of Haiti of 2010 on his twitter account those pictures were lifted from his twitter account and sold by press agencies without giving due accreditation and without the authority of the owner and then court orders in the favour of plaintiff and awarded him \$1200000 for infringement caused by undue advantage of the photograph. Here court recognised that there is copyright violation of the plaintiff though he posts his content on social media but then also there the plaintiff has ownership of his original content.

As we know almost all the social media had DMCA (digital millennium copyright act) according to which social media holds the right to remove the content Suo moto or after the due filling of an online report. Social media also have the terms of use i.e. TOU which state that the users grants social media a transferable and sub licensable license to public content which clearly means that by posting something on social media we give them transferable rights on our content in other words social media can transfer the content to third party but this depends upon the users that whether their accounts are private or public one such case in this matter is very appropriate to cite is the case of 'Sinclair v. Ziff Davis, LLC'⁷ plaintiff is the professional photo generalist, the employee of the plaintiff emailed the plaintiff for seeking the permission to use one of his copyrighted photos to which plaintiff replies , what amount of compensation the defendant would pay for using the photographs to which

⁵Jungong Sun, *Intellectual property and e-commerce: Alibaba's perspective*, WIPO MAGAZINE https://www.wipo.int/wipo_magazine/en/2018/05/article_0004.html

⁶10-cv-2730 (AJN) (S.D.N.Y. Aug. 13, 2014), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

⁷18-CV-790 (KMW) (S.D.N.Y. Jun. 24, 2020), UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK.

defendant replied \$50 to which plaintiff did not responded that she accept the offer or reject it and the defendant publish his article attaching the plaintiffs photograph and then plaintiff brought the suit to which court said while activating the instagram account plaintiff gives instagram the transferable and sub licensable right which clearway means that the content posted on public account is open to use by third party and gave a decision in favour of the defendant. Though court also acknowledge that the Instagram dominance of photo- and video-sharing social media, coupled with the expansive transfer of rights that Instagram demands from its users (taken form ,centre for art law, blurry instagram rules)

One more case on this point is very relevant to cite is the case of Fairmount Hotels Pvt. Ltd. vs. Bhupender Singh⁸ where because of Facebook it was possible to know that the defendant was using the plaintiff hotel photos without his authority. In this case defendant was the employee of the plaintiff later defendant opened his own hotel and used the pictures of plaintiff hotels in his Facebook account as his own to attract the customers however plaintiff filed the suit to which court ordered the permanent injunction to the defendant to not to use such unfair means.

It is very clear that though social media does not protect the intellectual property directly but it gives the users to accept and reject their terms and conditions and if users accept the terms of social media then they are also open to the wide variety of threads social media offers.one should understand that creativity should not be hampered just by posting something's on social media instead it should be rewarded by recognition of one's effort.

VI. EVOLUTION OF IP LAWS

The evolution of intellectual properties dates back to medieval Europe. When an article published in monthly review used the term Intellectual property rights as a phrase⁹. Though it was known to the world in 1883 when the Paris convention was held before that there were no international conventions held for intellectual property rights. The first multilateral effort made through Paris convention for protection of industrial property held on 20th march, 1883 in Paris. It was followed by Berne convention for protection of literary and artistic works in the year 1886 in Berne. Together these two were the initial international efforts known as Magna Carta of intellectual property rights. These two conventions marked the beginning of the IPR regime and after that IPR made a long journey with establishment of TRIPS and WIPO. However at that time there was no internet and therefore no social media existed and

⁸MANU/DE/1516/2018.

⁹Yashjain, *IPR law –history*, LEGAL SERVICE INDIA E JOURNAL, <http://www.legalserviceindia.com/legal/article-3731-ipr-law-history.html>.

laws were made to suit the situation of the time. But with the emergence of the internet every aspect of human life changed and so the laws also have to change to meet the requirements of today's society as the famous philosopher **Montesquieu** said , 'that laws should keep in pace with the changing needs of society'. So with the emergence of the internet or more specifically social media some noticeable changes have seen in the laws.

According to the ITU World Telecommunication Indicators Database, it took a mere four years for the Web to reach 50 million users. In contrast, the telephone took 74 years; radio took 38 years while personal computers and television took 16 and 13 years respectively.¹⁰ Earlier the IP laws are applicable in home country only but with the emergence of internet it felt necessary that intellectual property protection should be given in all the countries and there should be universal rule for protection of intellectual property so with the Paris convention right to priority was established which afterward got consideration from WIPO as well. The need for the harmonization of laws was recognized earlier in the case of *Shredded Wheat Co. Ltd V. Kellogg Co. G.B. Ltd*¹¹ where it was held that "it is of the highest importance that in such an important branch of commercial law as relating to trademarks, there should be uniformity as far as possible in all countries administering the same system of law."

In 1970 - 1980 copyright law was extended to provide protection to computer software's as in present day life software are the basic necessity, whether it is for writing purpose of protecting computers from virus or anything computer software can be made by anyone with the little knowledge of information technology and computer languages and therefore it is very necessary to give protection to computer software under IP laws. In India also copyright act and patent act provide protection to the computer software under section 2(ffc) of copyright act 1957 reads as "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result", read with section 2(o) of the Copyright Act 1957 which defines "literary works" includes computer programmes, tables and compilations including computer databases.", protects software or computer programmes as "Software work" under "Literary works" as per the Copyright law of India. It is still the point of discussion internationally that whether computer software should be given copyright protection or it should be protected under patent law. But in Author's point of view computer software primarily comes under patent protection. Though there is no law internationally

¹⁰ Curtis W. Cook , *Patents, Profits & Power: How Intellectual Property Rules the Global Economy*. 2002 .pg no.150

¹¹ [1939] SCR 329, Supreme Court of Canada

that recognizes the patentability given to computer software. Some of the countries have made the laws for protection of computer software but there is a need that there should be a universal law for the protection of computer software.

When we talk about the IT sector and development of law with reference to IPR it is necessary to include domain names. Internet domain names become much more than mere representing the websites of different companies on the internet. Domain name is a user friendly form of an internet protocol (I.P) address .In India domain name is protected under trademark law because generally domain name performs the same function online which trademark performs offline. Internationally also there is harmonized law related to domain name and in the year 1990 UDRP (uniform domain name dispute resolution policy) was introduced by WIPO. the internet corporation for assigned names and numbers (ICANN) with the assistance of WIPO promulgated an uniform domain name dispute resolution policy to resolve domain name controversies and had licensed several arbitration service to interpret and enforce it. Domain name is unique sequence of letter that corresponds to numerical internet protocol i.e. IP addresses that identify each of the millions of computer connected to the internet. Domain name enables packets of information transmitted over internet to be delivered to their intended destination¹².

There are various judicial pronouncements which also helps in the evolution of IP laws with reference to social media

VII. DOCTRINE OF DE MINIMIS INFRINGEMENT

The doctrine of de minimis has been applied by Delhi high court as a defence for copyright infringement. The doctrine states that “the law does not concern itself with trifles’. Though this maxim is well recognised in criminal law but for the first time in the case of “Independent News vs. Yashraj Films Pvt. Ltd.¹³ was introduced in IP laws. In this case, a singer appeared on television chat show , and part of popular song were played in the course of singers interview the alleged infringement was deemed de minimis and therefore not actionable, and in the process the court laid down five consideration for such cases:

(i) The size and type of harm - in the case at hand, it was found that only five word were used. The judges considered this to be too trivial and insignificant to warrant an actionable claim

¹² William Weston Fisher, *Intellectual Property Law*, <https://www.britannica.com/topic/intellectual-property-law>.

¹³MANU/DE/3921/2021

- (ii) The cost of adjudication - this relates to the amount that would be charged by the copyright owner when compared to the cost of adjudication.
- (iii) The purpose if violated legal obligation.
- (iv) The effect of legal rights in third parties
- (v) The intent of the alleged wrongdoer.

Here in the present case the court recognises the maxim of de minimis in intellectual property laws and also recognises that the size and type of harm should be considerable.

Ashok Kumar Orders recently India started using the ‘john doe, Anton pillar or Ashok Kumar order. This can be traced back in the year 1976 when the English court in the case of Anton pillar KG vs. manufacturing process limited¹⁴ grant the plaintiff to search and seize the premises of the infringer with the intention of preserving the evidence that may be destroyed . it was the first time that this kind of order has been passed by the court. Indian courts also find it necessary and term it as Ashok Kumar orders. In India it was well recognised in civil laws if we see, order 39 rule 1 and 2 of civil procedure code we find the similar laws however, this interim order for the first time in India was recognised in IP laws with the case of Tej Television Limited vs. Rajan Mandal in the year 2002.

It is well understood that there is significant role of information technology law for the evolution of intellectual property laws but it is necessary that with the changing need there should be change in both intellectual property law and also in information technology law. Though it has come a long way when the amendment act of information technology of 2008 was introduced. But these need to be keep in pace with the changing needs of society and also the day to day changing behavioural aspect of social media in order to curb the infringements.

VIII. AUTHOR’S POINT OF VIEW

In authors point of view social media in some way infringes the intellectual property but it can be remedied with proper course of action. This needs the active role of intermediaries and social media platforms. Though these social media platforms have DMCA policy but these policies are not giving the required fruits. Before the court of laws the social media platforms’ need to be active to curb the infringement. because now it is almost impossible to live without social media because in almost 100 of people 91 of them find social media a place to exhibit their art work or their business but they also have this fear that this can be duplicated by another so to avoid these problem it is necessary that the social media platform

¹⁴MANU/DE/0935/2008

should be stricter and should be more active to borne the fruits of DMCA policy.
