

Copyright &
Trademark
Aspects of
Social Media:
An Analysis

Dr. Jishnu J.R

**COPYRIGHT AND
TRADEMARK ASPECTS OF
SOCIAL MEDIA
AN ANALYSIS**

**Copyright and Trademark Aspects of
Social Media -An Analysis**

Research Work

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FOREWORD

History of civilization is the history of cognition, creation and communication of human beings. The communication resulted in exchange of ideas which is an essential component for development of knowledge. In the primitive society, the modes of communication were limited to gestures, cave paintings etc. The development of oral communication in the form of storytelling was an important milestone in the history of human beings owing to the reason that certain ideas, concepts and myths have been transmitted from generations to generations. Development of scripts paved the way for the development of an effective mechanism for organization and transmission of knowledge.

The invention of printing press by Johannes Gutenberg was the beginning of mass communication in the form of publication of periodicals, books and newspapers. This new initiative resulted in the emergence of new category of professionals, the press persons. The invention of telegraph, radio and television was a revolution in mass communication which resulted in the creation of a new social group, media persons, who became most powerful social force having the capacity to substantially influence politics, economy, social development, international relations, scientific inventions, art, culture literature, religions, family, style of life, pattern of behavior, appearance & apparels etc.

However, the emergence of social media is a shatter to the influence of traditional media in human life and social process. Though there was certain social control and legal control over traditional media in different forms like Regulatory Bodies, Intellectual Property Rights, Code of Conduct, Management Strategy and Legal Actions, the regulatory framework for social media is not at all effective.

The present book written by Jishnu J. R. is the result of original research study carried out by Dr. Jishnu J.R. The book covers all major

issues related to intellectual property dimensions of social media including the theoretical foundations, copyright issues, trademark infringement and legal initiatives at national and international level. In the concluding chapter, certain valuable suggestions which deserve the attention of policy makers are included. The book appears to be a reference material for legal practitioners, intellectual property experts and academia.

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PREFACE

Social media platforms have become an integral part of human life. The unending desire of human beings to communicate has enabled him to attain advancements of unexplainable levels. The man- technology symbiosis has reached to a certain level wherein human beings almost live a life beyond the bounds of earth. The manner in which he communicates his personal interests and affairs have changed with time.

This precisely forms the subject matter of this book. It is concerned with the intellectual property that man uses up in social media, the rights and problems related to it. The study is basically an interdisciplinary approach with respect to Intellectual Property Rights and Cyber Law.

The work walks through the aspects of copyright and trademark in social media. The contents disseminated by everyone and the brand names and advertisements being used by anyone via various social media platforms, contain in themselves certain rights and related perils. The book tries to recognise these rights, analyse its usage in social media and understands the associated problems. The book also makes a comparative analysis of this concept over jurisdictions to understand nature and behaviour of intellectual property laws and cyber laws, its inter relation and effectiveness in the virtual world. The work is basically the result of the researcher's curiosity, passion for intellectual property law and cyber law, fascination towards technological marvel and dependence on social media for anything and everything.

Through its chapters, the book tries to understand the basic nature and types of social media, the way in which humans engage in disseminating information and the manner in which advertisements are carried out. It also explains the fashion in which these activities affect the rights of the right holders and role of governments in regulating them. The main thrust of the study is to comparatively analyse intellectual property and cyber legislations of various jurisdictions related to these activities and understand the nature and functioning of these legislations in India.

In this book the focus is on analysing India's legislative stand point on these new forms of infringements and proposing suggestions, with respect to regulations, if necessary, to curb the issue.

ABBREVIATIONS

11th Cir.	United States Court of Appeals for the Eleventh Circuit.
2d Cir.	United States Court of Appeals for the Second Circuit.
4th Cir.	United States Court of Appeals for the Fourth Circuit.
5th Cir.	United States Court of Appeals for the Fifth Circuit.
6th Cir.	United States Court of Appeals for the Sixth Circuit.
8th Cir.	United States Court of Appeals for the Eighth Circuit.
9th Cir.	United States Court of Appeals for the Ninth Circuit.
AFP	Agence France-Presse.
AIR	All India Reporter.
Apr.	April
ARPANET	Advanced Research Projects Agency Network.
B2B	Business-to-Business.
B2C	Business-to Customer.
BCIA	Berne Convention Implementation Act.
BMG	Bertelsmann Music Group.
Bom.	High Court of Bombay.
C.D. Cal.	United States District Court for the Central District of California
C2B	Customer-to-Business.
C2C	Customer-to-Customer.
Cal.	High Court of Calcutta.
CD	Compact Disc.
CDPA	Copyright, Designs and Patents Act.
COLUM. J.L. & ARTS	Columbia Journal of Law & the Arts.
D. Mass.	United States District Court for the District of Massachusetts.
Dec.	December
Del.	High Court of Delhi.
DMCA	Digital Millennium Copyright Act.
DRM	Digital Rights Management.
DTH	Direct to Home.
E.D. Mich.	United States District Court for the Eastern District of Michigan.
E.D. Pa. May	United States District Court for the Eastern District of Pennsylvania
E.D.N.Y.	United States District Court for the Eastern District of New York.
E.U.	European Union.
EC	Electronic Commerce.
ECHR	European Convention on Human Rights.

ed.	Edition.
EMI	Electric and Musical Industries.
Etc.	Etcetera.
EUCD	European Copyright Directive.
F.	Federal Reporter.
F.2d.	Federal Reporter, Second Series.
F.3d.	Federal Reporter, Third Series.
Feb.	February
FTDA	Federal Trademark Dilution Act.
HTML	Hypertext Markup Language.
i.e.	That is.
Id.	Idem
IEEE	Institute of Electrical and Electronics Engineers.
IJCST	International Journal of Computer Science and Technology.
Inc.	Incorporated.
INDIAN J. INTELL. PROP. L.	The Indian Journal of Intellectual Property Law.
INTELL. PROP. L. BULL.	Intellectual Property Law Bulletin.
IP	Internet Protocol.
IPR	Intellectual Property Rights.
IPRED2	Intellectual Property Rights Enforcement Directive 2.
ISP	Internet Service Provider.
IT	Information Technology.
J. COMPUTER-MEDIATED COMM	Journal of Computer-Mediated Communication.
Jan.	January
KAT	Kickass Torrentz.
LLC	limited liability company.
Super. Ct.	Superior Court.
Mad.	High Court of Madras.
Mar.	March
MMORPG	Massively Multiplayer Online Role Playing Game.
MPAA	The Motion Picture Association of America.
N.D. Cal.	United States District Court for the Northern District of California
N.D. Ill.	United States District Court for the Northern District of Illinois.
N.D. Okla.	United States District Court for the Northern District of Oklahoma
N.D.N.Y.	United States District Court for the Northern District of New York.

NET	No Electronic Theft Act.
NOTRE DAME L. REV.	Notre Dame Law Review.
OCILLA	Online Copyright Infringement Liability Limitation Act.
OECD	Organisation for Economic Co-operation and Development
OSP	Online Service Provider.
P2P	Peer to Peer.
PC	Personal Computer.
PDF	Portable Document Format.
RIAA	Recording Industry Association of America.
S.D. Fla.	United States District Court for the Southern District of Florida
S.D. Miss.	United States District Court for the Southern District of Mississippi
S.D.N.Y.	United States District Court for the Southern District of New York
SC	Supreme Court.
SCIL	Super Cassette Industries Ltd.
STAN. L. REV	Stanford Law Review.
TDRA	Trademark Dilution Revision Act.
TPM	Technological Protection Measure.
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
U.S	United States of America.
U.S. Dist. LEXIS	LexisNexis database for U.S. District Court cases.
UK	United Kingdom.
UMG	Universal Music Group.
URL	Uniform Resource Locator.
USC	United States Code
USD	United States Dollar.
v.	Versus.
VAND. J. ENT. & TECH. L.	Vanderbilt Journal of Entertainment & Technology Law.
W.D. Va.	United States District Court for the Western District of Virginia.
WCT	WIPO Copyright Treaty.
WIPO	World Intellectual Property Organization.
WPPT	WIPO Performances and Phonograms Treaty.
WTO	World Trade Organisation.
WWW	World Wide Web.

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I

INTRODUCTION

1.1. INTRODUCTION

"I think therefore I am."¹ This is one of the basic thought that is regarded as the specific feature or essence of human beings. The essence of human being, in its very purest form consist of 3 elementary aspects; the bodily presence, the gift of consciousness and the awareness about social wholeness. These elementary aspects define a human being and his nature of being human.

Being human normally include one's cognitive ability, the ability to understand things from things. Cognitive ability creates within a man the desire to communicate with one another thereby helping him to attain social wholeness by associated behaviour thus forming the realm we live in now.

The cognitive ability within a human being is what defines him. It is this cognitive ability that can result in intellectual creations formed as an outcome of his application of his intellect upon the domain of everything. The cognitive ability when coupled with the unending desire of human being to disseminate information with each other has resulted in the formation of the 'fields of gold' namely the literary, artistic, scientific and industrial fields etc.

The 'fields of gold' thus formed are further enriched by the intangible creations of the human intellect. The intangible creations so created because of individual or collective intellectual thought process can enable a right over that creation thereby leading to the concept of intellectual property rights. In summary, the outcomes of intellectual activities in industrial, scientific, artistic and literary fields etc. are legal rights termed as the intellectual property rights. Intellectual property rights are the collective concept specified to the bundle of laws that protect the types of investments in brands, design, technology and the arts. The intellectual property shall include rights relating to: literary,

¹ 'Cogito ergo sum'; a Latin philosophical proposition by René Descartes meaning "I think therefore I am."

artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, unfair advantage and all other rights resulting from intellectual activities in the industrial, scientific, literary or artistic fields.²

The Unending desire of a human being to communicate and disseminate information led to his symbiosis with technology thereby resulting in creation of social media platforms. Social media is a group of internet-based applications that is built on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.³ The traditional concept of intellectual property gained a wider ambit with the approach of internet. The use of internet by people for interactive and sharing purposes led to the definitive use of social media platforms. The availability of digital form of intellectual properties paved a new dimension to its protection and infringements. Social media are media for social interaction, using highly manageable and accessible storage and dissemination techniques. Social media enables information sharing, sharing of interest through photos, videos and blogs. People use it, professionals use it, companies use these social media for advertising and expanding business.

Copyright is the term used to describe the area of intellectual property law that regulates the creation and use that is made of range of cultural goods such as books, songs, films and computer programs.⁴ Copyright in a work limits the uses that can be made of the work. The author's exclusive rights and entrepreneurs neighboring rights are the two concepts that makes the idea of copyright desirable. When a right is corresponded to a work because of intellectual activity, is granted with power, it becomes desirable. The exercise of an intellectual capability by an individual, or by the technical and organizational skill of a financially organized body is the rationale behind the cataloguing of copyright as author's rights and neighboring rights.⁵ The combination of the internet

² See generally Article 2(viii) of The Convention Establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on July 14, 1967.

³ A.M Kaplan, M. Haenlein, *Users Of The World Unite! The Challenges and Opportunities of Social Media*, 53(1) BUSINESS HORIZONS 61, 59-68 (2011).

⁴ P. Goldstein, *Copyright* 38 JOURNAL OF THE COPYRIGHT SOCIETY OF THE USA 109 (1990-1).

⁵ LIONEL BENTLY, BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 32 (3d ed. 2008).

and digital technology presents copyright law with what has been described as a digital dilemma. On one hand, digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the internet individuals may distribute those digital works around the world at the speed of light.

Advertising is a non-personal paid form where ideas, concepts, products or services, and information, are promoted through media by an identified sponsor to persuade or influence behavior.⁶ Advertising is the act of calling open receptiveness to something by visual, verbal or textual media, it can be an activity or a profession by which information so produced can be channeled to a larger group for increasing brand value or for enhancing the selling prospect of a commercial product. Marketing process include in itself four subsets i.e. product, price, place and promotion. Advertising is a component of promotional mix, with the purpose of creating awareness and responsiveness about product and services for taking choices. In modern time, advertisement has become an important way to promote products and services and is used for communication purpose as well.⁷

Social media have changed the brand building process. The consumer purchase decision making process have drastically changed over time. The needs and wants of the customer is properly defined now, the information relating to a product or service that can be gathered from social media is one of the major reason for this drastic change. Social media users make unauthorized use of trademark logos as if there are no restraints. Users share trademark logos for a variety of reasons. Some internet users want to share with their social media relations their love or hate for a brand of which the logo is the symbol. While others see the logo to express part of their personality. And some users perceive the trademark logo as raw material with which they may freely use to express some commercial, artistic or political message.⁸

1.2. OBJECTIVE AND PURPOSE

Copyright and trademark infringement in social media is a scorching issue. The unauthorized content sharing using social media sites

⁶ Ayanwale, A. B., Alimi, T. & Ayanbimipe, M. A. *The Influence of Advertising on Consumer Brand Preference*. 10(1) JOURNAL OF SOCIAL SCIENCE 9, 9-16 (2005).

⁷ Hussainy, S. K., Riaz, K., Kazi, A. K. & Herani, G. M. *Advertising Styles Impact On Attention In Pakistan*. 1(1), KASBIT BUSINESS JOURNAL, 29, 28-35. (2008).

⁸ DANNY FRIEDMANN, TRADEMARKS AND SOCIAL MEDIA: TOWARDS ALGORITHMIC JUSTICE 93 (2015).

and use of such sites for unauthorized use of trademarks pose a serious threat owing to the difference in the infringement nature when compared to traditional copyright and trademark infringement.

Social media is a complex technological platform. The various web generations and the enhanced man-computer symbiosis has created various types of social media platforms inbuilt with vibrant technological behavior. The proper working of these platforms are technologically complex and hence the role and responsibilities of actors involved such as internet service provider, the user and the right holder is an ambiguity and requires a relook.

Due to the change in the course of content dissemination process via social media platforms, there exist various legal conundrums. Even though the traditional International Treaties and Guidelines advised national legislations to cop up with the changing pattern of copyrights, it is important to analyse whether it require an entirely new set of rights in a world wherein activities are dominated by use of technology. Considering India and her pace in technological advancement and usage of social media, it is vital to have a look on the effectiveness and adaptability of the legislations that regulates copyrighted contents in social media.

Similarly, the unauthorised use of marks by an infringer thereby leading to the distinctiveness getting affected and the intentional use of marks to affect the reputation of the marks have increased in the social media platform. The regulations of international and national nature have provided with basic support to control and prevent the unauthorised use of marks. Even though regulations of international and national nature recognise and mentions the use of trademarks and allied threats with respect to use in social media, outlines the aspects of infringement and remedies and rules out the need for exceptions and limitations, it is imperative to analyse the applicability of these provisions upon changing social media. Use of a mark in commerce, trademark dilution principles and intermediary liability rules must be understood beyond the footing of traditional trademark infringements.

The following objectives are researched upon in the book:

1. To understand the concept and development of social media. To understand the social media functionalities and to identify the actors involved in social media platforms and their respective roles and responsibilities.

2. To make a clear analysis with respect to instances of copyright infringement in social media.
3. To make a clear analysis with respect to instances of trademark infringement in social media.
4. To make jurisdictional legislative comparison and to analyze digital agenda features that regulate contents in social media to understand the effectiveness of Indian legislations.
5. To make jurisdictional legislative comparison and to analyze the trademark law features and its applicability in social media to understand the effectiveness of Indian legislations.
6. To give suggestions as to changes to be brought in the existing legislations, policies and strategies that must be adopted for controlling copyright and trademark infringements in social media.

1.3. METHODOLOGY

The book is interdisciplinary in its nature and scope. It has both technological and legal connotations. So insights from these disciplines have been used whenever necessary. The methodology used for the study is analytical. The present study is prepared by studying the existing literature which includes analysis of primary sources like legislations and case laws of United States of America, European Union and India. Secondary sources like books, articles, journals of foreign publishers and Indian publishers were also extensively used throughout the study. Since the study is of contemporary nature and deals mostly with subjects online, online reference of authority sites, dependency on social media platform form a major part of the study.

1.4. THE CHAPTERS

The book consists of the following chapters

CONCEPTUAL AND THEORETICAL UNDERSTANDING OF SOCIAL MEDIA- Wherein the Author explains the concept and development of social media through web generations. Theoretical understanding and theoretical classification of social media are made based on various theories. The chapter further explains the different types of social media, its nature function and benefits.

INSTANCES OF COPYRIGHT INFRINGEMENT IN SOCIAL MEDIA- The chapter deals with the instances of copyright infringement occurring in social media platforms like content communities, media streaming and storing websites and social networks. The chapter explains the technological as well as legal aspect of these social media platforms. The chapter makes a clear analytical study of case laws from U.S and India to understand the efficiency of corresponding legislations.

INSTANCES OF TRADEMARK INFRINGEMENT IN SOCIAL MEDIA- The chapter deals with the instances of trademark infringement occurring in social media platforms like social networking platforms, collaborative projects and blogs. The chapter explains the technological as well as legal aspect of these social media platforms. The chapter makes a clear analytical study of case laws from U.S and India to understand the efficiency of corresponding legislations.

INTERNATIONAL AND NATIONAL LEGISLATIONS REGULATING COPYRIGHTED CONTENT IN SOCIAL MEDIA- This chapter deals with the jurisdictional legislative comparison and analysis of digital agenda features that were introduced to curb the problems posed by the ever-growing technology. Throughout the chapter legislative analysis and comparison is made with respect to rights exclusively applicable in the digital environment. The jurisdictional legislative study is made by comparing legislations of U.S., E.U. and India.

REGULATIONS CONCERNING PROTECTION OF TRADEMARK IN SOCIAL MEDIA- This chapter deals with the jurisdictional legislative comparison and analysis of the trademark law features and its applicability in social media. Trademark law features like ‘use in commerce,’ ‘trademark dilution principles’ and ‘intermediary liability’ are analyzed and compared with legislations of U.S., E.U. and India.

CONCLUDING REMARKS

II

CONCEPTUAL AND THEORETICAL UNDERSTANDING OF SOCIAL MEDIA

2.1. CONCEPT AND DEVELOPMENT OF SOCIAL MEDIA

Social Media is a group of internet-based applications that is built on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content.¹The textual breakup of this definition leaves us with few words/combination of words; ‘internet based’ ‘Web 2.0’ ‘group’ ‘ideological and technological foundation’ ‘creation and exchange’ which when stretched to understand the underlying meanings and features can enable one to understand the conceptual and theoretical understanding of social media.

This chapter gives a clear understanding to the term ‘internet based’ by explaining briefly the development of internet and the basic man-computer symbiosis. The man- computer symbiosis have helped human beings in their habitual and non-habitual pursuits thereby developing different generations of web, the term ‘Web 2.0’ belongs to one such generation. The chapter gives a clear understanding with respect to the web generations and their basic features. Owing to different type of content operability and user participation, social media has different ‘group’ in it. The chapter explains the different type of social media platforms and makes a comparison with the traditional media to understand the difference in features and applicability.

To understand the term ‘ideological and technological foundation’ one must know how humans behave within a social media platform, the human traits like cognition communication and cooperation when mixed with technology explains the theoretical understanding of social media and the theoretical classification of social media. The chapter also explains the social media functionality and the benefits of using it to

¹ A.M Kaplan, M. Haenlein, *Users Of The World Unite! The Challenges and Opportunities of Social Media*, 53(1) BUSINESS HORIZONS 61, 59-68 (2011).

justify the term ‘creation and exchange’ which is the basic and most eye-catching feature of social media.

The term internet is a merger of ‘inter’ and ‘net’, with ‘inter’ having its Latin source meaning as between or among, while ‘net’ imply the network. Licklider and Clark² elucidated the requirement of man-computer symbiosis and described an online network system that could enable social interactions. In due course the Advanced Research Projects Agency Network- ARPANET, ALOHANET and SATNET developed and enabled social interactions beyond geographical scope. The modern internet that uses the TCP/IP elements has End-to-End architecture,³ which made the present-day internet almost unique among the communications media.⁴ In due course of time government, industry, academia, and private parties started using internet for various purposes. Initially the internet assisted to interconnect research laboratories involved in government funded researches, and later it has expanded to help masses of users with multitude of purposes around the globe. The internet being the most democratic of all mass media, the users have changed their course of communication methods and conduct of business.

The most prominent part of the internet, World Wide Web (Web), enhanced the humans to maintain social interactions via man - computer symbiosis. The transitions from first generation of web to present day over decades have helped humans in their habitual and non-habitual pursuits. The web generations are; Web 1.0 which was mainly a read-only web. Web 1.0 was static and rather mono-directional. Businesses that provided catalogs or flyers to present their productions using the web and thereby made people read them and contacted with other businesses. The main goal of the websites were to publish the information for anyone at any time and establish an online presence. The websites were not

² J. C. R. Licklider, Welden E. Clark, *On-Line Man-Computer Communication*, 66 (11) PROCEEDINGS OF IEEE 113-128 (1978).

³ End-to-End principle is one of the central design principles of the Internet and is implemented in the design of the underlying methods and protocols in the Internet Protocol Suite. It is also used in other distributed systems. The principle states that, whenever possible, communications protocol operations should be defined to occur at the end-points of a communications system, or as close as possible to the resource being controlled.

⁴ ANDREW MURRAY, INFORMATION TECHNOLOGY LAW 25 (2010).

interactive and indeed were brochure-ware.⁵ Personal websites that used up the foundation of Web 1.0 functioned more like a traditional newspaper, which allowed individual to publish their views on any subject and to address them to the world at large.⁶ So to summarize Web 1.0 is static, non-interactive and the applications based on web 1.0 are proprietary.

Web 2.0, the term was coined by publisher and entrepreneur Tim O' Reilly who defined Web 2.0 as the business revolution in the computer industry caused by the move to the internet as platform, and an attempt to understand the rules for success on that new platform. Chief among those rule being: build applications that harness network effects to get better the more people use them.⁷ Writer Steven Fry defines Web 2.0 as an "idea in people's heads rather than a reality. It's an idea that the reciprocity between the user and the provider is what is emphasized. In other words, genuine interactivity, if u like, simply because people can upload as well as download."⁸ The definitions summarizes that Web 2.0 is a business concept adopted to bring inter human connections to the business models of various businesses and also an user concept that enables people to interact, upload and download user generated contents.

Web 3.0, the third generation of internet-based services that collectively comprise what might be called 'the intelligent Web' such as those using semantic web, micro formats, natural language search, data mining, machine learning, recommendation agents, and artificial intelligence technologies — which emphasize machine-facilitated understanding of information in order to provide a more productive and intuitive user experience.⁹ Web 3.0 tries to link, integrate, and analyze data from various data sets to obtain new information stream; it is able to improve data management, support accessibility of mobile internet, simulate creativity and innovation, encourage factor of globalization

⁵ Sareh Aghaei, Mohammad Ali Nematbakhsh, Hadi Khosravi Farsani, *Evolution of the World Wide Web: From Web 1.0 to Web 4.0* 3(1) INTERNATIONAL JOURNAL OF WEB & SEMANTIC TECHNOLOGY 2, 1-10 (2012).

⁶ Andrew Murray, *Supra* note 4, at 106.

⁷ *Supra* note 5, at 3.

⁸ ANDREW MURRAY, *Supra* note 4, at 108.

⁹ Nova Spivack, *Web 3.0: The Third Generation Web is Coming*, LIFEBOAT FOUNDATION, <http://lifeboat.com/ex/web.3.0>.

phenomena, enhance customer's satisfaction and help to organize collaboration in social web.¹⁰

Web 4.0 is the read-write-execution-concurrency web. It achieves a critical mass of participation in online networks that deliver global transparency, governance, distribution, participation, collaboration into key communities such as industry, political, social and other communities.¹¹ Web 4.0 will be such as a middleware in which will start functioning like an operating system.¹² The web 4.0 will be parallel to the human brain and implies a massive web of highly intelligent interactions.¹³

The major differences between the web generations are summarized below, Web 4.0 being the most advanced has the ability for higher interactive capabilities, and it helps in connecting with the real and virtual world in real time owing to its features, which is in its infant stage. This era being a web of things¹⁴ is in its developing stage, but web 2.0 has reached its maximum usability creating a firm background for the social media to properly work on. The strong belief that Web 2.0 has reached its maximum usability has helped in attaining a wide range of technological endeavors thereby creating complex legal situations which will be dealt in the forthcoming chapters.¹⁵

¹⁰ *Supra* note 5, at 5.

¹¹ Marcus, Cake, *Web 1.0, Web 2.0, Web 3.0 and Web 4.0 explained*, <http://www.marcuscake.com/economic-development/internet-evolution/>,

¹² Ron, Callari, *Web 4.0, Trip Down the Rabbit Hole or Brave New World?*, <http://www.zmogo.com/web/web-40trip-down-the-rabbit-hole-or-brave-new-world/>

¹³ Dan, Farber, *From semantic Web (3.0) to the WebOS (4.0)*, (Feb. 14, 2007), <http://www.zdnet.com/blog/btl/from-semantic-web-30-to-the-webos-40/4499/>.

¹⁴ Smart personal Assistant, Location based Intelligence, AI Robotics, Immediate translation, Voice Processing, Wearable technology, Augmented reality, Gesture Technology etc.

¹⁵ Chapter III and Chapter IV.

Table II.1- Major differences between web generations

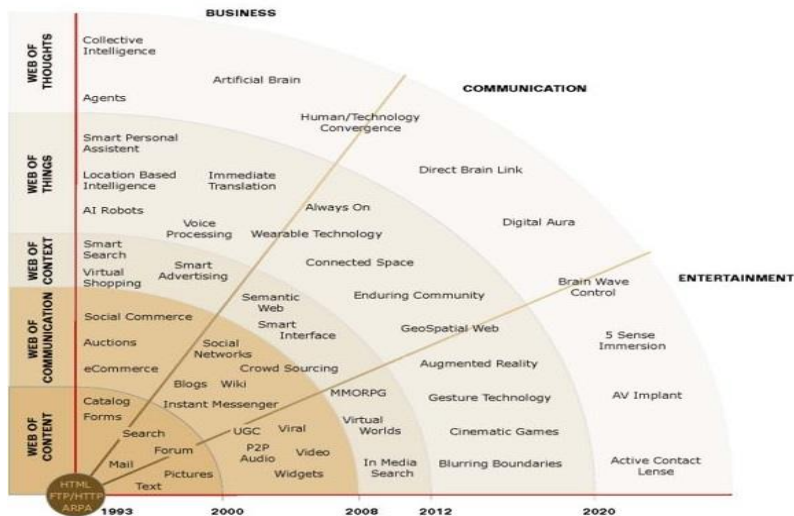
WEB 1.0	WEB 2.0	WEB 3.0	WEB 4.0
Read	Read/Write	Portable personal web	Read/Write/Execution/concurrency web
Used by Companies	Used by Communities	Used by Individuals	Used by Global mass from different fields
Owning	Sharing	Consolidating dynamic content	Multi-purpose
Lectures	Conversations	User engagement	Highly intelligent interaction
Information portal	Platforms	Semantic web	Advanced operating systems

When in future, the web 4.0 reaches its maturity will have a symbiotic relationship with that of humans. Web 3.0, has made the basic nature of social media, advanced, enabling internet availability on portable machines. The nature and use of various social media websites have gained a new avatar under Web 3.0, owing to its character change to hand held portable machines. All the social media websites based on Web 2.0 has reached the form of individual application with similar as well as advanced capabilities with respect to user engagement and content transfer.

Generally, the Web of Content, Communication and Context together form the Web 2.0. The Web of Things are usually the term for the Web 3.0 and the one which has more symbiotic relationship is Web 4.0, the Web of Thoughts.

The Diagram explains the elements which have developed through time that has enriched the fields of business, communication and entertainment under various forms of web generations.¹⁶

Figure II. 1- Elements in Web Generations¹⁷



"Social media" is the commonly-accepted term used to describe the use of web technology to provide a platform for distributing user-generated content. Unlike conventional media, in which a limited number of sources provide information to the public, in the social media context, the public both provides and consumes information.¹⁸ Social media is an ever-growing and evolving collection of online tools and toys, platforms and applications that enable all of us to interact with each other and share information. Increasingly, social media is both the connective tissue and neural net of the web.¹⁹ Social media is digital, content-based communications based on the interactions enabled by a plethora of web

¹⁶ Pranay Kujur, Bijoy Chhetri, *Evolution of World Wide Web: Journey From Web 1.0 to Web 4.0* 6(1) IJCST 134-138 (2015).

¹⁷ *Web 1.0 vs Web 2.0 vs Web 3.0 vs Web 4.0 vs Web 5.0 – A bird's eye on the evolution and definition*, <https://flatworldbusiness.wordpress.com/flat-education/previous/web-1-0-vs-web-2-0-vs-web-3-0-a-bird-eye-on-the-definition/>

¹⁸ Gregory S. Bernabeo, *Defending your TradeMark In The Social Medial World*, 2(16) BLOOMERANG LAW REPORTS 1, 1-4 (2010).

¹⁹ ANN HANDLEY, C.C CHAPMAN, *CONTENT RULES: HOW TO CREATE KILLER BLOGS, PODCASTS, VIDEOS, EBOOKS, WEBINARS (AND MORE) THAT ENGAGE CUSTOMERS AND IGNITE YOUR BUSINESS (NEW RULES SOCIAL MEDIA)* 76 (2010).

technologies. Social media is a collection of online platforms and tools that people use to share content, profiles, opinions, insights, experiences, perspectives and media itself, facilitating conversations and interactions online between groups of people.²⁰

Social media has the following characteristics; it incorporates inclusive selection of content formats including text, audiovisual, photos, audio, PDF and PowerPoint.²¹ Many social media make use of these options by allowing more than one content substitute. Social media allows interactions to cross one or more platforms through social sharing, email and feeds which involves different levels of engagement by participants who can create, comment or lurk on social media networks.²² Facilitates enhanced speed and breadth of information dissemination. Provides for one to one, one to many, and many to many communications. The social media facilitates communication to take place in real time or asynchronously over time, it is device indifferent.²³ It can take place via a computer (including laptops and net-books), tablets (including iPads, iTouch and others) and mobile phones (particularly smart phones). Extends engagement by creating real-time online events, extending online interactions offline, or augmenting live events online.

Social media has become very significant because of the two most important and precise characteristics of social media. They are: ubiquity and interactivity.²⁴ The user generated contents being everywhere at once enabling human-computer ecosystem and the ability of the population under such an ecosystem to make their choices of information sources and interaction with other people make the concept of social media momentous. The key characteristics of social media are; Free web space availability to the users to upload their personalized content. The audiences are provided with a personalized unique web address to have a unique identity, which makes them to share their content in real time. It remains intact till the time they maintain their online account. With the possibility of building personalized profiles, the social media enables an

²⁰ Giorgi Bagaturia, Margaret Johnson, *The Impact of Social Media in Marketing Management*, 3 (1) JOURNAL OF BUSINESS 6, 5-13 (2014).

²¹ *Id.* at 5.

²² *See generally Best Practices Manual - Social Media*, <http://mediadesknlm.com/wp-content/uploads/2014/09/MediaDeskNM-Social-Media-Guide.pdf>.

²³ *Id.*

²⁴ Dr. Suman Kumar Kasturi, *Social Media: Key Issues and New Challenges - A Study of Nalgonda District*, 5 (1) GLOBAL MEDIA JOURNAL 3, 1-12 (2014).

individual to have access to the likeminded people to interact with each other. It is also possible to conceal the profile from pirates and making it accessible to only a desired group of people. Social media websites turn to be the platform for virtual meetings. People, who are miles away from each other, can get in touch virtually with each other through such website enabled chat engines. The websites even make it possible to share valuable files, photos and multimedia content with each other. Through social media, it is possible for the audience to have a chance to upload their personalized content or other files as the services are open round the clock. With the online social networks, feedback, the key element in the communication process becomes vital. Feedback is immediate like in face to face communication through new media or social media communication, provided the responder is also online, at the time when the sender initiates the dialogue. The time stamp facility to understand the age of the user posts is another feature of social media. Every post in the social media has a time stamp indicating if the post is either fresh or stale. Depending on the freshness of the post, the responder may either choose to respond or not to respond.²⁵

Likewise, in the real world, the social media is a platform that enables one to work on and build up virtual identities and interact with each other creating virtual personal and community spaces, by sharing experiences through time. These characteristics help people to do a bunch of activities ranging from sharing experiences through a textual blog to virtual shopping and semantic web experience.

2.2. TYPES OF SOCIAL MEDIA

Depending on the nature of the social media website, the different type of content operability and user participation, social media is generally divided into five categories. The functionality and purpose also differ with respect to different categories of social media. Nature of social media enables the user with the ability to create communities, connect, communicate, broadcast, disseminate etc. the different types are;

²⁵ *Id.* at 5.

2.2.1. Collaborative projects

Collaborative projects are a special form of social media application that enables the joint and simultaneous creation of knowledge related content by many end-users.²⁶ The main idea underlying collaborative projects is that the joint effort of many ‘actors’ leads to a better outcome than any actor could achieve individually; this is similar to the efficient-market hypothesis in behavioral finance.²⁷ In order for the better outcome the actors (crowd) needs to fulfill three criteria, it needs to be sufficiently large and consist of a diverse set of actors that act independently from each other.²⁸ On the basis of functionality and usage there are four types of collaborative projects; The first type is wikis, which owe their name to the Hawaiian word for fast and allow users to add, delete, or revise content on a webpage by using a simple web browser as opposed to a more advanced HTML editor.²⁹ The second type of collaborative project is social bookmarking sites, or collaborative tagging services. They allow users to assign tags to bookmarks of web documents that can subsequently be organized in the form of tag clouds: visual representations of tags, the importance of each indicated by its font size or color.³⁰ The third type of collaborative project is online forums or message boards, via which people can hold conversations in the form of posted messages. Such forums are considered as collaborative projects only when their focus is on the joint creation of knowledge.³¹ The fourth and final type of collaborative project is review sites: websites that focus on exchanging feedback regarding firms, products, and anything else of relevance in human life. Prime examples in this category include TripAdvisor and Epinions.com. Review sites usually employ some form of reputation system that allows them to compute reliability scores based on ratings received within user reviews.³²

²⁶ Andreas Kaplan, Michael Haenlein, *Collaborative projects (social media application): About Wikipedia, the free encyclopedia*, 57 (5) BUSINESS HORIZONS 618, 617-626 (2014).

²⁷ Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 (2) THE JOURNAL OF FINANCE 383-417 (1970).

²⁸ JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005).

²⁹ Andreas Kaplan, Michael Haenlein, *supra* note 26.

³⁰ *Id.* at 619.

³¹ *Id.*

³² *Id.* at 618, 619.

2.2.2. Blogs

Blogs, which represent the earliest form of social media, are special types of websites that usually display date-stamped entries in reverse chronological order. It is updated at regular intervals and may consist of text, images, audio, video, or a combination of them. Blogs serve several purposes including delivering and/or sharing information.³³ They are the social media equivalent of personal web pages and can come in a multitude of different variations, from personal diaries describing the author's life to summaries of all relevant information in one specific content area. Blogs are usually managed by one person only but provide the possibility of interaction with others through the addition of comments. Due to their historical roots, text-based blogs are still by far the most common.³⁴ Nevertheless, blogs have also begun to take different media formats. The different types of blog include;

Personal Blog is a blog which is like ongoing personal diaries, with the intent of the blogger to post log of personal interests and linking it with the general audience is not much of an interest. The purpose is of personal delight, imaginative experimentation and memory archiving in digital format. Personal blogs are the traditional and most common form of blogs.³⁵

When blogs are being used by the community for posting a comment or sharing a link, it becomes a community blog. The focus of the community may be specific or vague, the purpose is to encourage people to be in an online community and communicate and discuss with each other. For example, Metafilter, reddit, boingboing, digg etc.³⁶

Microblogging are blogs that enables subscribers to broadcast short messages to fellow subscribers. Microposting is the essential feature of such blogs, which ranges from simple text, images, and videos to website links. The immediacy and portability are the underlying features

³³ OECD, WEB 2.0, WIKIS AND SOCIAL NETWORKING WEB 2.0, WIKIS AND SOCIAL NETWORKING 36 (2007).

³⁴ Andreas M. Kaplan, Michael Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, 53(1) BUSINESS HORIZONS 63, 59–68 (2010).

³⁵ *Id.*

³⁶ See <http://www.metafilter.com/>, <https://www.reddit.com/>, <http://boingboing.net/>, <http://digg.com/>.

that captured civic attention. Examples include tumblr microblog, twitter, friendfeed, etc.³⁷

When a blog is used by an organization or a corporation for achieving organizational goals through internal communication and culture development and externally through marketing, it becomes a corporate blog. Examples for corporate blogs are the Amazon blog, Delta Airlines blog, Red Cross blog, etc.³⁸

When blogs concentrate on subjects like politics, health, travel, fashion, education, music, legal, news, media type etc. they are called genre blogs. E.g. India political blog, Harvard health blog, nomadic matt, Vlog, etc.³⁹

2.2.3. Content Communities

Content communities are sites that allow users to upload and share various kinds of media. Content communities exist for various reasons; some are cooperatives for developing open source softwares, others are used to display and distribute original art, and still others are just to share interesting links and websites. Content community sites are typically populated by user generated contents. Users are generally required to set up accounts and thereafter can begin uploading and sharing their own content. These communities house a wide variety of contents, including software, video, visual art and of course, textual documents.⁴⁰ The goals of content communities are quite varied, some use sharing of texts in the form of books via book crossing.⁴¹ Photos being shared through 'Flickr',⁴² videos being shared through 'Youtube',⁴³ power point presentations being shared through 'slide share' and videos audios and photos widely shared using websites that use the peer-to-peer technology etc.

³⁷ See <https://www.tumblr.com/>, <https://twitter.com/?lang=en>, <http://blog.friendfeed.com/>.

³⁸ See <https://aws.amazon.com/blogs/aws/>, <http://deltapoints.boardingarea.com/>, <http://blogs.redcross.org.uk/>.

³⁹ See <http://indiapoliticalblog.com/>, <http://www.health.harvard.edu/blog/>, <http://www.nomadicmatt.com/>, <http://vlog.it/>.

⁴⁰ 1 KERRIC HARVEY, *ENCYCLOPEDIA OF SOCIAL MEDIA AND POLITICS* 315 (2014).

⁴¹ See <http://www.bookcrossing.com/>.

⁴² See <https://www.flickr.com/>.

⁴³ See <https://www.youtube.com/?gl=IN>.

2.2.4. Social networking sites

Social network sites are web-based services that allow individuals to construct a public or semi-public profile within a bounded system, articulate a list of other users with whom they share a connection, and view and traverse their list of connections and those made by others within the system.⁴⁴ A social network is a social structure made up of a set of social actors (such as individuals or organizations) and a set of the dyadic ties between these actors. The social network perspective provides a set of methods for analyzing the structure of whole social entities as well as a variety of theories explaining the patterns observed in these structures.⁴⁵

Social networking sites are application that enables users to connect by creating personal information profiles, inviting friends and colleagues to have access to those profiles and sending e-mails and instant messages between each other.⁴⁶ The uniqueness of social networking sites to poster ones social life on the web enabling them for further social relations and maintaining already existing offline relations makes the area of interaction and sharing of contents beyond geographical boundaries. Extending an individual space using a social networking site enables a person to post, share, advertise, and promote individual as well as business endeavors. Several companies are already using social networking sites to support the creation of brand communities, movie promotion, brand advertising, review pages for the same and sometimes used as a distribution channel of various products. Social networking sites across the globe include services such as Facebook, Google+, LinkedIn, Myspace etc.

2.2.5. Virtual Worlds

A virtual world is an online community that takes the form of a computer-based simulated environment through which users can interact with one another and use and create objects.⁴⁷ Virtual worlds are

⁴⁴ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 (1) J. COMPUTER-MEDIATED COMM 211-230 (2008).

⁴⁵ STANLEY WASSERMAN AND KATHERINE FAUST, *SOCIAL NETWORK ANALYSIS IN THE SOCIAL AND BEHAVIORAL SCIENCES: METHODS AND APPLICATIONS* (1995).

⁴⁶ Andreas M. Kaplan, Michael Haenlein, *Supra* note 34, at 64.

⁴⁷ Jonathan Bishop, *Enhancing the understanding of genres of web-based communities: the role of the ecological cognition framework*, 5(1) INTERNATIONAL JOURNAL OF WEB-BASED COMMUNITIES 4- 17 (2009).

platforms that replicate a three-dimensional environment in which user can appear in the form of personalized avatars and interact with each other as they would in real life.

Virtual world comes in two forms. The first, Virtual Game Worlds, require their users to behave according to strict rules in the context of Massively Multiplayer Online Role-Playing Game (MMORPG). For example; 'World of Warcraft', in which people can explore virtual planet of 'Azeroth' in the form of humans, dwarves, orcs or night elves to fight monsters. The second group of virtual worlds, often referred to as Virtual Social Worlds, allow inhabitants to choose their behavior more freely and essentially live a virtual life like their real life.⁴⁸ Within social media, virtual worlds have three characteristics that differentiate them from other applications. First, virtual worlds allow users to interact with others in real time. While content on pages like YouTube, Facebook, or Wikipedia is usually posted and then consumed by others with a time delay, a conversation within virtual world is identical to one in real life, with the exception that it is not conducted in a face-to-face format. Second, virtual worlds allow users to create fully customized virtual self-presentations in the form of avatars. Although a YouTube user may be able to create some form of an image within the community by carefully choosing the types of video messages posted, avatar customization within virtual worlds tends to be far more flexible. Finally, while content communities, blogs, and collaborative sites are two-dimensional (i.e., focused on content sharing), avatars within virtual worlds have the possibility of exploring their virtual environment in three dimensions. In many virtual worlds, the basic rules of physics continue to hold, which makes navigation within them very similar to what one is used to in the real world.⁴⁹

2.3. DIFFERENCE BETWEEN SOCIAL MEDIA AND TRADITIONAL MEDIA

Before the advent of internet, the traditional media involved features that enabled person-to-person and person-to-population communication modes. The landline telephone and media formats like newspapers, films, music are examples to such notion. Underlying idea is

⁴⁸ Andreas M. Kaplan, Michael Haenlein, *Supra* note 34, at 64.

⁴⁹ Andreas M. Kaplan, Michael Haenlein, *The fairyland of Second Life: Virtual social worlds and how to use them* 52(6) BUSINESS HORIZONS 565,566, 563-572 (2009).

that traditional media formats like these are usually produced at a single source and distributed to a wide population at a defined speed. Owing to this peculiar ‘one direction’ characteristic, the feedback receiving concept from the general population is silent.

The accessibility of a traditional media is also limited to various factors like geography, business market locales, and regional development. Traditional media being an industrial tangible media requires skill and expertise for its development and the permanence factor of a traditional media is more as it is mostly in tangible media source, this has its merits and demerits ranging from stability and dependability to impossibility of alterations and erasure.

The social media with the foundation of internet blurs the distinction between individual and mass audiences and replaces the Person to population of traditional mass media with the possibility of a many-to-many web of communication. This can be seen as people use the internet and digital content for individual communication with single known recipients (e-mail, instant messaging), small group communication with a limited number of recipients (forums, social networking sites, microblogging like Twitter), and mass communication with an unlimited number of unknown recipients (websites, blogs, streaming video). With social media, communication is often potentially interactive, rather than being one way. For example, readers of newspaper websites can provide instant feedback on a story, shoppers can post their own product reviews at online retail sites such as Amazon.com, and viewers can comment or vote to “like” or “dislike” a video on YouTube. Interactivity can also mean that users are able to employ these media to communicate with each other.⁵⁰

Social media tools and data are available to the public at ease and at low cost thereby reducing the accessibility conundrum posed by the traditional media. Social media contents being less complicated can be generated, used and shared by general population without being expert or skillfully developed, as the underlying features of social media enables such capabilities in a simplified manner. The communication period is instant, and permanence is low when compared to traditional media as it can be easily altered and erased.

⁵⁰ DAVID R. CROTEAU, WILLIAM D. HOYNES, STEFANIA MILAN, *MEDIA/SOCIETY: INDUSTRIES, IMAGES, AND AUDIENCES* 288,289 (2012).

Table II.2- Difference between traditional media and social media

FEATURES	TRADITIONAL MEDIA	SOCIAL MEDIA
1. Reach	Traditional technologies enable anyone to reach a large-scale audience at a lower speed.	Social media technologies enable anyone to reach a large-scale audience at a higher speed.
2. Accessibility	Means of production of traditional media are characteristically owned privately or by government,	Social media tools are accessible to anyone at diminutive or no cost.
3. Usability	Traditional media production typically requires specialized skills and training.	Social media does not, or in some cases requires skills, so anyone can operate the means of production.
4. Communication period	The time lag between communications produced by industrial media can be long.	Instant.
5. permanence	Industrial media, once created, cannot be altered or erased easily. (once a magazine article is printed and distributed changes cannot be made to that same article)	Can be altered instantaneously using comments or editing.

Social media through time has established its higher capability to outcome the features of traditional media. Most of the social media platforms being free, the users engage themselves in distributing contents almost free. The capability to form intimacy and target a larger audience can necessitate broadcasting to larger audience and it can be specific. Adaptability of a social media platform with user's intention is novel

when compared to the traditional media. The feedback capability with social media websites are immediate and measurable when compared to traditional media which require frequent monitoring and evaluation.

2.4. THEORETICAL UNDERSTANDING OF SOCIAL MEDIA

Media is a communication channel through which different forms of information are disseminated. The information so transferred may be used either for further dissemination or for storage purpose. The communication media includes physical media and media other than physical media, the mechanical media. Normally the physical media use up the word-of-mouth manner to disseminate information, ranging from personal conversation to large scale crowd-gathering meetings. Mechanical media normally use up the written or electronic channels which enables faster information dissemination and easier archiving of information for further reference and for future knowledge gaining. The information so disseminated is upon the reader to interpret and use accordingly.

The basic human traits of cognition, communication and co-operation make them social beings. So, when a media uses up these three features it becomes a socially used media. But the statement is with ambiguity, what if not all the three features are used, so it initiates a question as to when a media becomes social?

According to Émile Durkheim, a social fact is every way of acting, fixed or not, capable of exercising on the individual an external constraint; or again, every way of acting which is general throughout a given society, while at the same time existing in its own right independent of its individual manifestations.⁵¹ So a media becomes social because it is a byproduct of human behavior and social process that includes social relations and communications within. Since basic human traits of cognition, communication is objectified in media it becomes social in every sense even if it has individual manifestation or not.

The dependence of human beings on fellow human beings is inevitable; they can exist only based on social relations they maintain with other humans. Communication is the primary notion for having social relations. According to Max Weber, that to constitute a social relation, behavior needs to be a meaningful symbolic interaction between

⁵¹ EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 59 (STEVEN LUKES ED., THE FREE PRESS 1982) (1895).

human actors.⁵² Media that enable communication over real time as well as spacio-temporal distances are considered social.

According to ideas propounded by Marx and Tonnies, a human being externalizes parts of its knowledge in every social relation. As a result, this knowledge influences others, who change part of their knowledge structures and, as a response, externalize parts of their own knowledge, which results in the differentiation of the first individual's knowledge.⁵³ A certain number of communications is not just sporadic, but continuous over time and space. In such cases, there is the potential that communication results in co-operation, the shared production of new qualities, new social systems, or new communities with feelings of belonging together. This is the level of co-operative labour and community. So media that enable co-operation of people through communication thus bringing people together and mediate feeling of togetherness is social and also knowledge production through collaborative use of media also makes media social.⁵⁴

Any technological system is basically a social system in two respects. First, it is itself a self-organizing system, because it embraces actors and agency, and structures. Second, it is a subsystem of the universal societal suprasystem.⁵⁵ The combined heterogeneous functional aspect of humans and technologies is called the techno social system. The notion of the techno-social system refers to a system that enhances human cognition, communication, and co-operation; Cognition is the prerequisite to communicate and the precondition to co-operate. In other words, cooperation needs communication and communication needs cognition.⁵⁶ If the web is defined as a techno-social system that comprises the social processes of cognition, communication and co-operation, then the whole web is social in the Durkheimian sense because it is a social fact. Parts of it are communicative in the Weberian sense, while it is the community-building and collaborative part of the web that is social only

⁵² CHRISTIAN FUCHS, SOCIAL MEDIA: A CRITICAL INTRODUCTION 39 (2014). See also MAX WEBER, THE NATURE OF SOCIAL ACTION (W. G. RUNCIMAN ED., CAMBRIDGE UNIVERSITY PRESS 1978) (1922).

⁵³ *Id.* at 43.

⁵⁴ *Id.*

⁵⁵ Raffl, Celina, Wolfgang Hofkirchner, Christian Fuchs and Matthias Schafraneck, *The Web as Techno-Social System. The Emergence of Web 3.0. In Cybernetics and Systems*, AUSTRIAN SOCIETY FOR CYBERNETIC STUDIES 605, 604-609 (2008).

⁵⁶ *Id.*

in the most concrete sense of Tönnies and Marx. The part of the web that deals with cognition is exclusively Durkheimian without being Weberian, let alone Tönniesian–Marxian. The part that is about communication is Weberian and Durkheimian. And only the third, co-operative, part has all three meanings.⁵⁷ Based on this distinction we can say that web 1.0 is a computer-based networked system of human cognition, web 2.0 a computer-based networked system of human communication, web 3.0 a computer-based networked system of human co-operation.⁵⁸

Table II.3- Different understandings of sociality on the web⁵⁹

Approach	Sociological theory	Meaning of sociality on the WWW
1. Structural Theory.	Emile Durkheim: Social facts as fixed and objectified social structures that constantly condition social behavior.	All computers, the internet and all WWW platforms are social because they are structures that objectify human interests, understandings, goals and intentions, have certain functions in society and effect social behavior.
2. Social Action Theory	Max Weber: Social behavior as reciprocal symbolic interaction.	Only WWW platforms that enable communication over spacio-temporal distances are social.

⁵⁷ CHRISTIAN FUCHS, *supra* note 52, at 45,46.

⁵⁸ *Id.*

⁵⁹ *Id.*

3. Theories of social co-operation	Ferdinand Tonnies: Community as social system that are based on feelings of togetherness, mutual dependence and values.	Web platforms that enable the social networking of people, bring people together and mediate feelings of virtual togetherness are social.
	Karl Marx: The social as the co-operation of many humans that results in collective goods that should be owned co-operatively.	Web platforms that enable the collaborative production of digital knowledge are social.
4. Dialectic of Structure and Agency Emile Durkheim: Cognition as social due to conditioning external social facts. Max Weber: Communicative action. Ferdinand Tonnies, Karl Marx: Community- building and collaborative production as forms of co-operation.		The web as a dynamic threefold system of human cognition, communication and co-operation. Web 1.0 as a system of human cognition. Web 2.0 as a system of human communication. Web 3.0 as a system of human Co-operation.

Cognition, communication and co-operation of human beings helps in the development, structure and functioning of human society. The

physical media is the normal mode that forms the part of human interaction. Through mechanical media, human beings can further objectify human interests, understand goals and intentions and act accordingly thereby enabling collaborative productions.

Web 1.0 is a web of cognition. It is mainly about the consumption of information (a cognitive process) that is presented in hypertext form. Browsing the web and relating oneself to its knowledge content represents such a social fact. Though web pages are individually consumed, the cognitive processes are conditioned by external social structures such as ideas produced by others that are presented on a website.⁶⁰ With the rise of new heavily frequented platforms such as MySpace, YouTube, Facebook, Wikipedia, Friendster etc., communication and cooperation have become more important features of the web. This development has led to qualitative changes mainly in the way people make use of the web concerning its social dimension. The web dominated by communication referred to as Web 2.0, and the web dominated by co-operation referred to as Web 3.0.⁶¹

The techno social systems designed and driven by human behavior form the basic idea of Social media. Human social actions like cognition, communication and cooperation when coupled with the technologies provided by web it becomes the underpinning stratum of social media. The information function uses up in a social media build upon Web 2.0 can be understood from the table below;

Table II.4- Social media: Web 2.0 and relative information functions

SOCIAL MEDIA TYPES (Web 2.0)	EXAMPLES	INFORMATION FUNCTIONS		
		COGNITION	COMMUNICATION	CO-OPERATION
COLLABORATIVE PROJECTS	Social Bookmarking	✓	✓	✓
BLOGS	Blogspot.com	✓	✓	

⁶⁰ Raffl, Celina, Wolfgang Hofkirchner, *supra* note 55, at 607.

⁶¹ *Id.* at 608.

CONTENT COMMUNITIES	Youtube	✓	✓	
SOCIAL NETWORKING SITES	Facebook	✓	✓	✓
VIRTUAL WORLD	MMORPG	✓	✓	✓

It can be observed from the table that collaborate production by human beings occurs mostly in social media platforms wherein the participation is more than dissemination of contents. More the human participation more will be the interaction, information dissemination and understanding of things and actions correspondingly. Collaborative products, social networking sites and virtual world enables more user participation than in blogs and content communities. The richness is with respect to participation and not information dissemination.

2.5. THEORETICAL CLASSIFICATION OF SOCIAL MEDIA

The classification of social media formerly mentioned cannot be considered exhaustive, since there are various parallel levels to information dissemination in social media, the categorization can be made based on communication mode and information richness and their respective relation. The various theories create such a classification scheme which is more systematic and perceptive.

2.5.1. Social Presence Theory

Short, Williams, and Christie originally developed the theory of social presence to explain the effect telecommunications media can have on communication. They defined social presence as the degree of salience (i.e., quality or state of being there) between two communicators using a communication medium. They posited that communication media differ in their degree of social presence and that these differences play an important role in how people interact.⁶² Social presence is a sense of

⁶² JOHN SHORT, EDERYN WILLIAMS, BRUCE CHRISTIE, THE SOCIAL PSYCHOLOGY OF TELECOMMUNICATIONS 65 (1976).

being with another in an environment to feel a sense of social presence. Social presence theory will be able to determine the way people interact and communicate as the theory emphasizes the quality of a communication medium.⁶³ Social presence theory states that media differ in the degree of “social presence” defined as the acoustic, visual, and physical contact that can be achieved, they allow to emerge between two communication partners.⁶⁴

Two concepts of social presence are intimacy and immediacy. Intimacy is a function which represents eye context, physical distance and topic of conversation while immediacy conveys through speech and associated verbal and nonverbal cues.⁶⁵ More the level of intimacy and immediacy in a communication more effective it will be. Based on the social presence theory, when the communication channel provides adequate social presence for the level of interpersonal involvement for a task the communication is perceived as effective. Furthermore, according to the social presence theory, face to face is considered to have the most social presence while written and text-based communication has the least.⁶⁶ Considering Collaborative Projects and Blogs, has lesser intimacy and immediacy as it is more into written and text-based communication and hence social presence is less. But when the media provides better communication level through personal presence and better information holding user generated contents like that of in a social networking sites or content communities, the social presence is at a medium level. Considering virtual world that can replicate real life in virtual form will have the highest level of social presence.

2.5.2. Media Richness Theory

Media richness theory was developed by Daft & Lengel. Communication media vary in the capacity to process rich information. The reason for richness differences includes the medium’s capacity for

⁶³ Kala Devi Vegiayan, Abbas Ghanbari Baghestan, Yasha Sazmad Asfaranjan, *Exploring Employees Preference of Communication Channel*, 18(4) MIDDLE-EAST JOURNAL OF SCIENTIFIC RESEARCH 505, 504-511 (2013).

⁶⁴ Andreas M. Kaplan, Michael Haenlein, *Supra* note 34, at 61.

⁶⁵ Tu, C. and M. McLissac, *The relationship of social presence and interaction in online classes* 13(3) THE AMERICAN JOURNAL OF DISTANT EDUCATION 131-150 (2002).

⁶⁶ Kock, N., *The Psychobiological Model: Towards a New Theory of Computer-Mediated Communication Based on Darwinian Evolution*, 15 (3) JOURNAL OF ORGANIZATION SCIENCE 328, 327-348 (2004).

immediate feedback, the number of cues and channels utilized personalization and language variety. Rich media facilitates equivocality reduction by enabling managers to overcome different frames of reference and by providing the capacity to process complex subjective messages. Media of low richness process fewer cues and restrict feedback and are less appropriate for resolving equivocal issues.⁶⁷

Media richness theory evaluates the richness of media used for communication. The ability of the media to carry nonverbal cues that provide instant feedback, convey personality traits and support the use of natural language while communicating is the basis for determining richness of media.⁶⁸ The channel is richer if it's able to integrate feedback capability, language variety and personal focus. Communication media differ in their ability to facilitate understanding.⁶⁹ A rich medium facilitates insight and rapid understanding. Face to face communication provides a richer medium than a communication which is based on vocal cue than a textual based communication. When there is uncertainty with respect to the communication, the richer media that support it makes the communication clear. Considering collaborative projects and blogs, it is more into written and text-based communication and hence media richness is less. But when the media provides better communication level through textual, video and audio modes like that of in a social networking sites or content communities, the media richness is at a medium level. Considering virtual world that can replicate real life in virtual form that use up textual, audio, video and computer stimulated presence and emotions will have the highest level of media richness.

2.5.3. Social Information Processing Theory

Social information processing model was developed by Joseph Walther. Walther focused primarily on computer mediated communication. He criticized social presence theory and media richness theory, for several reasons. First, most of the early research was conducted in experimental settings that failed to mirror how people

⁶⁷ Daft, R. L., & Lengel, R. H., *Organizational information requirements, media richness, and structural design*, 32(5) MANAGEMENT SCIENCE 560, 554-571 (1986).

⁶⁸ Kock, N., *supra* note 66, at 328.

⁶⁹ Daft, R.L., R.H. Lengel and L.K. Treviono, *Message Equivocality, Media Selection and Manager Performance: Implications for Information System*, 11(3) MIS QUARTERLY 355-366 (1987).

communicate with different media in the real world.⁷⁰ Second, these early studies and researchers assumed that the absence of visual cues led to an absence of sociability. Third, they assumed that task-oriented communication lacked relational and social communication. And fourth, they failed to acknowledge that just as cues are filtered out, other cues are filtered into computer mediated communication and therefore computer mediated communication has some affordances that face-to-face communication does not.⁷¹ Walther believed that human's social nature is the same in computer mediated communication and face-to-face environments. He believed that people will somehow find out ways to influence social interactions online.⁷² Under this theory come two concepts of self-presentation and self-disclosure, this decides the communication effectiveness based on a person's involvement and his comparison with others.

2.5.4. Self-Presentation Theory

Self-presentation theory is developed by Erving Goffman. The goal of self-presentation is to make others accept the images individuals claim for themselves.⁷³ To achieve this goal, individuals must present themselves in accordance with their social roles, and make sure others positively evaluate their images.⁷⁴ Thus, individuals need to adjust their public images to audience expectations. This is done with the objective of influencing others to gain rewards and it is driven by a wish to create an image that is consistent with one's personal identity. The key reason why people decide to create a personal webpage is, the wish to present themselves in cyberspace.⁷⁵

2.5.5. Self-Disclosure Theory

The purpose of self-disclosure by an individual are for balancing a dialectic, for social comparison and for better understand relationships

⁷⁰ Walther, Joseph B., *Interpersonal Effects in Computer-Mediated Interaction: A Relational Perspective*, 19(1) COMMUNICATION RESEARCH 52–90 (1992).

⁷¹ Walther, J. B., & Parks, M., *Cues filtered out, cues filtered in: computer-mediated communications and relationships in* HANDBOOK OF INTERPERSONAL COMMUNICATION (M.L Knapp and J.L Daly ed., 2011).

⁷² *Id.*

⁷³ GOFFMAN, E., *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

⁷⁴ Jian Rui, Michael A. Stefanone, *Strategic self-presentation online: A cross-cultural study* 29 COMPUTERS IN HUMAN BEHAVIOR 111, 110-118 (2013).

⁷⁵ Schau, H. J., & Gilly, M. C., *We are what we post? Self-presentation in personal web space*. 30(3) JOURNAL OF CONSUMER RESEARCH 385-404 (2003).

with self and others. The three theories that explain these purposes are the Social Penetration Theory, Social Comparison Theory and Johari Window.

As we get to know someone, we engage in a reciprocal process of self-disclosure that changes in breadth and depth and affects how a relationship develops. 'Depth' refers to how personal or sensitive the information is, and 'breadth' refers to the range of topics discussed. This is referred to as the Social Penetration Theory.⁷⁶ The theory also argues that people in a relationship balance needs that are sometimes in tension, which is dialectic. So, a certain set of disagreements can be resolved with disclosures so made. This theory was formulated by psychologists Irwin Altman and Dalmas Taylor to provide an understanding of the closeness between two individuals.

Social comparison theory, initially proposed by social psychologist Leon Festinger believes that there is a force contained by individuals to attain precision through self-evaluations. The theory states that we evaluate ourselves based on how we compare with others.⁷⁷ This type of comparison helps us to decide whether we are superior or inferior to others in an area. Disclosures about abilities or talents can also lead to self-validation if the person to whom we disclose reacts positively. By disclosing information about our beliefs and values, we can determine if they are the same as or different from others. Last, we may disclose fantasies or thoughts to another to determine whether they are acceptable or unacceptable. We can engage in social comparison as the discloser or the receiver of disclosures, which may allow us to determine whether we are interested in pursuing a relationship with another person.⁷⁸

Johari Window,⁷⁹ the theory created by Joseph Luft and Harrington Ingham can be applied to a variety of interpersonal

⁷⁶ Kathryn Greene, Valerian J. Derlega, Alicia Mathews, *Self-Disclosure in Personal Relationships*, in THE CAMBRIDGE HANDBOOK OF PERSONAL RELATIONSHIPS 412-413 (Anita L. Vangelisti and Daniel Perlman ed., 2006).

⁷⁷ OWEN HARGIE, SKILLED INTERPERSONAL INTERACTION: RESEARCH, THEORY, AND PRACTICE 261 (5th ed. 2010).

⁷⁸ Kathryn Greene, Valerian J. Derlega, Alicia Mathews, *supra* note 76, at 367.

⁷⁹ Able, Accepting, Adaptable, Bold, Brave, Calm, Caring, Cheerful, Clever, Complex, Confident, Dependable, Dignified, Empathetic, Energetic, Extroverted, Friendly, Giving, Happy, Helpful, Idealistic, Independent, Ingenious, Intelligent, Introverted, Kind, Knowledgeable, Logical, Loving, Mature, Modest, Nervous, Observant, Organized, Patient, Powerful, Proud, Quiet, Reflective, Relaxed, Religious, Responsive, Searching,

interactions to help us understand what parts of ourselves are open, hidden, blind, and unknown which helps us to understand people's relationship with self and with others.

Table II.5- Classification of social media based on theories

TYPES OF SOCIAL MEDIA	SOCIAL PRESENCE	MEDIA RICHNESS	SOCIAL INFORMATION	
			SELF PRESENTATION	SELF DECLARATION
COLLABORATIVE PROJECTS	Low	Low	Low	Low
BLOGS	Low	Low	High	High
SOCIAL NETWORKING SITES	Medium	Medium	High	High
CONTENT COMMUNITIES	Medium	Medium	Low	Low
VIRTUAL WORLD	High	High	High	High

Self-disclosure of oneself in social media enriches the communication and enables a proper relationship building which is the core functionality of social media. The theories above mentioned limits the ambiguity of a person using a social media with respect for the purpose he is there. More the disclosure more he will be familiar in that world, lesser the disclosures makes him anonymous and less social for a purpose. Self-presentation and self-disclosures are high when it comes to blogs, social networking sites and virtual worlds as they depict a person's personality at a higher grade, the relationship building parameters are also

Self-Assertive, Self-Conscious, Sensible, Sentimental, Shy, Silly, Spontaneous, Sympathetic, Tense, Trustworthy, Warm, Wise, Witty. These are the johari adjectives and to understand a person's nature or his socialness, these adjectives are placed into four quadrants with traits like OPEN, HIDDEN, BLINDSPOT AND UNKNOWN.

high considering social networking sites, the individuals can positively portray themselves in their social networking sites as well as blogs. Considering collaborative projects and content communities, less importance is given to a person's traits and behavior. Rather it gives importance to the information dissemination and sharing of user generated contents.

2.6. SOCIAL MEDIA FUNCTIONALITY

Social media provides for a diverse set of user experience and its features are used up in daily individual life and in the marketing stratum for various purposes. In general, the functions of social media ranges from establishing individual identity to marketing strategies. The essential functions include;

Online social selfhood functionality: social media enables individuals to establish an online social selfhood or online social identity for various purposes. As stated earlier, self-presentation and self-disclosure of one's individual traits in a social media platform for efficient communication thereby building an online social relationship for attaining diverse preferences and aims are one of the paramount functions of social media. Social media platforms like social networking sites, blogs and virtual world uses up this functionality for establishing social identities, self-promotion, self-branding and relationships of different nature. Firms use them for developing their own online market platform through advertisements, customer discussion pages, and fan pages and for discussing market strategies within the employers/employees of a company.

The online social selfhood functionality of social media for maintaining relationships can be achieved through proper self-disclosure.⁸⁰ Relationship maintenance is one of the main motives of using social networking sites. Personal branding and advertising which uses up the basic idea of online social identity functionality, uses concepts like experience, perspective thinking, proper usage of a social media channel, the uniqueness of an individual or a brand and perception of media richness, to make a platform or a social media channel, the most

⁸⁰ Burger, C. R., Calabrese, R. J., *Some Explorations in Initial Interaction and Beyond: Toward A Developmental Theory of Interpersonal Communication*, 1(2) HUMAN COMMUNICATION RESEARCH 99–112 (1975).

preferred communication channel.⁸¹ Social media marketing can be done in two ways; the first way is to build followers, fans, or connections by sharing useful content, running contests and generally engaging with users. The second way is through paid advertising using Facebook ads, google, or twitter promoted accounts to advertise products on services on them.⁸²

Online Dissemination functionality: Social media is a communication channel through which different forms of information are disseminated from textual to graphically simulated forms. Social media platforms are designed for communication and sharing of user generated contents. Communication messages ranges from ephemeral communications to interminable communications. Some requires responding and some doesn't. The communications seen in social networking sites are ephemeral and have the sole purpose of relationship building. Blogs are less about staying connected and messages are ephemeral in nature rather than facilitating rich interminable conversations. Industries and markets uses communication modes usually for advertising which may be feedback receivable or not. Sometimes firms use social media for interminable conversations using blogs and discussions platforms for a product or a service.

User Generated Contents in the form of audio and video are also disseminated through social media websites. The concept of 'sharing' represents the degree to which users can distribute and receive User Generated Contents. Sharing alone is a way of interacting in social media, but whether sharing leads users to want to converse or even build relationships with each other depends on the functional objective of the social media platform. For instance, the objects of sociality are pictures for Flickr, Indie music for MySpace, and Videos for Youtube.⁸³

Online Community functionality: This functionality enables users to form communities and sub communities of specific interests. Two major types of groups exist. First, individuals can sort through their contacts and place their buddies, friends, followers, or fans into different

⁸¹ Kala Devi Vegiayan, Abbas Ghanbari Baghestan, Yasha Sazmad Asfaranjan, *supra* note 63.

⁸² Giorgi Bagaturia, Margaret Johnson, *supra* note 20.

⁸³ Jan H. Kietzmann, Kristopher Hermkens, Ian P. McCarthy, Bruno S. Silvestre, *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUSINESS HORIZONS 245, 241-251 (2011).

self-created groups (Twitter). Second, groups online can be analogous to clubs in the offline world: open to anyone, closed (approval required), or secret (by invitation only). Facebook and Flickr have groups, for instance, with administrators who manage the group, approve applicants, and invite others to join.⁸⁴ Influential people, socializers, observers and promoter uses these communities for their definitive purposes. The basic human traits of cognition, communication and co-operation are the foundation of online community functionality.

Virtual Worlds are the most interactive of all virtual community forms. These communities enable users to live a parallel life in the virtual world. Users can create their own graphically simulated persons and control the character's life and behavior. The characters can communicate, socialize and hold relationships. The communities in virtual worlds can hold discussions as like in the real world because the social presence and self-disclosure and self-presentation are higher. Use of realistic computer simulated environments provides an ambient platform for the business entities to attract customers.

The diagram (Figure II.2) represents a section of the functionality of social media platform. The user with information of different nature including general information, copyrighted contents, other non-copyrighted contents, advertising information, trademark and brand names can gear up his online dissemination functionality and community formation functionality using the social media platforms so available. The other interested users using the social media websites can form communities and enable further information and content dissemination via the social media platform. These social media platforms enable the user to communicate, socialize, hold relationships and exchange information easily.

⁸⁴ *Id.*

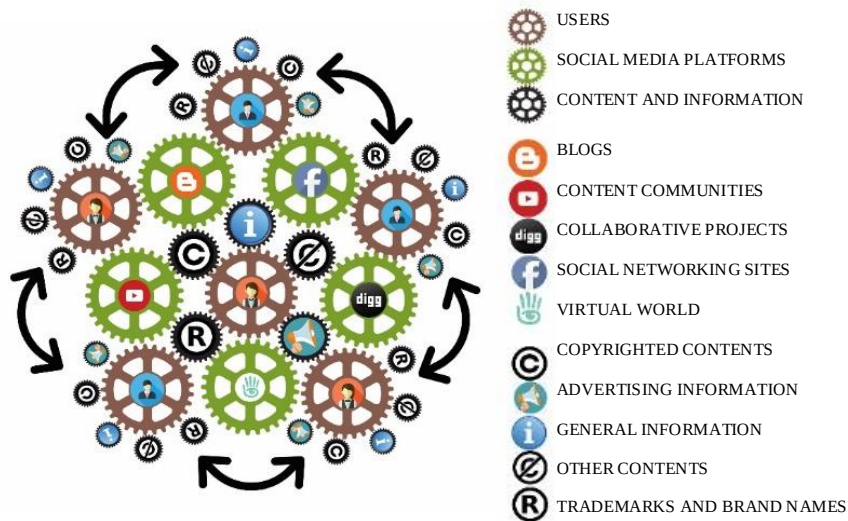


Figure II.2- Social Media Functionality Gear

2.7. BENEFITS OF SOCIAL MEDIA

As pointed out by Schaefer “There are three hallmarks of social media: Evolution, Revolution and Contribution. First, it is an evolution of how we communicate, replacing email in many cases. It’s a revolution: the first time in history we have access to free, instantaneous, global communication. Third, social media is distinguished by the ability of everybody to share and contribute as a publisher.”⁸⁵ Online communication tools have the potential to increase one’s awareness of the movements of our professional or social contacts. Twitter, for instance, offers us an update of things people we know happen to be doing at a point of time. This phenomenon has been referred as social proprioception by Clive Thompson, named after the physical quality of proprioception that tells a creature where its extremities are by the reception of stimuli produced within the organism. Social proprioception tells us where the nodes of our community are and provides a sense of connectedness to and awareness of others without direct communication. Internet is the third place where people connect with friends, build a sense of togetherness.⁸⁶

⁸⁵ MARK W SCHAEFER, THE TAO OF TWITTER, REVISED AND EXPANDED NEW EDITION: CHANGING YOUR LIFE AND BUSINESS 140 CHARACTERS AT A TIME (2d ed. 2014).

⁸⁶ Trisha Dowerah Baruah, *Effectiveness of Social Media as a tool of communication and its potential for technology enabled connections: A micro-level study*, 2(5)

In the Wisdom of Crowds,⁸⁷ it is pointed out that a crowd come about with enhanced rejoinders and precise analysis than even the most qualified doyens would provide on their own. Social media has the clout to virtual forgathering. A gathering which has the capability to view, discuss and share various topics. Collaborative judgment of millions of people would render the world theoretically errorless. The cultural meet ups, transmission of ideas and interests would make the world further amicable to live in. Budding of new inter cultural and intra cultural relations renders emotional happiness and bolster humanity. Besides the emotional happiness there will be colossal sharing of information that will be beneficial for the improvement in art, literature, health, science and technology. In brief social media heightens social constructivism, breadth of gen and technological literacy which forms the core of globally bridged ethnically educated economy.

Social media globally bridges markets thereby enabling an advanced form of marketing. Social media facilitate open forms of communication which upsurges the company's brand value, attributes and customer's experience. Social media is best for the following situations:⁸⁸ Promote open communication between employees and management, enable employees to share project ideas and work in teams effectively, which helps in sharing knowledge and experiences, social media also promotes better content, such as webcast and videos, than just simple text, helps to communicate collaboratively between current and potential customers, in receiving feedback, product definition, product development, or any forms of customer service and support, encourage members, or part of the company's employees, to become members of a well-recognized community, social media becomes a good venue for discussions and becomes a classic goal of marketing and communications, but the companies must ensure that the employees are adhering to the rules and etiquettes of social media.⁸⁹

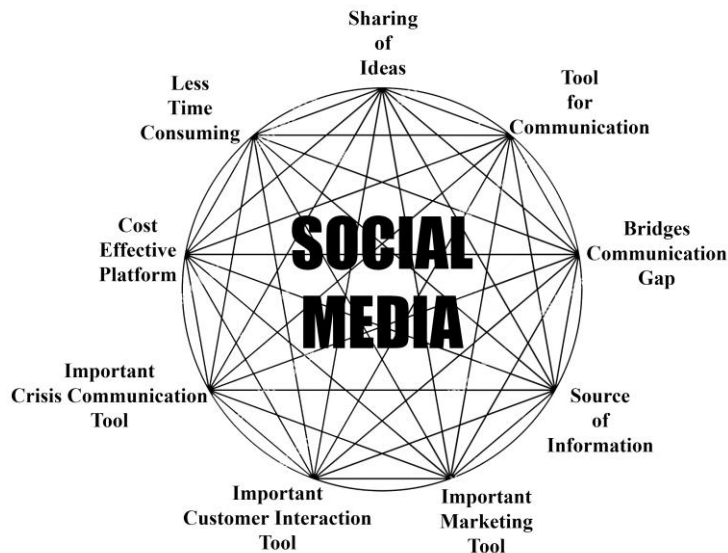
INTERNATIONAL JOURNAL OF SCIENTIFIC AND RESEARCH PUBLICATIONS
4, 1-10 (2012).

⁸⁷ JAMES SUROWIEKI, WISDOM OF CROWDS (2005).

⁸⁸ Simeon Edosomwan, Sitalaskshmi Kalangot Prakasan, Doriane Kouame, Jonelle Watson, Tom Seymour, *History Of Social Media And Its Impact On Business*, 16(3) THE JOURNAL OF APPLIED MANAGEMENT AND ENTREPRENEURSHIP 8 (2011).

⁸⁹ *Id.*

Figure II.3- Benefits of Social Media



The main benefits of Social Media are;⁹⁰ Social networking sites allow users to share ideas, activities, events and interests within their individual networks, the social networking sites, blogs, virtual worlds form the basic social media communication tool. Social media bridges the distance among different people. It offers platforms for online users to find others who share the same interests and build virtual communities based on those shared interests.

Content generating and sharing sites serve as sources of information for various topics. Users can search for content, download and use the content available on these sites free of cost. Social media is widely used by most of the firms/organizations to market their products/services in the society. The companies resort to social networking sites to generate opinions on the existing and future products that are available in the market. This is an excellent marketing strategy undertaken by most of the companies to draw consumers and elicit public opinion. Such comments or opinions help the organization to redesign their products. Such social networking and user appraisal sites are an important way of promoting products and generating opinions.

⁹⁰ *Supra* note 86, at 8, 9.

Social media networking is perfect for customer interaction, customer feedback, and customer support. New business contacts can be obtained for networking purposes. When the major forms of public relations tool fail, social media can be used extensively to communicate with the public regarding any crisis that might have gripped the nation or any organization. But it is important to remember that while social media can have a positive impact during natural disasters, it can have a less favorable effect during business crises, in which case, corporate communication teams need to understand how they can use social media to their advantage.

Since social media is an online platform it is cheaper to use unlike print media. Social media is an effective time management medium of communication both for business as well as for academic purposes. One can post a message or browse for any information at the click of a button. This is an added advantage in comparison to print and other electronic media like television and radio, though one can get the updates in television, yet social media channels provide impromptu information and connection with the people that matters most.

2.8. CONCLUSION

By understanding the Web generations, one can understand that Web 2.0 is what paved the foundation stone to the advanced web generations of the future. So, a regulation at this level is imperative so that the legislation will be able to adapt with the technological change. The social media classification so made in this chapter supported by theoretical foundations can enhance further research on the future web generations. The chapter throughout has insisted on the fact that it is the unending desire of human beings to communicate that have resulted in the creation of social media and sociality within the social media. The trailblazing impression of social media has kindled advancements. Besides the numerous gains, the social media carries conundrums of different genre. The content communities, blogs, social networking sites used by the individuals and business entities for online content sharing, online branding and advertising constructs teething troubles which turn out as giant legal difficulties. Works of intellectual nature coupled with property rights in the new digital era of social media, restricts persons from the unauthorized use of the same. The concept of copyright and trademark has gained a new outlook after digitization.

The information society is built upon the sharing and exploitation of information, while copyright law is about protection and control of information. One is about exploitation and the other reward.⁹¹ Content communities that includes the peer to peer network, YouTube, has demonstrated a tremendous amount of copyright infringement owing to unauthorized use of copyrighted materials by persons. The social networking sites, besides the relationship building feature, has a perfectly build system to share user generated contents and to publish copyrighted materials online. Any person committing acts that affect the copyright holder's rights, allows the latter to enforce their copyright and to seek an award of damages. The advancement in technology and numerous users of social media sharing user generated contents affecting copyright holders causes a high degree of tension in the information society, a society which emphasis on immediacy and which tends to 'cut and paste' information.⁹²

Trademarks in traditional sense and online brands in contemporary sense has its existence due to its continuing relation with the consumers, the advertisements keep them alive and the product quality and services grants them the goodwill. When the advertisements are faked, trademarks are used without authorization and counterfeit products are made available it affects the owners of brands largely. The brand owners use social networking sites, social bookmarking sites and blogs for their brand promotion and consumer feedbacks. When a user of social media uses the brand illegally, it results in improper dilution of famous mark and trademark tarnishment. Online fake advertising thereby promoting sale of counterfeit goods with the intent of profit grabbing through non-official websites by creating consumer confusion by sharing harmful information regarding a brand within seconds affects the trademark and brand owners adversely thereby creating a pool of legal conundrums.

The copyright and trademark aspects of social media needs to be properly regulated legally and technically so that the basic human traits of cognition, communication and cooperation, which forms the basic features of web 2.0, goes in harmony. In the subsequent chapters a thorough analysis of instances of copyright infringement and trademark infringement are made so that the relevant legislations can be identified and examined.

⁹¹ Andrew Murray, *supra* note 4, at 265.

⁹² *Id.* at 175.

III

INSTANCES OF COPYRIGHT INFRINGEMENT IN SOCIAL MEDIA

3.1. INTRODUCTION

Copyright is the term used to describe the area of intellectual property law that regulates the creation and use that is made of range of cultural goods such as books, songs, films and computer programs.¹ Copyright in a work limits the uses that can be made of the work. The author's exclusive rights and entrepreneurs neighboring rights are the two concepts that makes the idea of copyright desirable. When a right is corresponded to a work because of intellectual activity, is granted with power, it becomes desirable. The exercise of an intellectual capability by an individual, or by the technical and organizational skill of a financially organized body is the rationale behind the cataloguing of copyright as author's rights and neighboring rights.²

The combination of the internet and digital technology presents copyright law with what has been described as a digital dilemma. On one hand, digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the internet individuals may distribute those digital works around the world at the speed of light. Paul Goldstein argues that copyright should be extended "into every corner where consumers derive value from literary and artistic works."³ Copyright was necessary to provide financial incentives for both creation and distribution. Before the internet, the rights of authors, publishers, and the public were generally aligned because of one important fact: providing the public with access to content was costly.

¹ P. Goldstein, *Copyright* 38 JOURNAL OF THE COPYRIGHT SOCIETY OF THE USA 109 (1990-1).

² LIONEL BENTLY, BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 32 (3d ed. 2008).

³ PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 236 (2003).

Regardless of whether content creators required a financial incentive to create, distributors of content required a financial incentive to make the necessary investments to distribute those works to the public.⁴ It is because of the costs of copying and distribution, the interests of creators and distributors were generally bundled together under the copyright law. But the problem here is what will happen to a world where works are duplicated and distributed freely and illegally by people through social media? The illegal peer to peer sharing, the unauthorized sharing via media sharing and storage websites are new trends in digital world creating dilemmas which will be dealt in this chapter.

The chapter makes a detailed analysis of the technologies that defines the complex social media applications as it is necessary to understand the applicability of various provisions of the laws and the judiciary's dilemma in interpreting them.

3.2. INSTANCES OF COPYRIGHT INFRINGEMENT VIA CONTENT COMMUNITIES

3.2.1. Peer to peer (P2P) Networks

Peer to peer can be defined as the sharing of computer resources and services by direct exchange between systems.⁵ The peer-to-peer movement allows millions of internet users to connect "directly, forming groups and collaborating to become user-created search engines, virtual supercomputers, and file systems."⁶ P2P file sharing networks can be classified into four basic categories: the centralized, decentralized, hierarchical and ring systems. Although these topologies can exist on their own, it is usually the practice for distributed systems to have a more complex topology by combining several basic systems to create, what is known now as hybrid systems.⁷

Considering the social media platforms of peer to peer structure are usually hybrid systems, it has its own technological complexity

⁴ JESSICA LITMAN, DIGITAL COPYRIGHT 15 (2001), "If creators can't gain some benefit from their creations, they may not bother to make new works."

⁵ See generally KAN, G., GNUTELLA, PEER-TO-PEER: HARNESSING THE POWER OF DISRUPTIVE TECHNOLOGIES, (A. ORAM ed. 2001)., See also, Choon Hoong Ding, Sarana Nutanong, and Rajkumar Buyya, *Peer-to-Peer Networks for Content Sharing*, (Dec 8, 2017), <http://www.cloudbus.org/papers/P2PbasedContentSharing.pdf>.

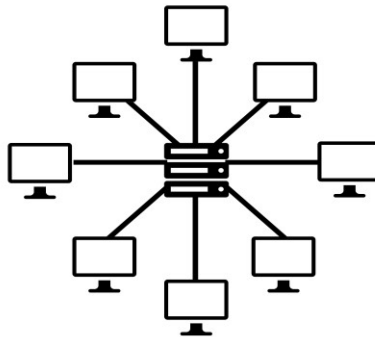
⁶ *Id.*

⁷ Choong, *supra* note 5 at 2.

fashioning legal consequences. The legal consequences are basically due to the sharing of a copyrighted content by an unauthorized person, but it gets complex because it can be done by a person or persons staying anonymous. The legal conundrum furthers with the liability factor. The role and knowledge of online service providers must be addressed by the law as they are acting as the facilitators at the first place for the infringing activity to occur. To understand all these legal aspect, one must have a clear understanding of the nature of the peer to peer networks which are hybrid systems. In the following pages, the nature of peer to peer architecture, its technological brilliance and the complexity related to it; the liability factor and anonymity factors are discussed.

Centralized topology is basically the traditional client-server model. The centralized server manages the files and user database, who are the clients to the server, commonly called as the peers.⁸ The peer having an IP address and holding files to be shared will contact the server. Every time, when the application is launched, the database dynamically created by the server forms an exclusive database that maps file names to sets of IP addresses for people to search. All search queries will be send to the server, if there is a match, a direct link to the peer sharing the file is established and the transfer executed.⁹ At no time of the process the file ever be placed on the server.

Figure III.1- Centralized Topology

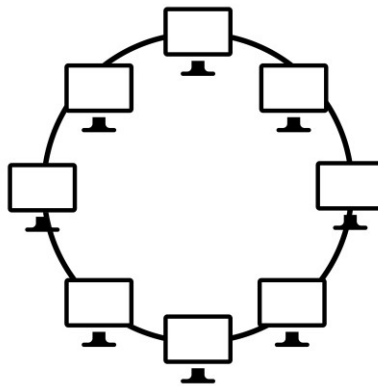


⁸ PETER, B., TIM, W., BART, D., & PIET, D., A COMPARISON OF PEER-TO-PEER ARCHITECTURES 1-2 (2002).

⁹ Kurose, J. F. & Ross, K. W., *Computer Networking: A Top-Down Approach Featuring the Internet* (2003), http://www.bau.edu.jo/UserPortal/UserProfile/PostsAttach/10617_1870_1.pdf

Ring topology is made up of a cluster of machines that are arranged in the form of a ring to act as a distributed server.¹⁰ Each networked device will be connected to two other devices. This bunch of devices will be structured to offer enhanced load balancing and advanced availability. This topology which is most likely owned by a single organization is generally used when all the devices are moderately neighboring on the network. In this type of network anonymity is not an issue.

Figure III.2- Ring Topology

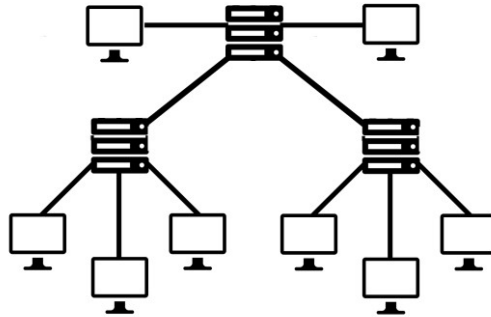


The hierarchical topology helps to develop a network topology in distinct layers. Each layer focuses on functions, qualifying one to choose the right equipment and features for the layer. The hierarchical topology model encompasses a core layer of high-end routers and switches optimized for network availability, a distribution layer of routers and switches performing forwarding decisions and an access layer connecting users via hubs, bridges, switches, or routers.¹¹

¹⁰ Minar, N., *Distributed Systems Topologies: Part 1*, OREILLY NETWORK (2001), http://www.openp2p.com/pub/a/p2p/2001/12/14/topologies_one.html

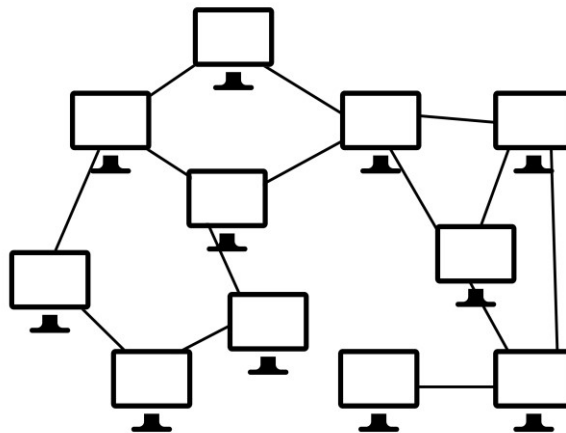
¹¹ *Hierarchical Topology*, etutorials.org, <http://etutorials.org/Networking/Lan+switching+first-tep/Chapter+10.+LAN+Switched+Network+Design/Hierarchical+Topology/>

Figure III.3- Hierarchical Topology



In a Decentralized Topology P2P architecture, no centralized servers exist. All peers are equal, hence creating a flat, unstructured network topology.¹² In order to join the network the client must contact a node that is always online which gives the joining client the IP address of one or more already connected clients thereby making it part of the dynamic network. Since there are no servers to manage searches, queries for files are flooded through the network.¹³ The knowledge about the connected clients will be limited to the corresponding neighbor to which they are connected.

Figure III.4- Decentralized Topology



The hybrid topology is more real-world system that generally combine several basic topologies into one system known as the hybrid

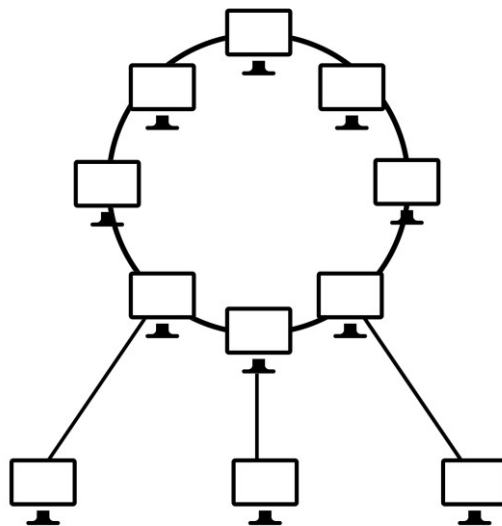
¹² PETER, B, *supra* note 8.

¹³ KUROSE, J. F. & ROSS, K. W, *supra* note 9.

architecture.¹⁴ In a hybrid topology, the topology will be a combination of the earlier mentioned topologies, combined, they can provide high results.

In centralized and ring topology, the ring topology has an improvement of holding and balancing higher capacities when compared to centralized topology. In this form, the main servers align themselves to a ring topology creating a bigger server and forms the central server to which clients are connected in a central topology manner. The entire system is a hybrid; mixture between the sturdiness of a ring topology with the simplicity of a centralized system.¹⁵

Figure III.5- Centralized and ring topology



In centralized and centralized topology, the server of a network is itself a client of a higher network. The centralized server which the user depend on, processes the data and present it by depending on other servers.¹⁶ For example when a web browser contacts a centralized web server, the web server may process and format the results so that they can be presented in HTML format and in the process of doing that, these servers might themselves contact other servers (e.g. Database server) in order to obtain the necessary information.¹⁷

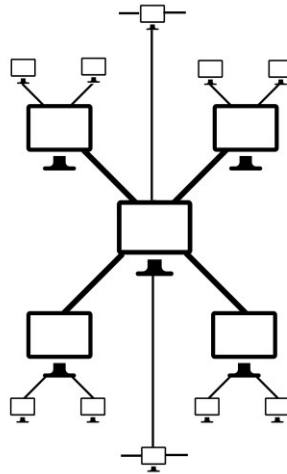
¹⁴ See generally YANG, B. H. & GARCIA-MOLINE, DESIGNING A SUPER-PEER NETWORK, (2002).

¹⁵ Choong, *supra* note 5 at 5.

¹⁶ *Id.*

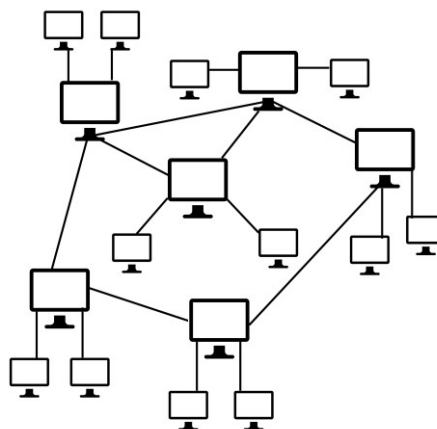
¹⁷ *Id.*

Figure III.6- Centralized and Centralized Topology



In Centralized and Decentralized Topology, a super node is any node that also serves as one of that network's relayers and proxy servers, handling data flow and connections for other users.¹⁸ A super node is an assembly of peers with high speed connection. In this topology the super nodes are different set of grouped peers that conjointly act as the central server and the super nodes are connected in the decentralized manner. That is super nodes are tied together in the decentralized topology and combined they form the central server, to which each node can act as a subset to other peers.

Figure III.7- Centralized and Decentralized Topology



¹⁸ *Supernode (networking)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Supernode_\(networking\)](https://en.wikipedia.org/wiki/Supernode_(networking)).

Considering the legal issues related to Peer to Peer networking it is imperative to understand the technologies adopted by Napster, Gnutella and Bit torrent, as they are the major peer to peer networking technologies that initiated and facilitated the copyright infringement via social media.

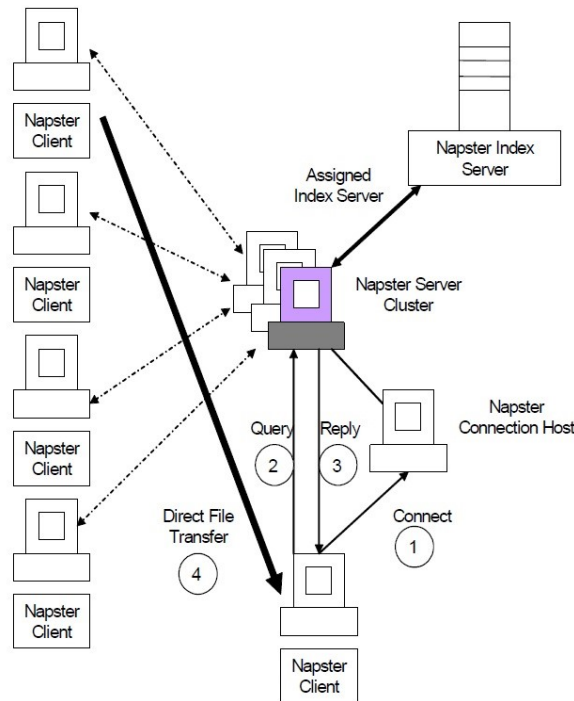
3.2.2. The Napster Topology

The Napster Topology, is based on the centralized model of P2P file-sharing. It has a Server-Client structure where there is a central server system which aims traffic between individual registered users. The central server systems consist of server clusters. The registered users can make a list of the file in the directory of the server clusters of the central server which is in the shared folder of the registered user's PC. These directories are updated every time a user logs on or off the Napster server network. The central server system act as a common connection arbiter. The client registers with the assigned server, providing identity and shared file information for the server's local database. In turn, the client receives information about connected users and available files from the server.¹⁹

From the illustration followed it can be understood that users are almost always anonymous to each other. In a Napster architecture, the client must install a Napster utility that act as the Napster connecting host between the client, Napster central server cluster and Napster index server. Once the connection is made the Napster central server will keep an index of all the Napster users currently online and connect them to each other. The client can now run a search query for the file he intends to download. The Napster utility on the client's server queried the index server for other Napster computers online that had the file the client has requested. Whenever a match is found, the Napster server informs the client as to where to find the requested file. The Napster server replies with a list of these systems in the results window and the client can choose and download. Once the download is over, the connection will be terminated, and the client will have the file on this system after the direct file transfer. The key point is that the user can remain anonymous and the actual file is never stored on the central server or on any intermediate point on the network.²⁰

¹⁹ Choong, *supra* note 5 at 8.

²⁰ *Id.*

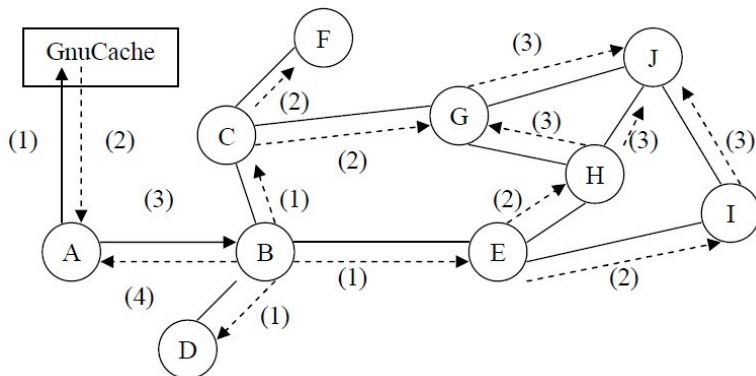
Figure III.8- The Napster Architecture²¹

3.2.3. Gnutella architecture

Gnutella architecture basically uses the decentralized topology. There is no central database that knows all the files available on the Gnutella network unlike Napster. Instead, all the machines on the network inform each other about available files using a distributed query approach.

Gnutella hosts will be always connected to the Gnutella network. A client can use gnucahe application to connect with the hosts and to send a query, the Gnutella host will respond to the connection request making the client a part of the Gnutella and thereby making him another host. The Gnutella host will then forwards that query to all the hosts connected in the network to see if the requested file is on the local hard disk of any of the host. If so, they send back the file name and machine IP address to the requester and thereby establishing a connection between the requestor and host, and file transfer is done via HTTP protocol and not via Gnutella protocol.

²¹ *Id.*

Figure III.9- Gnutella Architecture²²

From the figure above, suppose that user A that is connected to the network wants to search for some files. He sends a query message to his neighbor, user B. User B first checks that the message is not an old one. It then checks for a match with its local data. If there is a match, he sends the queryhit message back to user A. If not, user B then forwards the query message to users C, D, and E. Users C, D, and E performs the same steps as user B and forwards the query message further to users F, G, H, and I who will again repeat the same process mentioned earlier. Suppose that user H is the first one to forward the query message over to user J. Any subsequent query messages forwarded by users G and I to user J will be discarded since checks against its local table shows that it has already received those messages. This holds for user G as well when user H forwards the query message to him. Suppose now that user J finds a match against his local data. He responds by sending a queryHit message back to user A, following the same path the query message was carried through which is from J, to H, to E, to B, and to A. Now, user A can initiate the file down load directly with user J using the HTTP protocol.

3.2.4. Bit torrent topology

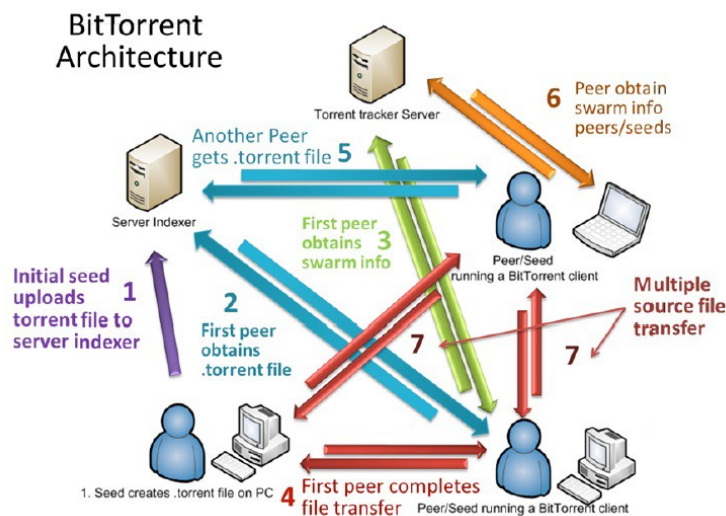
Bit torrent enables decentralized, peer-to-peer file sharing via a centralised coordination mechanism. To join a Bit torrent network and begin downloading files, one must first obtain the .torrent file associated with the files. The .torrent files are typically published on the web, and contain information about the files that are contained in the torrent, and the location of the torrent's trackers.²³ The tracker is computer which acts

²² *Id.* at 15.

²³ Alistair Atkinson, *What is BitTorrent's architecture?* QUORA, <https://www.quora.com/What-is-BitTorrents-architecture>

as a server, and maintains a list of nodes which are participating in the system (i.e. computers that are currently downloading or uploading file data). For a new node to join a Bit torrent network, it sends a message to the tracker requesting the IPs of some of the other participating nodes, so that it can connect to them and begin downloading. No actual file data is downloaded from the tracker; its job is simply to facilitate node discovery.

Figure III.10- Bit Torrent Architecture²⁴



At first .torrent file is created by the initial seeder and is uploaded on the server indexer, where the list of the .torrent of various files will be displayed. The interested user/ peer can obtain the .torrent file from the server indexer social media platform. The .torrent file can establish a connection to the fellow peers who are at the same time uploading and downloading the same content after downloading the same .torrent file thereby creating a swarm. After being in the swarm, user will start downloading bits of the data from all those who are present in the swarm and simultaneously uploads the bits so downloaded to the fellow swarms who are already present and who will join later. It is typically a requirement that user also upload data while part of the network.²⁵ A typical Bit torrent system needs to contain at least one seeder (at least

²⁴ Borges, Raymond & Patton, Robert & Kettani, Houssain & Masalmah, Yahya, *BitPredator: A Discovery Algorithm for BitTorrent Initial Seeders and Peers*. (2018) https://www.researchgate.net/publication/241972547_BitPredator_A_Discovery_Algorithm_for_BitTorrent_Initial_Seeders_and_Peers

²⁵ Alistair Atkinson, *supra* note 23.

initially) which has a complete copy of the data being shared. Once at least one complete copy has been uploaded by the seeder to other nodes the seeder may leave the network; however for successful ongoing sharing of the file data, at least one complete copy must remain available across the nodes in the network.²⁶ So in summary the topology follows decentralized torrent publication, centralized system coordination, and decentralized peer communication.

Table III.1- Peer to Peer architecture and their features

P2P Architecture	Purpose	Anonymity	Security	Liability in infringements
General topologies				
Centralized	File sharing of all types.	Limited	High	Knowledge based
Ring	File sharing of all types.	Limited	Moderate	Knowledge based
hierarchal	File sharing of all types.	Moderate	High	Knowledge based
Decentralized	File sharing of all types.	High	Low	Knowledge based
Hybrid topologies				
Centralized and Ring Topology	File sharing of all types.	High	moderate	Knowledge based
Centralized & Centralized Topology	File sharing of all types.	High	moderate	Knowledge based
Centralized & Decentralized Topology	File sharing of all types.	High	Low	Knowledge based

²⁶ *Id.*

Potential social media topologies				
Napster	Music MP3 File Sharing	Limited	Moderate	Knowledge based
Gnutella	File sharing of all types.	High	Low	Knowledge based
Bittorrent/ Utorrent	File sharing of all types.	Very high	Very low	Knowledge based

3.2.5. Legal history of peer to peer networking

Efforts to combat online piracy did not begin with the lawsuits against individual users. The Recording Industry Association of America (RIAA) initially instituted lawsuits against ISPs and companies that owned the P2P platforms.²⁷ When the RIAA first filed suit against individual file sharers, repercussions flew through the legal community.²⁸ Originally, one of the reasons copyright owners went after the facilitators, rather than the direct infringers, was because of the cost-effectiveness of receiving a large lump sum from a single lawsuit instead of small sums from multiple individual suits. Additionally, it was effective to sue the actors causing the problem as they are responsible for making large-scale copyright infringement possible by distributing P2P sharing software.²⁹

The modern litigation over P2P sharing relies on the Supreme Court's analysis in *Sony Corp. of Am. v. Universal City Studios, Inc.*³⁰ Sony developed the Betamax home recording video system, a device that

²⁷ See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1346, 1345-1433 (2004). Stating that, initially, copyright owners mostly sued direct facilitators of the infringement.

²⁸ *Id.*

²⁹ Jeannie Roebuck, *BitTorrent Sharing: The Case against John Does* 18(1) INTELL. PROP. L. BULL. 37 (2013).

³⁰ 464 U.S. 417 (1984).

allowed users to record television shows for viewing at a later time.³¹ Copyright owners sued Sony for contributory copyright infringement.³² Favoring technological innovation, the Supreme Court did not find Sony liable, holding that “if a significant portion of the product’s use is non-infringing, the manufacturers and sellers cannot be held contributory liable for the product’s uses.”³³ The Court found that “time shifting,” or watching a recorded program at a later time, was a legitimate act of fair use, and was predominately used for individual personal enjoyment.³⁴

While P2P technology is different from the Betamax, the Sony framework is inapplicable. Whether P2P file sharing constitutes copyright infringement depends on whether the shared work is copyrighted and whether the sharing was authorized. Thus, like the Betamax, P2P sharing technology allows for both infringing and non-infringing uses.

In *A&M Records, Inc. v. Napster*,³⁵ Napster enabled a centralized file sharing network thereby enabling people to share contents via the

³¹ *Id.*

³² *Id.*

³³ *Id.* at 491.

³⁴ *Id.* at 417.

³⁵ *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1011 (9th Cir. 2001), Napster was an Internet service that facilitated the transmission of MP3 music files between and among its users. Napster, through software which it provided for free on its Internet website, enabled its users to make music files on the hard drives of their computers available to other Napster users, search for music files on other users' hard drives, and transfer the music files from one user to another. Among its other services, Napster provided technical support, maintained a chat room where its users could interact, and provided a directory where artists could provide information about their music. After downloading the software, first-time users were required to register with the Napster system by creating a "user name" and password for future entrance to the site. Once a user entered a "user name" and password, he could proceed to use the service. To make music files available to other Napster users, the user would first create a "user library" directory on his hard drive, designating each file he wished to share with an identifying file name. The Napster software would then search the user's hard drive for available files in the proper MP3 format. The software would then upload the file names of all properly formatted files from the user's hard drive to the Napster computers (also known as "servers"). These file names would then be added to Napster's "collective directory," and would be accessible by other Napster users as long as the offering user remained online. Once the offering user logged off the Napster service, the music files obtained from his hard drive would no longer appear on the site, and would no longer remain available to other Napster users.

The primary means to navigate the Napster system for music files was through Napster's search function. The user, once logged into the Napster system, would access a form made by the software. The user would complete the form by entering either the name of the song or a particular artist. The request would be transmitted to a Napster server and

platform. Plaintiffs, the copyright holders of the shared files, brought various secondary liability claims against Napster. Napster relied on Sony's holding for its defense. They argued that Napster's software was capable of substantial non-infringing uses; therefore, Napster should not be liable for contributory infringement. The Court accepted Napster's argument regarding contributory liability, but found Napster liable based on the theory of vicarious liability: Napster had actual and specific knowledge of the infringing activities, failed to remove the infringing material, and financially benefited from the activity.³⁶ Even though Court relied on Sony Betamax decision, there was a deviation from the principle applied as the technology and nature of infringement and knowledge about the infringing activity was different.

Another case is *Grokster*,³⁷ in which, unlike Napster, Grokster uses a decentralized file sharing network wherein each individual user acted as both the client and server. Many copyright holders in the entertainment industry sued Grokster, a popular P2P sharing platform. In its decision, the United States Court of Appeals for the Ninth Circuit determined that the decentralized architecture of Grokster's technology precluded a finding of vicarious liability. The Court held that Grokster did not have sufficient control of, or access to, its software platform. The case ultimately reached the Supreme Court, where the Court found Grokster liable for inducement of infringement since Grokster self-promoted its

compared to the identifying file names made available by other Napster users on-line at the time. Napster's server would then compile a list of all instances where the search terms matched the identifying file names provided by other users, and send the resulting file names to the searching user. To download a music file from another user, a user simply would click on the appropriately marked "link" on the computer screen. The Napster servers would then obtain and provide the Internet address of the offering user to the requesting user. The requesting user's computer used the offering user's Internet address to establish a connection with the offering user's computer. Once this connection was established, the music file would be downloaded from the hard drive of the offering user's computer to the hard drive of the requesting user's computer.

³⁶ Jeannie Roebuck, *supra* note 29 at 38.

³⁷ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Similar to napster usage, Grokster is virtually no different. New users obtain access to the user network, which, in turn, allows users to make available, search for, and transfer files with other users. As with Napster, all file transfers take place directly between users' computers; the files do not pass through Grokster's computers. In this case Plaintiffs submitted evidence that Grokster is able to filter out or block infringing files from the networks and could filter or block infringing material from being distributed.

service as an alternative to Napster and attempted to capture Napster's market share.³⁸

Both the Napster and Grokster Courts agree that one is liable for contributory infringement if it has knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. Court while applying this principle must investigate few factors;³⁹ Standard of knowledge required to establish contributory copyright infringement, commercially significant non-infringing uses and material contribution to user's infringement.

3.2.6. Liability of Peer to Peer networks post Napster and Grokster

The problem of copyright infringement did not end with the Grokster case, the new technology introduced new platforms which created further legal conundrums. Post Napster and Grokster, countless number of peer to peer platforms were introduced. Bram Cohen, released Bit torrent as a free peer to peer distribution tool in 2002, it has been extensively used since then by consumers of music, movies, television and films. The Bit Torrent architecture is more complex and advanced enabling more users to participate, engaging in downloading and uploading, as the process is quicker with higher net traffic. Edward William Felten, Professor of Computer Science and Public Affairs at Princeton University stated that Bit Torrent technology will be a litmus test for Supreme Court standards for inducement.⁴⁰ In the wake of Grokster decision, Bram Cohen entered into agreement between The Motion Picture Association of America (MPAA) to fight online piracy. Later on movie companies entered into agreement to use its technology to distribute television and films.⁴¹ Many a Bit torrent based sites came into existence and has endured various law suits and simultaneously shut down owing to their knowledge and willfulness in facilitation for copyright infringement.

In 2006, MPAA announced a series of federal law suits, against high Bit torrent sites such as TorrentSpy, IsoHunt, eDonkey, Usenet hosts

³⁸ Jeannie Roebuck, *supra* note 29 at 38.

³⁹ David Corwin, *Contributory Copyright Liability in Napster versus Grokster: A Distinction without a Difference* 24 (605) LOYOLA OF LOS ANGELES ENTERTAINMENT LAW REVIEW 613-615, 605-618 (2004).

⁴⁰ Felten E., *BitTorrent The Next Main Event* THE FREEDOM TO TINKER, (June 28, 2005), <https://freedom-to-tinker.com/2005/06/28/bittorrent-next-main-event/>.

⁴¹ MATTHEW RIMMER, *DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD* 114 (2007).

and peer to peer services.⁴² In 2006, MPAA brought legal action in the United States District Court against TorrentSpy, alleging that it facilitated users in obtaining infringing content using torrent software.⁴³ Applying the formula for inducement developed in the Grokster case, MPAA argued that the defendants should be held liable as contributory infringers for the infringing acts of users of their torrent site, especially as they had actual and constructive knowledge of the infringing activity that occurs on their torrent site.⁴⁴ Moreover the defendants should be held vicariously liable for the infringing acts of users because they could supervise and control the infringing activities that occur through the use of their torrent site.⁴⁵ TorrentSpy denied that it had the capacity to prevent copyright infringement through censoring torrent files on the basis of link and filename. They also denied any actual or constructive knowledge of copyright infringement. The judge ruled that TorrentSpy had to monitor its users to create detailed logs of their activities and these were to be handed over to the MPAA. As a response to this decision, TorrentSpy decided to block access to all U.S. visitors instead.⁴⁶

In 2008, Columbia Pictures Industries, Inc., et.al v. Justin Bunnell, Forrest Parker, Wes Parker, Valence Media LLC,⁴⁷ judgment was made against Valence Media LLC (Defendant) for willful inducement of copyright infringement, contributory copyright infringement, and vicarious copyright infringement. United States District Court, Central District of California in this case observed that TorrentSpy operators intentionally modified or deleted directory headings naming copyrighted titles and forum posts that explained how to find specific copyrighted works; concealed IP addresses of users; and withheld the names and addresses of forum moderators.⁴⁸ Owing to these reasons the Court ordered permanent injunction against the defendants and Plaintiffs were awarded statutory damages of \$3,000 per infringement, reaching a total of

⁴² MPAA, *Studios Move To Thwart Illegal File Sharing On Major Pirate Networks*, Press Release, http://www.mpaa.org/press_releases/2006_02_23.pdf

⁴³ Columbia pictures industries inc. v. Bunnell C.D. Cal, No, 06-1093, complaint filed 2/23/06, https://regmedia.co.uk/2008/05/07/torrentspy_fine_and_injunction.pdf

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Ernesto, *TorrentSpy, One Year After the Shutdown* TORRENT FREAK (March 24, 2009), <https://torrentfreak.com/torrentspy-one-year-after-the-shutdown-090324/>.

⁴⁷ 2:06-cv-01093-FMC-JCx (2008).

⁴⁸ Elinor Mills, *TorrentSpy loses Calif. copyright lawsuit* CNET, (Dec 19, 2007), <https://www.cnet.com/news/torrentspy-loses-calif-copyright-lawsuit/>.

\$110,970,000.⁴⁹ The website chose to shutdown later on after the judgment.

In 2010, the case *Arista Records LLC v. Lime Group LLC*,⁵⁰ plaintiffs, consisting of 13 major record companies, raised several claims for secondary copyright infringement against LimeWire, LLC (LimeWire), a file-sharing program that utilizes peer-to-peer technology (namely, the BitTorrent protocol and the Gnutella network) and permits users to share digital files via an internet-based network.⁵¹ Summary judgment was granted for inducement of copyright infringement by the defendants.

Based on the decision made by Supreme Court in *Grokster*, Judge Wood articulated a two-part test to establish inducement liability; the defendant engaged in purposeful conduct that encouraged copyright infringement, with the intent to encourage such infringement.⁵² Judge Wood explained that a defendant's "intent to foster infringement can be

⁴⁹ *Columbia pictures industries inc. v. Bunnell C.D*, *Supra* note 43, at 2, Permanent injunction was passed against the defendants, defendants were permanently enjoined from directly, indirectly, contributorily, or vicariously infringing in any manner any Copyrighted Works, including without limitation by engaging in any of the following activities:

(a) encouraging, promoting, soliciting, or inducing, or knowingly materially contributing to, enabling, facilitating, or assisting, any person or entity, via any computer server, computer program, website, or online system, network or service, including without limitation any peer-to-peer or file-trading network, (i) to reproduce, download, distribute, upload, or publicly perform or display any Copyrighted Work, or (ii) to make any Copyrighted Work available for reproduction, download, distribution, upload, or public performance or display, or (b) reproducing, downloading, distributing, uploading, or publicly performing or displaying any Copyrighted Work.

⁵⁰ *Arista Records LLC v. Lime Group LLC*, 2010 WL 1914816 (S.D.N.Y. 2010).

⁵¹ LimeWire is a file-sharing program that utilizes "peer-to-peer" ("P2P") technology. By employing P2P technology, LimeWire permits its users to share digital files via an Internet-based network known as the "Gnutella network." LimeWire users can share almost all files stored on their computers with other LimeWire users. When a LimeWire user wishes to locate digital files available through the network, she enters search criteria into the search function on LimeWire's user interface. LimeWire then scans the computers of other LimeWire users, to locate files that match the search criteria. The LimeWire user can download any files that LimeWire locates. When the user downloads a file, LimeWire transfers a digital copy of the file from the computer on which it is located to the LimeWire user's computer. *See also* United States Of America V. Jason P. Bailey D.C. Docket No. 9:11-cr-80091-WJZ-1 7 (2012), <https://cases.justia.com/federal/appellate-Courts/ca11/12-118089/12-118089-2012-10-22.pdf?ts=1411123148>

⁵² Judge Wood found overwhelming evidence of purposeful conduct that fostered infringement, including that LimeWire created and distributed the LiveWire software, which "users employ to commit a substantial amount of infringement."

established by evidence of a defendant's "clear expression" of such intent, or of "affirmative steps the defendant has taken to foster infringement."⁵³ Judge Wood found that LimeWire had the right and ability to supervise, but did not exercise any meaningful supervisory control, and failed to provide a legitimate reason for not doing so. Furthermore, Judge Wood noted that LimeWire users were drawn to the service because of the infringement, and that LimeWire profited from an increased user base, through advertising, as well as sales through its music store, thereby enabling defendant liable for secondary copyright infringement.⁵⁴

Following the outcome in the Lime Group case, eight music publishers filed a new copyright infringement lawsuit, also against LimeWire. *EMI April Music Inc. v. LimeWire*,⁵⁵ accuses Lime Wire of facilitating "pervasive online infringement." This suit filed by RIAA on behalf of 8 Music companies led to the shutdown of the file sharing program LimeWire.

The case *Maverick Recording Company, UMG Recordings Inc, Arista Records LLC, Warner Brothers Records Inc, Sony BMG Music Entertainment V. Whitney Harper*,⁵⁶ addresses another defendant

⁵³ Judge Wood looked at five factors: LimeWire's (1) awareness of substantial infringement by users, (2) efforts to attract infringing users, (3) efforts to enable and assist users to commit infringement, (4) dependence on infringing use for the success of its business, and (5) failure to mitigate infringing activities. The plaintiffs showed that LimeWire had developed specific plans to attract Napster and Kazaa (previously determined to be liable for copyright infringement for their file-sharing services) users and even engaged in a marketing campaign through Google's AdWords where search terms such as "replacement napster" and "kazaa" would link to LimeWire. Demonstrating Defendants' efforts to enable and assist users to infringe. *See also* Skadden, *Arista Records v. Lime Group Summary*, 2 (May 19, 2010), https://files.skadden.com/eimages%2FArista_Records_v_Lime_Group_Summary.pdf.

⁵⁴ *Id.*

⁵⁵ No. 10 Civ. 4695 (S.D.N.Y. 2010)

⁵⁶ 598 F.3d 193 (5th Cir. 2010), *See also* <https://www.Courtlistener.com/opinion/71512/maverick-recording-co-v-harper/>, In June 2004, MediaSentry, a company retained by Plaintiffs to investigate the infringement of their copyrights over the Internet, identified an individual using a file-sharing program to share 544 digital audio files with other users of a peer-to-peer network. The shared audio files included a number of Plaintiffs' copyrighted sound recordings. By tracing the user's Internet protocol address, Plaintiffs ultimately identified Harper as the individual responsible for the file sharing.

To ensure that each of the 544 audio files was a downloadable file, MediaSentry initiated a download of the entire group. The company captured screen shots showing all of the files that Harper was sharing. It also captured the metadata associated with each file, which included the name of the artist and song. This information allowed Plaintiffs to identify those sound recordings on which they held a copyright. MediaSentry fully

knowledge factor: under what conditions a defendant's lack of knowledge of copyright can reduce the damages awarded. In *Maverick Recording*, plaintiffs sought just the \$750 minimum statutory damages per song downloaded. The defendant argued that her lack of knowledge of copyright law triggered the lower level of \$200 applicable to an "innocent infringer," one who "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."⁵⁷

United States Court of Appeals for the Fifth Circuit held that the innocent infringer defense is not available where a copyright notice appeared "on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access." Because copyright notices appeared on the CD's the music companies sold to the public, the Court reasoned, defendant had access to phonorecords with notice, and so could not claim the innocent infringer defense.⁵⁸

downloaded six of the audio files from Harper's "shared folder." Subsequent discovery indicated that Harper had downloaded all of the files from the Internet to the computer without paying for them, and that she had not copied, or "ripped," any of the songs from compact discs that she had bought legally.

During discovery, Plaintiffs examined Harper's computer. The examination showed that its operating system had been reinstalled in 2005. As a result, most of the files present on the computer in 2004, when MediaSentry performed its investigation, had been overwritten. The forensic examination did show that three file-sharing programs had been installed and used on the computer, including a program known as LimeWire, which had been used after the operating system was reinstalled. It also revealed a new cache of approximately 700 recordings downloaded since the reinstallation. Fifteen of the copyrights that Plaintiffs' second amended complaint alleged that Harper infringed came from this newly discovered cache.

⁵⁷ *Id.* Plaintiffs had requested the minimum damages of \$750 per infringed work set forth in Section 504(c)(1). Harper asserted that her infringement was "innocent" under Section 504(c)(2), which provides that "where the infringer sustains the burden of proving . that [she] was not aware and had no reason to believe that . her acts constituted an infringement of copyright, the Court in its discretion may reduce the award of statutory damages to a sum of not less than \$200." Harper averred that she thought her actions were equivalent to listening to an Internet radio station.

⁵⁸ *Id.* The arguments so made by the defendant are insufficient to defeat the interposition of the Section 402(d) limitation on the innocent infringer defense. Harper's reliance on her own understanding of copyright law or lack thereof is irrelevant in the context of Section 402(d). The plain language of the statute shows that the infringer's knowledge or intent does not affect its application, as copyright infringement itself has no mens rea element. Lack of legal sophistication cannot overcome a properly asserted Section 402(d) limitation to the innocent infringer defense.

This understanding is supported by the historical structure of the copyright law. What is now Section 402(d) was amended as part of the Berne Convention Implementation Act ("BCIA"), Pub.L. No. 100-568, 102 Stat. 2853 (1988). Before the Berne Convention was

Sony BMG Music Entertainment v. Tenenbaum case,⁵⁹ the United States Court of Appeals for the First Circuit held as a matter of law that Tenenbaum had violated the Copyright Act, and a jury found that Tenenbaum's violations were willful. The Court instructed the jury that the Copyright Act provides for damages for willful violation. The Court also gave the jury a set of non-exhaustive factors that it might wish to consider in issuing its award, including the nature of the infringement; the defendant's purpose and intent; the profit that the defendant reaped, if any, or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant's continuation of infringement after notice or knowledge of copyright claims; and the need to deter this defendant and other potential infringers.⁶⁰

In Columbia Pictures Industries, Inc. v. Fung,⁶¹ the United States Court of Appeals for the Ninth Circuit held that Fung and his company committed inducement by, among other things, taking “no steps to develop filtering tools or other mechanisms to diminish the infringing

adopted, publishers ran the risk of placing their work into the public domain by failing to include a notice of copyright. "Under the BCIA," however, "notice is no longer required at publication." See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.02(C)(3) 2-7 (2009). But the BCIA, in part through Section 402(d), "preserves an incentive for use of the same type of copyright notice." *Id.* That incentive is the bar to the innocent infringer defense. Under this scheme, it would make no sense for a copyright defendant's subjective intent to erode the working of Section 402(d), which gives publishers the option to trade the extra burden of providing copyright notice for absolute protection against the innocent infringer defense. Harper cannot rely on her purported legal naivety to defeat the Section 402(d) bar to her innocent infringer defense.

⁵⁹U.S. Dist. LEXIS 68642 (D. Mass. 2010) , See also <http://caselaw.findlaw.com/us-1st-circuit/1636118.html> , From 1999 to at least 2007, Tenenbaum downloaded and distributed copyrighted music without authorization, using various peer-to-peer networks.¹ Tenenbaum knew that his conduct was illegal, but he pressed on, ignoring warnings from his father, his college, and recording companies. In 2007, Sony BMG Music Entertainment, Warner Bros. Records Inc., Arista Records LLC, Atlantic Recording Corporation,² and UMG Recordings, Inc. (together, “Sony”), sued Tenenbaum under the Copyright Act, 17 U.S.C. Section 101 et seq., for statutory damages and injunctive relief. Sony pursued claims for thirty copyrighted works, although Tenenbaum had apparently distributed far more. During discovery, Tenenbaum lied about his activities, blaming unidentified burglars and a foster child living in his parents' home, among others. Only at trial did Tenenbaum admit that he had distributed as many as five thousand songs.

⁶⁰ Tfisher, *Sony BMG Music Entertainment v. Tenenbaum*, H20, <https://h2o.law.harvard.edu/collages/16178>

⁶¹ 710 F.3d 1020 No. 10-55946 (9th Cir. 2013).

activity by those using his services”⁶² and running advertisements on a site whose object is to promote copyright infringement. The Ninth Circuit first made clear that it will be exceedingly difficult for any defendant who induces copyright infringement to fit within the safe harbor exception. It then held that Fung and his company were ineligible for the safe harbor for at least two reasons. First, they had “red flag knowledge” of the infringement occurring via his site: “The material in question” – the MPAA member’s movies and TV shows – “was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the material solicited and assisted was both copyrighted and not licensed to random members of the public, and that the induced use was therefore infringing.”⁶³

And second, Fung and his company were ineligible for the safe harbor exception because they profited from the infringement through advertising while having the “right and ability to control” infringing activity occurring through their site.⁶⁴ Bit Torrent site Isohunt was shut down after MPAA lawsuit defeat.

One of the significant case of copyright infringement occurred in 2016, shutting down the world’s biggest online piracy site, Kickass Torrents, with U.S. criminal charges accused of distributing over USD 1 billion worth of illegally copied films, music and other content.⁶⁵

In this case KAT (Kickass Torrentz) solicited, collected, and indexed torrent files, and the site generated millions of dollars from the unlawful reproduction and distribution of copyright-protected media, including movies some of which were still playing in theatres, television shows, music, video games, computer software, and electronic books. Vaulin, the owner of the website and his co-defendants received donations from KAT users and made millions from online advertising revenues.⁶⁶ In addition to KAT, Vaulin and his co-defendants operated a few “direct download websites.” These websites, rather than collecting

⁶² *Id.* at 31.

⁶³ *Id.* at 46.

⁶⁴ *Id.* at 52. *See also Isohunt.Com To Shut Down In Lawsuit Settlement*, THE MOTION PICTURE ASSOCIATION OF AMERICA (Oct. 17, 2013), <https://www.mpa.org/press/isohunt-com-to-shut-down-in-lawsuit-settlement/#.Wc5WYbpuLIU>.

⁶⁵ *Suspected boss of online piracy site Kickass Torrents arrested*, THE HINDU (Jul.21, 2016), <http://www.thehindu.com/news/Suspected-boss-of-online-piracy-site-Kickass-Torrents-arrested/article14501027.ece>.

⁶⁶ *United States Of America V. Artem Vaulin*, 16 CR 438-1 3 (N.D. Ill.2017), <http://lawtheories.com/wp-content/uploads/2017/08/US-v-Vaulin-Opinion.pdf>

torrent files, made unauthorized copies of copyrighted works directly available for users to download.⁶⁷

The defendant moved to dismiss the indictment on various grounds. First, he contests the sufficiency of the indictment's allegations of criminal copyright infringement within the United States and contends that he cannot be prosecuted under the Copyright Act for any extraterritorial infringement and challenges the government's core theory of criminal copyright infringement, maintaining that his conduct is not actionable under the Copyright Act. Specifically, he argues that the torrent files he is accused of producing and hosting are not content protected under the Act, that he cannot be prosecuted for secondary infringement of the protected content referenced in the indictment, and that, if he can, the statutes he is charged with violating are unconstitutionally vague.⁶⁸

The United States District Court for the Northern District of Illinois answered all these notions and rejected his motion for dismissal of indictment. Considering the extraterritorial application, the Court said that Copyright Act does not apply extraterritorially to reach acts of infringement that occur entirely abroad. But the core theory underlying the indictment was that Vaulin aided, abetted, and conspired with users of his network to commit criminal copyright infringement in the United States. Millions of Vaulin's users resided in the United States.⁶⁹ These users "uploaded" and "downloaded" content, desired infringed copyrighted content. Vaulin's motion to dismiss the indictment was rejected by explaining the fact that, in setting out the conspiracy count, Vaulin "made available and caused others to make available without authorization vast amounts of copyrighted content on KAT to millions of individuals in the United States by collecting and uploading torrent files, that KAT used a network of computer servers from around the world, including computer servers located in Chicago, Illinois, and that various overt acts in furtherance of the conspiracy occurred in the United States. The acts of infringement and acts of aiding and abetting infringement occurred in this district. Depending on this fact, Court held that the indictment's allegations of wrongdoing occurring in the United States are sufficient."⁷⁰

⁶⁷ *Id.*

⁶⁸ *Id.* at 14.

⁶⁹ *Id.*

⁷⁰ *Id.* at 15.

With respect to the argument put forth by Vaulin on Government's core theory of criminal copyright infringement, maintaining that his conduct was not actionable under the Copyright Act owing to the fact that torrent files are not themselves protected content under the Copyright Act. To this the Court described the torrent files merely as a means of obtaining the copyrighted movies and other media. Protected content alleged in the indictment was a few movies and other copyright-protected media that users of Vaulin's network purportedly downloaded and distributed without authorization from the copyright holders.⁷¹

With respect to Secondary infringement liability, the Court depended on the Grokster Judgement,⁷² wherein it was stated that one infringes a copyright contributorily by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. But Vaulin argued on this aspect that contributory and vicarious infringement are common law principles and are not theories of liability enumerated in the Copyright Act. For this reason, that there can be no liability for criminal contributory and vicarious infringement. Court after making a meticulous reference, stated that persons who knowingly and wilfully aid or abet copyright infringement are subject to the same criminal penalties as it applies to the principal.⁷³ Court held that when Congress amended the Copyright Act in 1976, 18 U.S.C. Section 2⁷⁴ which, by its terms, applies to every criminal offense was in force. For this reason, there was no need to include language within the Copyright Act itself that criminalized aiding and abetting criminal infringement.⁷⁵

⁷¹ *Id.* at 16.

⁷² *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

⁷³ NIMMER ON COPYRIGHT § 15.01 (2017), *see also* Benton Martin & Jeremiah Newhall, *Criminal Copyright Enforcement Against Filesharing Services*, 15 N.C. J. L. & Tech. 108, 101-152 (2013); Notes, *The Criminalization of Copyright Infringement in the Digital Era*, 112(39) HARV. L. REV. 1709 1705-1722 (1999).

⁷⁴ (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

⁷⁵ Numerous Courts have permitted indictments to proceed or have upheld convictions under 18 U.S.C. Section 2 for aiding and abetting violations of 17 U.S.C. Section 506. E.g., *United States v. Frison*, 825 F.3d 437, 438 (8th Cir. 2016), *United States v. Stevens*, 543 F. Supp. 929, 948-49 (N.D. Ill. 1982); *see also* *United States v. Dove*, No. 2:07CR00015, 2008 WL 3979467, 3 (W.D. Va. 2008) (sustaining conviction where Court instructed jury on aiding and abetting a violation of 17 U.S.C. Section 506).

Finally with respect to the argument that the statutes he is charged with violating are unconstitutionally vague, the Court explained, to satisfy the due process concerns the Court depended on the void-for-vagueness doctrine, “a penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.”⁷⁶ In this specific case the statutes at issue are sufficiently definite such that ordinary people can understand what conduct is prohibited.⁷⁷ The statute plainly states that infringement occurs “by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution” and hence the indictment charges that Vaulin and his co-defendants conspired and aided abetted precisely this activity. The website is currently offline.

It is clear from the above judicial pronouncements that content owners rely on common law tort principles of secondary liability. Vicarious liability even though, applied by the Courts, it is quite difficult to establish party’s relationship with the direct infringer, but still there are instances where the Courts have applied an aspect of vicarious liability; the fact that the third party derives a direct financial benefit from the infringement. Contributory liability, often applied by the Courts, which can be established if the defendant knows of the infringement; and if the defendant materially contributes to or induces the infringement. Coming to copyright infringement via social media, principles have changed as the Courts have adapted to new technologies and new business methods resulting in different application of the standards.

Earlier in *Sony Corp. v. Universal City Studios*,⁷⁸ the Supreme Court did not impose contributory liability where a “staple article of commerce” used in infringement possessed “substantial non-infringing uses.” Thus, when a product is capable of both substantial infringing and non-infringing uses, defendant’s mere knowledge of the product’s infringing use is not sufficient to establish contributory copyright infringement. However, this safe harbor has been limited in cases in

⁷⁶ See *Skilling v. United States*, 561 U.S. 402-03 (2010).

⁷⁷ 17 U.S.C. Section 506(a) criminalizes “willful infringement,” and specifies, for purposes of 17 U.S.C. Section 506(a)(1)(B), that this infringement occurs by “the reproduction or distribution” of “copies or phonorecords” of “copyrighted works.” 17 U.S.C. Section 506(a)(1)(A)–(B). In the context of 17 U.S.C. Section 506(a)(1)(C).

⁷⁸ 464 U.S. 417 (1984).

which the secondary infringer distributes a product with the object of promoting its use to infringe copyright.⁷⁹ It is evident from the above cases that the concept of secondary infringement will remain unsettled, as each time a Court addresses the scope of secondary liability in a new context, the standards change. But it is pertinent that the laws gets updated with time and judiciary take such adaptive measures so that the content owner's intellectual property right will be protected in social media.

3.3. INSTANCES OF COPYRIGHT INFRINGEMENT VIA MEDIA STREAMING AND STORING WEBSITES

Media streaming and storing websites, had its inception as a private video sharing service, which has now become a worldwide entertainment target. It lets users upload and watch an unlimited video online. Videos can be a song video, movies, simulations, recordings of public events, personal recordings of friends. These videos range from being informative to personal files.

Advanced media streaming and storing websites like YouTube offers opportunities for expressing through videos by self-publishing through one's personal page, making content available for to an extremely large virtual gatherer interested in viewing it. Being a social media website, YouTube allows users to post and tag videos, watch those posted by others, post comments in a thread discussion format, search for content by keyword or category, and create and participate in topical groups. Users can view profiles of individuals who have posted or commented on videos, see their favorite videos, and contact them.

Media streaming and storing websites offer new and remediating relationships to texts that indicate changes and acceleration of spectatorial consumption. YouTube's success has been attributed in large part to its user-friendliness. Users do not need to log-in in order to view clips, and videos start streaming as soon as the webpage loads, so there is no need to worry about software compatibility, downloading files, or even clicking the "play" button.⁸⁰ On the interface, videos appear with a scrollable

⁷⁹ See *MGM Studios, Inc. v. Grokster*, 125 S. Ct. 2764 (2005). See also Michael J. McCue, *Secondary Liability For Trademark And Copyright Infringement* <https://www.lrrc.com/files/Uploads/Documents/M.%20McCue%20Utah%20Cyber%20Symposium%20SECONDARY%20LIABILITY%20Sept%2023.pdf>

⁸⁰ LUCAS HILDERBRAND, *INHERENT VICE: BOOTLEG HISTORIES OF VIDEOTAPE AND COPYRIGHT* 277 (2009).

sidebar of other videos that search results have concluded are of related interest, so users can click through from one clip to another without doing multiple searches. This mode of hyper linking effectively replicates channel-surfing and introduces non-narrative seriality to the viewing experience.⁸¹ Other Media streaming and storing websites includes Veoh, streamin.to, ozofiles.com, bduupload.info, speedplay.xyz, thevideo.me, nowvideo.sx, vidzi.tv, mersalaayitten.com etc.

The abundance of pirated content on YouTube puts the online service and its parent company in a precarious position. Much of the copyrighted content on the website has not been cleared for posting or distribution by the rightful owners, yet YouTube users are able to watch this pirated content at their leisure and without the interruption of commercials. As a result, some content owners have voiced concerns over the website's policies on copyright protection.⁸² Major media companies, along with smaller players in the content industry, have expressed contrary viewpoints on the matter. Although many copyright owners have repeatedly expressed strong disapproval of YouTube, a growing number have come to embrace it as an efficient means of increasing exposure and awareness of their content.⁸³

The epic, protracted litigation between Viacom International and YouTube has highlighted the tension between anachronistic digital copyright laws and new Web 2.0 services.⁸⁴ In 2007, Viacom demanded in the United States District Court for the Southern District of New York that YouTube to take down over 150,000 copyright works- including television programming and motion pictures such as SpongeBob Square Pants, The Daily Show with Jon Stewart, The Colbert Report, South Park, Ren and Stimpy, MTV Unplugged, ALGore's climate change documentary and Mean Girls. The media behemoth alleged that the internet video site has facilitated massive copyright infringement: 'Using

⁸¹ Lucas Hilderbrand, *Where Cultural Memory And Copyright Converge*, 61 FILM QUARTERLY 49, 48-57 (2007).

⁸² Eugene C. Kim, *Youtube: Testing The Safe Harbors Of Digital Copyright Law* 17 (139) SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 141, 139-172 (2007).

⁸³ Melissa de Zwart, 'Someone is angry on the internet' *Copyright Creativity and Control in the context of fan fiction*, in, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 141, 142 (Megan Richardson, Sam Ricketson ed. 2017).

⁸⁴ Mathew Rimmer, *The Dancing Baby Copyright Law, Youtube and Music Videos*, in, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 155 (Megan Richardson, Sam Ricketson ed. 2017).

the leverage of the internet, YouTube appropriates the value of creative content on a massive scale for YouTube's benefit without payment or license.⁸⁵ It was argued by the media giant that YouTube had failed to take sufficient legal and technological measures to filter copyright infringing material: YouTube has deliberately chosen not to take reasonable precautions to deter the rampant infringement on site.⁸⁶ The media corporation contended that YouTube had directly infringed its economic rights in respect of public performance, public display and reproduction of copyrighted works. Viacom also contended that the internet video site was guilty of secondary copyright infringement because it had induced consumers to engage in copyright infringement.⁸⁷

In its defense, YouTube has contended that Viacom's complaint threatens the freedom of internet users by seeking to make carriers and hosting providers liable for internet communications, Viacom complaint threatens the way hundreds of millions of people legitimately exchange information, news, entertainment and political and artistic expression.⁸⁸ They have supported their arguments on certain grounds; firstly, YouTube has maintained that the online media streaming and storing website has substantial non- infringing uses. Markedly, the internet video site hosts authorized amateur content and YouTube has entered into number of agreements with content providers such as Warner Brothers to provide legitimate copyright content. They suggested that unauthorized content encompasses only a minority of video featured on YouTube.⁸⁹ Secondly YouTube emphasized that it is shielded by the safe harbor provisions of DMCA as they removed the copyright infringing material when contacted by copyright owners and finally, YouTube suggests that many of videos which appear upon the service can be protected by the defense of fair use as some were parody and some were of transient measure and being in the de minimis zone.

The plaintiffs counter argued that YouTube was not eligible to the safe harbor protection under the Digital Millennium Copyright Act (DMCA) for airing the clips because, YouTube had knowledge about the

⁸⁵ *Id.* at 156.

⁸⁶ Complaint for Declaratory and Injunctive Relief and Damages, submitted in *Viacom International Inc v. Youtube Inc*, No 07 CV 2103 (LLS), 2007 WL 77561 (SDNY 2007).

⁸⁷ Mathew Rimmer, *supra* note 84 at 156.

⁸⁸ Eric Auchard, *google says Viacom lawsuit threat to Internet use*, REUTERS (May 1, 2007), <https://www.reuters.com/article/us-google-viacom/google-says-viacom-lawsuit-threat-to-internet-use-idUSN3047264820070501>.

⁸⁹ Mathew Rimmer, *supra* note 84 at 158.

fact that these clips did indeed infringe on the plaintiff's copyrights.⁹⁰ Judge Stanton granted Google's motion for summary judgment, holding that Google was under the protection of the safe harbor provisions of the Digital Millennium Copyright Act, notwithstanding evidence of

⁹⁰ See *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *Viacom Int'l, Inc. v. YouTube* 676 F.3d 19 (2d Cir. 2012), and 07 Civ. 2103 (2013), See also *Viacom Int'l, Inc. v. YouTube*, CASE BRIEFS

intentional copyright infringement. The judge held that while the company indubitably had general awareness that some copyrighted material had been uploaded by users, it did not know as to which clips had been uploaded with permission and which had not. Judge Stanton added that mandating video-sharing sites to proactively police every uploaded video “would contravene the structure and operation of the D.M.C.A.”⁹¹

On Appeal in 2012, Judges Cabranes and Livingston reversed Judge Stanton's judgment holding that “a reasonable jury could find that YouTube had actual knowledge or awareness of specific infringing activity on its website. The United States Court of Appeals for the Second Circuit recommended, that on remand, the district Court should allow the parties to brief on several issues including: whether Copyright Act (DMCA) require knowledge or awareness of specific infringing activity? May the common law willful blindness doctrine be used to show knowledge or awareness of specific instances of infringement under the DMCA? Does a service provider have the “right and ability to control” infringing activity under Section 512(c)(1)(B) of the DMCA whether an item-specific knowledge of infringing activity exists? And finally, whether there was any syndication of clips to third parties.”⁹²

Judge Stanton ruled in favor of YouTube on all four issues finding that YouTube had no actual knowledge of any specific instance of infringement of Viacom's works, and therefore could not have “willfully blinded itself”. He also ruled that YouTube did not have the “right and ability to control” infringing activity because “there is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their activity.”⁹³ Before the matter could return to the United States Court of appeals for the second circuit the dispute was resolved between the parties in a settlement in 2014.

In *UMG Recordings, Inc. v. Veoh Networks, Inc.*,⁹⁴ Veoh was engaged in operating a publicly accessible media streaming and storing

⁹¹ *Id.*

⁹² Mathew Rimmer, *supra* note 84 at 171,172.

⁹³ *Viacom Int'l, Inc. v. YouTube* *supra* note 90.

⁹⁴ 620 F. Supp. 2d 1081 (C.D. Cal. 2008), <https://www.loeb.com/articles-ipentertainmentcaselawupdates-20130322-umgreloadingsincvveohnetworksinc>

website that allowed users to post videos to its website and share those videos with other users. After videos were posted, the site's automated processes make the videos viewable by others and extracts data that helps others find videos for viewing. Veoh was bound by terms of service that prohibit them from posting or sharing infringing materials. Veoh employees do not review videos before they become publicly accessible, Veoh employs various technologies and procedures to remove copyrighted videos that have been posted to the website without authorization and used to terminate the membership of users who repeatedly post infringing material.⁹⁵

Despite Veoh's efforts to prevent copyright infringement on its system, UMG filed its complaint, the only notices Veoh received regarding alleged infringements of UMG's works were sent by the Recording Industry Association of America. The notices simply listed specific videos and links that were allegedly infringing, Veoh removed the material located at the links identified in the RIAA notices even though RIAA did not mention UMG or asserted rights to all works by the identified artists.⁹⁶

UMG filed suit against Veoh for direct, vicarious and contributory copyright infringement, and for inducement of infringement, asserting, among other contentions, that efforts to prevent copyright infringement on its system were "too little too late," that Veoh did not adopt the filtering technology until after it harbored infringing material "for its own benefit," and initially only applied the technology to new videos that users uploaded, and only later applied the filtering software to existing videos on the site.⁹⁷ UMG also asserted that Veoh removed copyrighted material only if identified specifically in a notice of infringement.

Veoh asserted as an affirmative defense that the DMCA's safe harbor for web service providers protected it from liability. The United States District Court of Central District of California granted Veoh's motion for summary judgment, finding that the DMCA's safe harbor provision at 17 U.S.C. Section 512(c) shielded Veoh from liability.⁹⁸

⁹⁵ *Id.*

⁹⁶ *UMG Recordings Inc. v. Veoh Networks Inc.*, LOEB AND LOEB LLP <https://www.loeb.com/articles-ipentertainmentcaselawupdates-20130322-umgreCORDINGSINCvveohnetworksINC>

⁹⁷ *Id.*

⁹⁸ *Id.*, 665 F.Supp.2d 1099 (2009).

On appeal, UMG argued that Veoh did not meet the threshold requirement for Sec. 512(c), that the alleged infringement of copyright be “by reason of the storage at the direction of a user,” and specifically that Veoh’s automatic processes that allowed users access to the uploaded videos went beyond “storage” of material and were not at the direction of the user, removing Veoh from the safe harbor protection.

United States Court of Appeals for the Ninth Circuit concluded that UMG’s reading of the “by reason of” language to require that the infringing conduct “be storage” as opposed to “by reason of storage” was too narrow and that “the language and structure of the statute, as well as the legislative intent that motivated its enactment, clarify that Section 512(c) encompasses the access-facilitating processes that automatically occur when a user uploads a video to Veoh.” The Court likewise rejected UMG’s argument that the automatic process by which Veoh allowed users to access uploaded videos was not at the direction of the user. Noting that Veoh does not actively participate in or supervise the file uploading and that it does not preview or select files before the upload is complete, but rather simply employs software that automatically processes user-submitted content and puts it in a format that is readily accessible to users, which process “is initiated entirely at the volition of Veoh’s users,” the Court concluded that Veoh satisfied the threshold requirement that the infringement be “by reason of the storage at the direction of a user of material” residing on Veoh’s system.⁹⁹

Having concluded that Veoh met the DMCA’s threshold requirement, the Ninth Circuit turned to UMG’s argument that genuine issues of fact remained as to whether Veoh had actual knowledge of infringement, or was aware of facts or circumstances from which infringing activity was apparent.¹⁰⁰ UMG asserted that the District Court

⁹⁹ *Id.*, As the Ninth Circuit explained, the safe harbor is only available to a website that meets a number of criteria. As a threshold matter, Section 512(c) only applies where the alleged infringing activities fall within the meaning of “infringement of copyright by reason of the storage at the direction of a user.” In addition, to qualify for the safe harbor, the service provider: (i) does not have actual knowledge that the material or an activity using the material [posted to the site] is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material. In addition, to qualify, the service provider “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity. UMG Recordings v. Veoh Networks, Inc. 667 F.3d 1022 (9th Cir. 2011).

¹⁰⁰ *Id.*

improperly construed the knowledge requirement to unduly limit the circumstances in which a service provider can be considered to have actual knowledge and applied too stringent a standard for so-called “red flag” awareness. Specifically, UMG argued that Veoh hosted a category of copyrightable material on its site and must have known that content in this category contained infringing material, and that Veoh’s general knowledge that its services could be used to post infringing material sufficiently demonstrated knowledge of infringing activity.¹⁰¹

The appellate Court disagreed, rejecting UMG’s “should-have-known approach.” Noting that, contrary to UMG’s assumptions, many music videos could be legally posted on Veoh’s site, the Court reasoned that UMG’s interpretation of the knowledge requirement would not only undermine the express intent of the statute, to “facilitate making available quickly and conveniently via the Internet, movies, music, software, and literary works – precisely the service Veoh provides,” but would also render the safe harbor useless.¹⁰² Sec. 512(c) applies only to claims of copyright infringement, yet, under UMG’s interpretation, the fact that a service provider’s website could contain copyrightable material would remove the service provider from the safe harbor’s protections. The Court declined to adopt UMG’s broad interpretation of the knowledge requirement, stating “We therefore hold that merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the actual knowledge requirement under Section 512(c)(1)(A)(i).”¹⁰³

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*, The Court also rejected UMG’s argument that the district Court had improperly mixed the two tests for actual knowledge and red-flag awareness, citing to the standard set by the Second Circuit in the YouTube case: “The difference between actual and red flag knowledge is . . . between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or ‘subjectively’ knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.” Acknowledging the distinction between actual and red flag knowledge, the Court concluded that UMG had not established any genuine issue of material fact on whether Veoh had either actual or red-flag knowledge. *UMG Recordings v Shelter Capital Partners* No. 09—55902 (9th.Cir. 2013).

In the case *Lenz v. Universal Music Corp.*,¹⁰⁴ Stephanie Lenz made a home video of her young children dancing in her kitchen, in which the song “Let’s Go Crazy,” by the musical artist Prince, “can be heard for approximately twenty seconds, albeit with . . . poor sound quality.” Lenz then uploaded the video to YouTube to “share, with friends and family.” On June 4, Universal Music Corporation, which owns the copyright to the song, sent YouTube a DMCA takedown notice requesting that Lenz’s video be removed due to copyright infringement. “The notice included a ‘good faith belief’ statement as required by 17 U.S.C. Section 512(c)(3)(A)(v).”¹⁰⁵ After YouTube removed the video, Lenz sent a DMCA counter-notification¹⁰⁶ claiming the video did not infringe since it constituted a fair use of Prince’s song; YouTube then restored the video.

Lenz filed suit in the Northern District of California, claiming Universal misrepresented, in violation of the DMCA, that it had a good faith belief her video was infringing.¹⁰⁷ The district Court denied Universal’s motion to dismiss, holding that “fair use is a lawful use of a copyright,” and therefore, a “copyright owner must evaluate whether the material makes fair use of the copyright” in order to properly state a good faith belief of infringement. After several years of procedural battles over discovery, both parties moved for summary judgment, which the Court denied. Explaining why a fair use inquiry was necessary, the Court found the evidence that Universal issued the takedown notice without considering fair use to be sufficient to deny Universal’s motion. Not only did Universal’s stated video-review procedure lack explicit consideration of fair use, but Universal’s head of business affairs also did not mention fair use when he testified that “the general guidelines are that when a writer is upset . . . we review the video to ensure that the writer’s composition was the focus of the video.” However, the Court did not go

¹⁰⁴ Case notes, *Copyright Law — Digital Millennium Copyright Act — Ninth Circuit Requires Analysis Of Fair Use Before Issuing Of Takedown Notices. — Lenz V. Universal Music Corp.*, No. 13-16106, 2016 WL 1056082 (9th Cir. Mar. 17, 2016), *Reh’g En Banc Denied*, *Id.*, 129 (8) HARVARD LAW REVIEW 2290, 2289- 2301 (2016), *see also* 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

¹⁰⁵ *See Lenz*, WL 1056082, 2 (2016) “We have a good faith belief that the . . . activity is not authorized by the copyright owner, its agent, or the law.” quoting Email from Alina Moffat, Assoc. Dir., Bus. Affairs, Universal Music Publ’g Grp., to YouTube.com, copyright@youtube.com.

¹⁰⁶ *See* 17 U.S.C. Section 512(g).

¹⁰⁷ *See Order Granting Defendant’s Motion to Dismiss with Leave to Amend*, *Lenz*, 572 F. Supp. 2d 1150 (No. 07-03783), 2008 WL 962102 (2008).

so far as to grant Lenz's motion. Instead, it held that Universal's admitted failure to consider fair use was not sufficient to establish liability under Section 512(f). It stated that "the 'good faith belief' requirement . . . encompasses a subjective, rather than objective, standard." As such, actual knowledge of misrepresentation (and not mere error) is necessary. Lenz needed to "demonstrate that Universal had some actual knowledge that its takedown notice contained a material misrepresentation." However, the Court also held that Lenz could proceed under a willful blindness theory in showing that Universal believed "there was a high probability that any given video might make fair use of a Prince composition" and that it deliberately avoided learning of this fact.¹⁰⁸

The Ninth Circuit affirmed.¹⁰⁹ Writing for the majority, Judge Tallman held that Section 512 "unambiguously contemplates fair use as a use authorized by the law," and, as such, requires copyright holders to consider fair use before issuing takedown notices. The Court invoked the standard from *Rossi v. Motion Picture Association of America*,¹¹⁰ as the district Court had, to highlight that the good faith requirement necessitates subjective belief that the material in question infringes copyright rather than any inquiry into the objective reasonableness or correctness of the fair use determination. In short, the fair use de-termination does not have to be correct or reasonable; it just must have happened. The Court in *Rossi* held that the jury therefore had to determine if Universal's actions sufficiently approximated a fair use analysis (even if not labeled as such) on which it could have formed a subjective good faith belief regarding fair use.¹¹¹ It continued: "If . . . a copyright holder forms a subjective good faith belief the allegedly infringing material does not constitute fair use, we are in no position to dispute that belief even if we would have reached the opposite conclusion." And while the Court noted that the consideration of fair use need not be prohibitively extensive to satisfy this subjective good faith requirement, it made clear that mere "lip service" to fair use would not suffice. Though the Court maintained that a showing of willful blindness could support a finding of "knowing" misrepresentation, it held that Lenz had failed to carry her burden of production at summary judgment; since she did not present evidence showing that Universal subjectively believed there was a high probability the video was a fair

¹⁰⁸ Case notes *Supra* note 104 at 2291.

¹⁰⁹ Mark J Randazza, *Lenz v. Universal: A Call to Reform Section 512(f) of the DMCA and to Strengthen Fair Use* 18 (4) VAND. J. ENT. & TECH. L. 765, 743-781 (2016).

¹¹⁰ 391 F.3d 1000, 1004 (9th Cir. 2004).

¹¹¹ Case notes *Supra* note 104 at 2292.

use, she could not proceed to trial on the theory. The Court concluded by holding that Lenz could seek recovery of nominal damages resulting from unquantifiable harm under Section 512(f).¹¹²

Judge Smith concurred in part and dissented in part. He concurred in the majority opinion apart from its interpretation of “knowing” misrepresentation under Section 512(f), and would have held that Universal’s actions were insufficient to form a good faith belief as a matter of law. He concluded that “when the misrepresentation concerns the good faith requirement, the knowledge requirement is satisfied when the party knows that it has not considered fair use.” Further, Judge Smith took issue with the Court’s interpretation of the “knowingly” requirement. On Universal’s view, Rossi’s actual knowledge standard requires that a party subjectively believe the fact it asserts to be false to be liable for misrepresentation; but such a view does not capture claims that are made without a basis for knowing their truth or falsity. Rather, the Court should have construed “knowing” misrepresentation to include claims of infringement made without proper consideration of fair use. On such an interpretation, he found that Universal, by not explicitly considering fair use, violated Section 512(f) as a matter of law.¹¹³

Later on in 2016, a writ of certiorari was made by Lenz, presenting the question “Whether the Ninth Circuit erred in concluding that the affirmation of good faith belief that a given use of material use is not authorized “by the copyright owner, its agent, or the law,” required under Section 512(c) of the Digital Millennium Copyright Act, may be purely subjective and, therefore, that an unreasonable belief—such as a belief formed without consideration of the statutory fair use factors—will not subject the sender of a takedown notice to liability under Section 512(f) of the DMCA?”¹¹⁴ The US Supreme Court declined to grant certiorari in this case on June 19th, 2017¹¹⁵

It is obvious from the above judgments that the Courts have clearly ruled out the ambit of the safe harbor provisions with respect to liability of internet service providers. The District Court correctly held that 17 U.S.C. Section 512(c)(1)(A) requires knowledge or awareness of

¹¹² *Id.*

¹¹³ Case notes, *Supra* note 104 at 2292.

¹¹⁴ Stephanie Lenz,V.Universal Music Corp., Universal Music Publishing, Inc. And Universal Music Publishing Group, <http://www.scotusblog.com/wp-content/uploads/2016/09/16-217-petition-for-cert.pdf>

¹¹⁵ Certiorari -- Summary Disposition, 2 https://www.supremeCourt.gov/orders/Courtorders/061917zor_6537.pdf

facts or circumstances that indicate specific and identifiable instances of infringement, which means that service providers can still depend on the safe harbor provisions of the DMCA in shielding against copyright infringement claims, even if these providers have general awareness of prevalent infringing activity on their websites, but not 'Red Flag Awareness.' This is a good movement as it protects business models from being restrictive. Similarly, the Court's rejection of UMG's argument that the mere presence of a music video was a "red flag" indicating that copyrighted material was on Veoh's website also demonstrate the efficiency in demarking the safe harbor provisions from the radically increasing copyright risks to online hosting providers.

Another concept that has an importance and has to be definitely considered while using contents in a media sharing and storing website is fair use. The fundamental theories of copyright law argue that granting a limited monopoly to the creators of works with public value allows them to benefit from it, and therefore incentivizes them to create more, thereby creating a cycle that keeps adding to 'public value'. The quintessential aim of copyright law, therefore, is not to create the limited monopolies, which has nowadays become its focus, but the creation of 'public good'.¹¹⁶ Observed from this standpoint, it becomes but normal to see that fair use is itself an essential facet of the working of copyright law, it encourages the user in creating more works and also helps to maintain a robust public domain, without affecting their rights. The difference, is in seeing 'fair use' as a right against seeing it as a defense. Rights are an entitlement under law, constitutional or otherwise, while the nature of defense is not only limited in scope by default but is also only relevant when the person claiming it is already being prosecuted. By rights, the very nature and purpose of copyright law is to encourage public good, the former understanding should be favored.

3.4. INSTANCES OF COPYRIGHT INFRINGEMENT VIA SOCIAL NETWORK

Upon closer examination, the various social networks are generally set up to connect with others in the virtual environment in slightly different ways. Facebook, for example, forms an online platform for people to connect and share various types of files with family, friends,

¹¹⁶ Kartik Chawla, *Through the Looking Lenz – A discourse on Fair Use*, SPICY IP (Sept 24, 2015), <https://spicyip.com/2015/09/through-the-looking-lenz-a-discourse-on-fair-use.html>.

and online groups who have the same interests. Meanwhile users are also able to find out about companies and receive updates about their recent developments by including them into their news feed. Twitter allows people to quickly share their ideas via short message posts. Pinterest, aids users in discovering and bookmarking creative items and ideas. Instagram's mission is the sharing of pictures and short videos. Yet, what they all have in common is that they offer ample opportunity to knowingly or unknowingly infringe on the copyright of creative minds whose works are available in some form online and who may object to sharing “the potential abundance of their works.”¹¹⁷

In social networking sites browse-wrap agreements cover the access to or use of materials available on its website or downloadable product. Only if the person agrees to the terms and conditions on the web page, then he can access the contents of the web page. In most cases, the website or the browse wrap includes a statement that the user’s continued use of the website or the downloaded software manifests assents to those terms.¹¹⁸ Browse wrap agreements occur when a website’s legal terms state that when a visitor browses or otherwise uses the website, the visitor agrees to all the legal terms and conditions set forth by the owner of the website in its legal terms and conditions document or web page.¹¹⁹ Browse wrap is an agreement on a website that binds the user typically to the terms of use for the website by virtue of browsing the website. For a browse wrap agreement to be enforceable, the website must give the user actual or constructive notice of the agreement and the user must consent to the agreement. Unlike a clickwrap agreement, a user does not need to act to affirm his consent to be bound. Instead, the agreement typically states that use of the website is deemed acceptance of the agreement.¹²⁰

¹¹⁷ Inka Bauer, *When copyright and social media meet: Zooming in on current issues and cases*, UNDERGRADUATE LAW JOURNAL 13, 12-24 (2015).

¹¹⁸ Rebecca Furtado, *E-contracts – What are Shrink Wrap, Click Wrap, and Browse-Wrap Agreements?* I PLEADERS (June 29, 2016), https://blog.ipleaders.in/e-contracts-shrink-wrap-click-wrap-browse-wrap-agreements/#_ftn1. See also Nancy Kim, *Clicking And Cringing: Making Sense Of Clickwrap, Browsewrap And Shrinkwrap Licenses*, https://law.stanford.edu/index.php?webauth-ocument=event/266730/media/slspublic/Kim_clicking_and_cringing.pdf

¹¹⁹ *Browse-Wrap Agreement*, the law dictionary.com <https://dictionary.thelaw.com/browse-wrap-agreement/>

¹²⁰ *Browsewrap Agreement*, Thomson Reuters Practical Law [https://uk.practicallaw.thomsonreuters.com/5-508-6048?_lrTS=20171229114212856&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-508-6048?_lrTS=20171229114212856&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

To increase the likelihood of enforceability of a browse wrap agreement, the website should: Provide conspicuous notice of the browse wrap agreement, make clear that use of the website constitutes consent to the agreement, prominently indicate where its terms are located, the name browse wrap comes by analogy to shrink wrap agreements that are formed when the user affirms his consent to a printed agreement on a product (typically software) by opening the clear, plastic, shrink-to-fit wrapper that seals the product.¹²¹

Every social networking sites are in build with browse wrap agreements that protects the contents of the users on various grounds and limits the liability of the service providers on various occasions. Questions of law pops up based on the browse wrap agreement when there is an unauthorized content use by another person.

In the case *AFP v. Morel v. Getty Images (US), Inc. et al.*,¹²² United States District Court for the Southern District of New York upholds jury's award of maximum statutory copyright damages of \$1.2 million, plus \$20,000 in DMCA damages, finding sufficient evidence that defendants wilfully infringed plaintiff photojournalist's copyright in eight photographs taken in aftermath of January 2010 Haiti earthquake. In this particular case Morel had to establish (1) ownership of a valid copyright and (2) that the Counterclaim defendants infringed any of his exclusive rights granted by 17 U.S.C. Section 106. Wherein the defendants did not dispute with respect to Morel's valid copyright in the photos at issue. Getty and AFP had appealed the \$1.2 million award claiming there was not enough evidence presented at the trial to establish wilful copyright infringement. They had asked the Court to vacate the jury's finding of wilful infringement, reduce the award to Morel, or grant a new trial.¹²³ Federal judge rejected the appeal and stated that there was evidence from which the jury could have concluded that the defendant's infringement and particularly AFP's was not just wilful but reflected a gross disregard for the rights of copyright holders.¹²⁴ The Court added, the evidence was

¹²¹ *Id. see also* Long v. Provide Commerce, Inc. B257910 (Los Angeles County Super. Ct. No. BC513925) 2016.

¹²² 10-cv-2730 (AJN), (S.D.N.Y. 2014).

¹²³ David Walker, *Judge Upholds \$1.2 Million Verdict in Morel v. AFP Copyright Case* PDNPULSE (Aug 14, 2014), <https://pdnpulse.pdnonline.com/2014/08/judge-upholds-1-2-million-verdict-morel-v-afp-copyright-case.html>.

¹²⁴ 10-cv-2730 (AJN), (S.D.N.Y. 2014). Para 144.

plainly sufficient for the jury to conclude that AFP's infringement was wilful under either an actual knowledge or reckless disregard theory.¹²⁵

Morel had uploaded his images to Twitter, offering to license them to news outlets. The images were stolen and re-distributed by another Twitter account holder. Judge Nathan cited evidence presented at trial that Vincent Amalvy, AFP's Director of Photography for the Americas, knew or should have known that the images were Morel's, and that AFP didn't have permission to distribute them. The evidence against Getty for wilful infringement was that it left Morel's images on its web site under a false credit for more than two weeks after AFP sent a "kill notice" telling Getty to remove the images.¹²⁶

At the same time, Nathan upheld a \$10,000 jury award against AFP for Digital Millennium Copyright Act violations, while vacating a \$10,000 award for DMCA violations against Getty as the DMCA makes it unlawful to intentionally remove or alter copyright management information, or to knowingly provide or distribute false copyright management information with intent to conceal infringement. Evidence presented at trial showed that Vincent Amalvy, the AFP Director of Photography, knew that Morel's images were falsely credited to another Twitter user, but distributed the pictures with the false credit. Getty violated the DMCA by continuing to distribute the images under a false credit, after receiving notice from AFP to remove the images, the judge said.¹²⁷

Another issue involved was that of the validity of the 'terms of use agreement' with social networking sites, what is noteworthy is the Court's ruling that notwithstanding a website's terms of use which may include a term to the effect that the Social Networking Sites are free to use the images posted by the user in any manner the site chooses, an agency before using/distributing that photograph must seek the permission of the photographer.¹²⁸ Arguments were made by both the parties where AFP asserted that anything uploaded to Twitter (the photograph had been uploaded by Morel via Twitpic which allows users to post to Twitter) was freely available for re-distribution by other Twitter users under the browse wrap agreement of the social networking service. Court finally held that

¹²⁵ *Id.* at 7.

¹²⁶ David Walker, *supra* note 123.

¹²⁷ *Id.*

¹²⁸ Swaraj Paul Barooah, *Copyright in Photographs vis-a-vis Social Networking Sites* SPICY IP (Dec 4, 2013), <https://spicyip.com/2013/12/copyright-in-photographs-versus-social-networking-sites.html>

posting of the images by Morel to Twitter did not mean forfeiture of his right and therefore he was entitled to damages for infringement occurred.

The Indian law on copyrights is like the US law which recognizes that rights to a photograph belong to the photographer unless there is an agreement to the contrary or the photograph is clicked by the photographer under employment- Section 17 of The Copyright Act, 1957 recognizes that the photographer is the first owner of copyright in respect of a photograph. Section 17 (a) makes the employer the first owner of copyright in a literary, dramatic or artistic work (which includes a photograph). Section 30 of the 1957 Act allows for licensing of the copyrighted work by the owner through “writing by him or by his duly authorized agent.” Section 10 A of Information Technology Act 2000 recognizes electronically formed contracts.¹²⁹ The Indian judiciary to date doesn’t have any case laws that has dealt with matters related to browse wrap agreements.

3.5. INSTANCES OF COPYRIGHT INFRINGEMENT, LIABILITY UNDER THE INDIAN CONTEXT

Liability for copyright infringement can either be primary or secondary in nature. Primary liability, such as the case of a file-sharer deliberately storing or facilitating the transmission of infringing works to the public, is in any case not covered within the Indian law of fair use exception.¹³⁰ It is only secondary liability, where the primary infringer is provided with a space that can be used as a conduit pipe, channel or network to transmit illegal copies created by him, that forms the subject matter for law suits. So, the Courts face difficulties while adjudicating on the permissible limits of activity that facilitates, or could potentially facilitate, copyright infringement.¹³¹

The first Myspace litigation did put a test on to the effectiveness and interpretative status of these legislations with respect to secondary liability. In *Super Cassettes Industries Ltd. v. Myspace Inc.*,¹³² the defendant’s website facilitated the sharing of media content by users and subscribers. The plaintiff alleged that the defendant provided search and indexing function on its website that permitted users to search for video or

¹²⁹ *Id.*

¹³⁰ *See generally* Section 52 b and c of Copyright Act 1957.

¹³¹ Ananth Padmanabhan, *Give Me My Space And Take Down His* 4 (2013) <http://www.ijlt.in/archive/volume9/Ananth%20Padmanabhan.pdf>

¹³² *Super Cassettes Industries Ltd. v. Myspace Inc. (Myspace)*, MIPR 2011 (2) 303.

sound recordings and play such content on a computer thereby willfully promoting copyright infringement as the plaintiff was engaged in business related to sound recording and video label. The plaintiff alleged that the defendant was liable for both primary and secondary infringement. The plaintiff's case for primary infringement was that the defendant was engaged in unauthorized communication of the copyrighted works of the plaintiff to members of the public. For the secondary infringement plea, the plaintiff relied on Section 51(a)(ii) of the Act.¹³³

Rejecting the primary infringement plea raised by the plaintiff, the Delhi High Court held that even though it requires authorization from the owner as per the exclusive right under Section 14, merely providing the means to communicate the work to the public or providing the place for such communication would not call upon section 51 (a) (i) relating to primary infringement, as it requires something more than. By that the Hon'ble Court meant that to have high level of involvement required for being a primary infringer active participation, inducement, or approval by the defendant is a necessary ingredient. The High Court made a distinction between knowledge regarding certain acts amounting to infringement in character from active participation or inducement of such acts. The Court concluded that merely providing the means for infringement would not establish control, and therefore, any person providing such means could not be said to have approved or countenanced such act.¹³⁴

The Court concluded that infringement in terms of section 51 (a) (ii) had occurred in this case and hence liable for secondary infringement. Since web space is a "place" in the terms required by the section and there were financial gain from advertisements. The argument as to a lack of knowledge of infringement was rejected on the ground that My Space's safeguard provisions against infringement such as take-down-stay-down functionality, hash block filters and rights management tools based on fingerprinting technology clearly recognized a motive to believe that an infringement would occur. Also, the fact that Myspace modifies the format of the content before making it available on its website established the knowledge element making them liable.¹³⁵

¹³³ Ananth Padmanabhan, *surpa* note 131 at 6.

¹³⁴ *Id.* at 7.

¹³⁵ *Super Cassettes v. MySpace*, THE CENTRE FOR INTERNET AND SOCIETY <https://cis-india.org/a2k/blogs/super-cassettes-v-my-space>.

The Court further held that the safe harbor provision available to intermediaries were not applicable to Myspace as for Section 79 of the Information Technology Act to be attracted, required all three conditions mentioned therein to be satisfied. Since the defendant was engaged in modifying the content uploaded on its website, the Court held that the condition of non-modification of the information contained in the transmission was unfulfilled.¹³⁶ Section 79(2)(c) was also held to be inapplicable, as the Court explained that due diligence was required while the intermediary was discharging its duties. Thus, if the defendant was put to notice about the rights of the plaintiff in certain works, the defendant had to conduct a preliminary check in all the cinematographic works relating to Indian titles before communicating the works to the public, rather than falling back on post-infringement measures. The defendant's act of permitting the user to upload content on its server, and then modifying the same, was held to be contrary to the due diligence requirement.¹³⁷

The John Doe Orders passed by the Indian Courts after the Myspace judgment have to be analyzed as the judgment has created a trend for the service provider liability. As per the new jurisprudence, even if the service provider attempted in good faith to prevent copyright infringement through its terms of use and later addressing them through its post-infringement measures was clearly considered as evidence of knowledge of infringement and control over the uploading of copyrighted material. This created a fear among the online service providers and they were forced to obey the John Doe orders so passed to stay away from infringement liability. This trend amounted to high tension and low prospect to attain the safe harbor provision. In *Reliance Big Entertainment Pvt. Ltd. v. Multivision Network*¹³⁸ and in *Sagarika Music Pvt. Ltd. v. Dishnet Wireless Ltd.*,¹³⁹ wherein copyright owner in such cases seek injunctive relief against various John Does, and alleged different internet service providers as defendants along with such John Does.

¹³⁶ Ananth Padmanabhan, *surpa* note 131 at 10.

¹³⁷ *Id.*

¹³⁸ C.S. (O.S.) No. 3207/2011, I.A. No. 20510/2011 (Del. 2011), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=269404&yr=2011.

¹³⁹ C.S. No. 23/2012, G.A. No. 187/2012 (Cal. 2012), <http://www.indiankanoon.org/doc/147345981/>.

The permissibility of this strategy was called into question before the Madras High Court in *R.K. Productions Pvt. Ltd. v. B.S.N.L.*¹⁴⁰ This case arose out of John Doe orders sought in respect of the Tamil film “3”, The prerelease reputation and popularity of the songs from the film initiated the producers of the film for an a John Doe order against all websites that hosted torrents or links that facilitated access to or download of the film, fearing its availability on media streaming and storing websites and other peer to peer websites instantly after the film’s release. The Madras High Court initially granted an ex parte order.¹⁴¹ From the order, internet service providers and the various John Does, were restrained from infringing the copyright of the motion picture “3” through various methods. The order thus resulted in the blocking of access to various torrent and media sharing websites.

In the *R.K. Productions* case, the Madras High Court has in fact relied on the decision in the *Myspace* case as well as given independent reasoning to conclude that the internet service providers are liable for infringement. The Court relying on the proviso to Section 81 of Information Technology Act, 2000,¹⁴² held that the exemption from intermediary liability explained in Section 79 would not apply to cases of copyright infringement under Section 51(a) (ii) of the Copyright Act, 1957.

The Court holding the inapplicability of section 79, and the overriding effect of section 81, it can be inferred that an internet service provider who is engaged in facilitating the technical transmission of information, can be bagged under the liability for copyright infringement if there are reasonable grounds to believe that various communications that occur via the use of its network amount to copyright infringement. This aspect can be observed from the random John Doe orders passed against internet service providers in the later years.

In *Multi Screen Media Pvt Ltd V. Sunit Singh and Ors*, a restrain order was passed by Delhi High Court against more than 400 websites that were illegally streaming live or recorded footage of the 2014 FIFA

¹⁴⁰ *R.K. Productions Pvt. Ltd. v. B.S.N.L.*, 5 LW 626 (Mad. 2012).

¹⁴¹ *R.K. Productions*, C.S. No. 208/2012, O.A. No. 230/2012 (Mad. 2012), <https://docs.google.com/file/d/0Bxi2TzVXuI5ZUI9EcIRQZXIRdVdUb3c2S3EwSk1Udw/edit?pli=1>.

¹⁴² Act to have overriding effect.-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

World Cup.¹⁴³ The reason for the order was because these websites were ‘likely’ to host the content in question.¹⁴⁴ Similarly Phantom Films was granted a John Doe order by the Bombay High Court for blocking sites that ‘may’ be pirating its movie, *Masaan*,¹⁴⁵ and for the movie *Piku*, from Delhi High Court.¹⁴⁶

A deviation in opinion happened in 2016 wherein an urgent application was filed before the Bombay High Court, requesting for a relief based on the principles of John Doe orders, and Order I, Rule 8 and Section 151 of the Civil Procedure Code, 1908 for the movie *Uda Punjab*,¹⁴⁷ The plaintiffs provided a long list of websites, which hosted links for the illicit download of the movie and prayed, inter alia, that all of these websites be blocked by the ISPs also defendants herein.¹⁴⁸ The Court however, applied the principles of intermediary liability and reasoned that it was unreasonable to block entire websites on unwarranted claims that they hosted only illicit content and nothing else.¹⁴⁹

¹⁴³ Thomas J. Vallianeth, *Ashok Kumar Goes on a Rampage – 219 Websites Ordered Down in the FIFA Broadcast Case* SPICY IP (July 8, 2014), <https://spicyip.com/2014/07/ashok-kumar-goes-on-a-rampage-219-websites-ordered-down-in-the-fifa-broadcast-case.html>.

¹⁴⁴ Learned counsel for the plaintiff also submits that many of the websites are anonymous in nature and it is virtually impossible to locate the owners of such websites or contact details of such owners. It is further submitted that many of these Rogue Websites also hide behind domain privacy services offered by various domain name Registrars. According to him, the cause of action arises against the defendants as they are likely to host, stream, broadcast, retransmit, exhibit, make available for viewing and download, provide access to and communicate to the public display, upload, modify, publish, update and / or share the broadcast of the 2014 FIFA World Cup matches and contents related thereto in the sub-continent more particularly in India in relation to the 2014 FIFA World Cup without obtaining permission from the plaintiff.

¹⁴⁵ Kartik Chawla, *The Trend and Tumour that is a John Doe Order* SPICY IP (July 20, 2015), <https://spicyip.com/2015/07/the-trend-and-tumour-that-is-a-john-doe-order.html>.

¹⁴⁶ See http://delhihighCourt.nic.in/dhcqrydisp_o.asp?pn=99784&yr=2015, Defendant nos.76 to 100 are all the presently unknown person who the plaintiff apprehends will infringe the copyright of the plaintiff in the upcoming cinematograph film “Piku-Motion Se Hi Emotion”. The plaintiff seeks proactive protective orders from this Court qua these defendants as well. This would be consistent with the International “John Doe” practice and India’s TIPS obligation to effectively enforce all Intellectual Property Rights, including copyright.

¹⁴⁷ Vasundhara Majithia, *Uda Punjab: An IP Controversy [Part I]* SPICY IP (June 20, 2016), <https://spicyip.com/2016/06/udta-punjab-an-ip-controversy-part-i.html>.

¹⁴⁸ See *Balaji Motion Picture Limited & Anr. ... V Bharat Sanchar Nigam Ltd. & 49 Ors.* NO. 1783 OF 2016 IN SUIT (L) NO. 633 OF 2016 (Bom. 2016).

¹⁴⁹ *Id.* at 2, para 5 6 7 8.

The Court took a different turn as the Court ordered that entire websites must not be blocked and only the specific download links be removed or rendered inaccessible. This order was a welcome change, considering the Court's past mannerism in ordering entire blocking of websites in contravention of the net neutrality principle. It is pertinent in this case to point out that the Court made a curious distinction between free links and subscription-based websites. It held, "The orders of restraint sought cannot, therefore, cover any fee-based websites irrespective of whether they are listed in the plaint or not. I must proceed on the footing that subscription and fee-based websites are already regulated as to their contents. They have a built-in liability. There is no possibility of these websites hosting illicit content and being permitted to charge access fees. I will leave it open to the Plaintiffs to point out specific instances of violation or default by any fee-based secure website and to move again in respect of those."¹⁵⁰ Here in this case the Court simply supposed that the fee-based ones could not possibly host any infringing content and the free ones were without doubt engaged in copyright infringement.

From the case analysis it can be understood that when it comes to internet blocking, the Indian Courts have undertaken two distinct John Doe Order approaches. One is stricter Madras High Court approach wherein sweeping John Doe orders are issued directing internet service providers to disable access to a large number of websites while adjudicating suits for copyright infringement¹⁵¹ and the other aspect is Bombay High Court, which has favored granting of limited John Doe orders, based on concrete and precise information, to block specific URLs and links hosting the infringing material rather than entire websites.¹⁵²

The first Myspace judgment was highly criticized because it was indeterminate to the technological impediments of regulating speech on the internet and in imposing incomprehensible burdens on internet service

¹⁵⁰ Vasundhara Majithia, *supra* note 147.

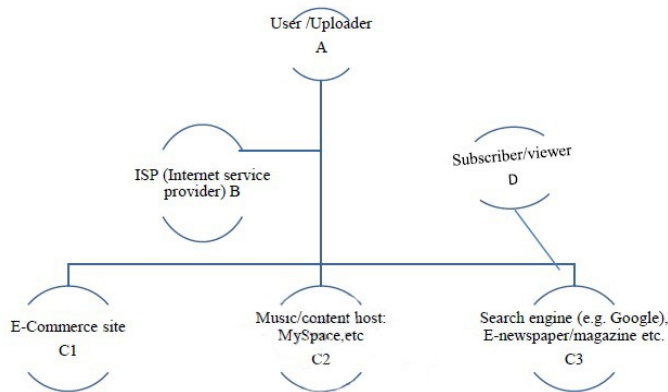
¹⁵¹ See also *lipstick, harry met sejai*, filed by Prakash Jha Productions, in respect of the film *Lipstick Under My Burkha*, and by Red Chillies Entertainment, in respect of its film *When Harry Met Sejal*. Through these orders, the High Court has restrained unauthorized copying, transmission, display, release, show, upload, download, exhibit, play or in any manner communication of these films. Internet archives (<http://www.archive.org/>) and 2,649 other websites were specifically ordered to be blocked under the orders.

¹⁵² Aprajita Nigam, *India: John Doe Orders Bring Light In Dark Age Of Digital Piracy*, LEXORBITIS (Nov 6, 2017), <http://www.mondaq.com/india/x/642974/Trademark/John+Doe+Orders+Bring+Light+In+Dark+Age+Of+Digital+Piracy>.

providers. The latest judgment in the matter of *Super Cassettes v. MySpace*¹⁵³ is a breakthrough and liberal ruling, which ropes the safe harbor immunity enjoyed by internet intermediaries in India. It pleasantly interprets the provisions of the IT Act, 2000 and the Copyright Act, 1957 in reinstating the safe harbor immunity to intermediaries even in the case of copyright infringement claims.

On an appeal filed by Myspace against the Single Judge's decision the major issues were, whether Myspace could be said to have knowledge of infringement as to attract Section 51(a)(ii) and consequent liability; Second, does proviso to Section 81 override the "safe harbor" granted to intermediaries under Section 79 of the IT Act third, possibility of harmonious reading of Sections 79 and 81 of the IT Act and Section 51 of the Copyright Act.¹⁵⁴ The nature of the dispute in respect of internet transactions, is explained through a diagram,¹⁵⁵

Figure III.11- Internet transaction and the online actors



The user/uploader (A) uploads content on the internet via the Internet Service Provider (B), and on the internet space we have within the social media platforms that includes the media storing and sharing website like the Myspace (C2) and at any given point of time, there can be potentially a large number of subscribers/ viewers (D). When a particular content is posted by the creator, the possibility of dissemination

¹⁵³ FAO(OS) 540/2011, C.M. APPL.20174/2011, 13919 & 17996/2015 (Del. 2016).

¹⁵⁴ *Id.* at Para 31.

¹⁵⁵ *Id.*

increases and thereby its popularity. C1, C2 and C3 are the intermediaries who host, or facilitate hosting of content.¹⁵⁶

Considering the first question, with respect to knowledge, the Court made a defined observation that section 51(a)(ii) anticipates actual knowledge and not general awareness by the internet intermediaries in case of copyright infringement. So in this case in order to attract liability for secondary infringement, Myspace should have had actual knowledge and not mere awareness of the infringement. Appreciating the difference between virtual and physical worlds, the judgment stated “the nature of internet media is such that the interpretation of knowledge cannot be the same as that is used for a physical premise.”¹⁵⁷ As per the Court, the following facts only amounted to a general awareness, which was not satisfactory to establish secondary liability. Mere apprehension of unlawful content on the website and prohibitions placed through user agreements do imply its knowledge of infringement.¹⁵⁸ The provision for safeguard devices¹⁵⁹ does not imply actual knowledge of infringement.¹⁶⁰ Myspace argued that video modification for advertisement insertion was through automated processes and the limited license obtained was to perform this automated task of modifying and inserting advertisements to the video: it was from the content uploader and not Super Cassette Industries Ltd. (SCIL) All these show that it did not possess “actual knowledge” nor have “reason to believe” that uploaded content infringed SCIL’s rights.¹⁶¹

The Court imposed a duty on SCIL to specify the works in which it owned copyright and being shared without authorization on Myspace. It held that merely giving names of all content it owned without expressly pointing out the infringing works was contrary to the established principles of copyright law.¹⁶² Further, Myspace contended and the judge agreed, that in many instances the works were legally shared by

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at para 35.

¹⁵⁸ *Id.* at para 32.

¹⁵⁹ the Rights Management Tool, Notice and Take Down provision, Take Down Stay Down tool and Hash Block Filter.

¹⁶⁰ *Supra* note 158.

¹⁶¹ *Id.*

¹⁶² *Super Cassettes v. MySpace (Redux)*, The Centre for Internet and Society, <https://cis-india.org/a2k/blogs/super-cassettes-v-myspace>

distributors and performers and often users created remixed works which only bore semblance to the title of the copyright work.¹⁶³

It is only when Myspace has specific or actual knowledge or when it has reasonable belief, based on information supplied by SCIL and if despite such knowledge or reasonable belief it fails to act can it be held liable for infringement. In such cases it becomes even more important for a plaintiff such as Myspace to provide a specific title, because while an intermediary may remove the content fearing liability and damages, an authorized individual's license and right to fair use will suffer or stand negated.¹⁶⁴

To the second question whether proviso to Section 81 override the "safe harbor" granted to intermediaries under Section 79 of the IT Act, the Court pronounced that, given the supplementary nature of the provisions, one where infringement is defined and traditional copyrights are guaranteed and the other where digital economy and newer technologies have been kept in mind, the only logical and harmonious manner to interpret the law would be to read them together. Not doing so would lead to an undesirable situation where intermediaries would be held liable irrespective of their due diligence. The Court held that the proviso does not override the safe harbor, i.e. the safe harbor defense cannot be denied to the intermediary in the case of copyright actions. The three sections have to be read harmoniously.¹⁶⁵

Regarding Section 79, the Court reiterated that the Section only granted a limited immunity to intermediaries by granting a measured privilege to an intermediary, which was in the nature of an affirmative

¹⁶³ *Id.*

¹⁶⁴ The Court added, an indiscriminate and blind acceptance of SCIL's entire list to run a general filter and "take down" all content would result in grave damage and result in likely multifarious disputes: with up-loaders, many of whom are original creators in their own right and might have used a miniscule quantum of the copyrighted content in their larger original creation; with distributors, who might hold genuine licenses and with others who create versions, remixes or original titles which may have little content; still there may be other content uploaders whose material only superficially resembles with the titles owned by SCIL, because of the lyrics or titles but is otherwise genuine creation with its independent copyright.

¹⁶⁵ The judgment referred to the Parliamentary Standing Committee report as a relevant tool in interpreting the two provisions, declaring that the rights conferred under the IT Act, 2000 are supplementary and not in derogation of the Patents Act or the Copyright Act. The proviso was inserted only to permit copyright owners to demand action against intermediaries who may themselves post infringing content – the safe harbor only existed for circumstances when content was third party/user generated.

defense and not a blanket immunity to avoid liability.¹⁶⁶ The very purpose of Section 79 was to regulate and limit this liability; whereas the Copyright Act granted and controlled rights of a copyright owner.¹⁶⁷

Setting aside the Single Judge's order aside, the Court directed SCIL to provide a specific catalogue of infringing works which also pointed to the URL of the files. Upon receiving such specific knowledge, Myspace has been directed to remove the content within 36 hours of the issued notice. Myspace will also keep an account of the removals, and the revenues earned from ads placed for calculating damages at the trial stage.¹⁶⁸

The Court demanding an actual knowledge of awareness has supported the intermediaries on their liability aspect. The use of general filters can lead to disproportionate takedowns and might also affect the fair use principle. The judgment that harmoniously read section 79 and 81 created exemptions from liability for online intermediaries available to even in cases of copyright infringement. The judgment in its form is effective and transformative.

3.6. CONCLUSION

The internet being a space with undefined boundaries, the copyright owner's ability to control dissemination of their works without affecting their rights is merely impossible owing to the technological complexities.

From the various case laws so analyzed it can be understood that the basic laws in U.S. that has to be analyzed and compared with the principle set forth by the Internet Treaties- The WIPO Copyright Treaty (WCT) 1996 and The WIPO Performances and Phonograms Treaty (WPPT) 1996 are Digital Millennium Copyright Act of 1998, The Copyright Act of 1976, Anti Cybersquatting Consumer Protection Act of 1999, Digital Theft Deterrence and Copyright Damages Improvement Act

¹⁶⁶ *Super Cassettes v. MySpace (Redux)*, *supra* note 162.

¹⁶⁷ The Court found Judge Whyte's decision in *Religious Technology Centre v. Netcom Online Communication Services* (1995), to be particularly relevant to the instant case, and agreed with its observations. To recall, Netcom was the landmark US ruling which established that when a subscriber was responsible for direct infringement, and the service providers did nothing more than setting up and operating tech systems which were necessary for the functioning of the Internet, it was illogical to impute liability on the service provider.

¹⁶⁸ *Super Cassettes v. MySpace (Redux)*, *supra* note 162.

of 1999. Similarly the principles enunciated in the Internet Treaties which were introduced to solve the digital dilemmas have to be analysed with E.U. legislations like European Copyright Directive (EUCD) Directive 2001/29/EC, Directive on electronic commerce 2000 Directive 2000/31/EC, The Electronic Commerce (EC Directive) Regulations 2002 and Copyright, Designs and Patents Act, 1988, as well. A thorough analysis of the Internet Treaties and the jurisdictional comparison among U.S. and E.U. must be made with the Indian copyright legislations such as The Copyright Act, 1957 and Information Technology Act, 2000 to understand the lacunas within the legislative features.

The technology creates difficulty to both the copyright owners and the service providers, so it seems that it is imperative to have a harmonious reading of the Copyright Act and Information Technology Act in India. The comparison with American case laws shows that the Indian Courts are adapting to the technological change slowly owing to the lack of familiarity and limited cases reported. At this time, as mentioned formerly, it is very important to make an analysis of the provisions with respect to intermediary liability and the basic aspects of technological protection measures and circumvention activities relating to copyright and internet, with foreign jurisdictions, to understand the legal lacunas that can be caused by ever transforming robust social media platforms. Chapter V of this book provides a comprehensive analysis of the international and national legislations regulating copyrighted content in social media.

INSTANCES OF TRADEMARK INFRINGEMENT IN SOCIAL MEDIA

4.1. INTRODUCTION

Advertising is a non-personal paid form where ideas, concepts, products or services, and information, are promoted through media by an identified sponsor to persuade or influence behavior.¹ Advertising is the act of calling open receptiveness to something by visual, verbal or textual media, it can be an activity or a profession by which information so produced can be channeled to a larger group for increasing brand value or for enhancing the selling prospect of a commercial product. Marketing process include four subsets i.e. product, price, place and promotion. Advertising is a component of promotional mix, with the purpose of creating awareness and responsiveness about product and services for taking choices. In modern times, advertisement has become an important way to promote products and services and is used for communication purpose as well.²

The chapter analyses the concept of social media advertisements and trademark related issues. A comparative analysis is made with traditional advertisement to understand the meaning, usage, principle and related issues. Case analysis forms the crux of the study to understand the relevant trademark legislative features applicable in the social media.

4.2. ADVERTISING BRANDS WITH TRADEMARK: MEANING, USAGE, RELATED ISSUES AND ITS RELATIONSHIP WITH SOCIAL MEDIA ADVERTISING

Well-known brands carry with them trademarks, the marks that are applied by the producers in the advertising process to make the

¹ Ayanwale, A. B., Alimi, T. & Ayanbimipe, M. A. *The Influence of Advertising on Consumer Brand Preference*. 10(1) JOURNAL OF SOCIAL SCIENCE 9, 9-16 (2005).

² Hussainy, S. K., Riaz, K., Kazi, A. K. & Herani, G. M. *Advertising Styles Impact on Attention In Pakistan*. 1(1), KASBIT BUSINESS JOURNAL, 29, 28-35. (2008).

consumers aware of the source, worth and individuality of their product. The use of trademark in an advertisement depends on the platform in which it is used. Considering traditional advertisement and social media advertisement, the meaning of trademark and infringement principles are the same, the major difference is caused by the usage of those trademark in varying platforms, thereby creating technical and legal confusions. It is imperative that only a comparative study can give clarity on the dilemmas created using trademark in advertisements both in traditional advertising and social media advertising.

A trademark is a symbol, word, or words validly recorded or well-known by use as to indicate a company or product. A trademark or a community trademark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.³ The definition of trademark in EU and US are identical in nature; ‘Trademark includes any word, name, symbol, or device or any combination thereof...’ that identifies and distinguishes the goods or services of one undertaking from those of another and that indicates the source of goods or services.⁴ The definition for trademark in Indian law states as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.⁵

From the trademark definitions the definition comprises two significant features, the distinctiveness of the mark and the authorized user. The authorized user has the exclusive right to use the distinctiveness of the mark by representing it and appropriating it as he wishes. Misrepresentation and misappropriation are the two acts that can affect the prior cited significant features thereby creating a consumer confusion and brand dilution ending up in trademark infringement. When a person other than the authorized user, without his permission uses up the trademark on similar product, will create a consumer confusion thereby

³ Article 2, First Council Directive 89/104/EEC of 21 December 1988 (Trademark Directive) and Article 4 Council Regulation (EC) No. 40/94 of 20 December 1993 (Community Trademark Regulation). They both give the same broad definition of a trademark.

⁴ 15 U.S.C. Section 1127.

⁵ Sec 2 (zb) of Trademarks Act, 1999.

getting misrepresented.⁶ The aspect of misrepresentation will create a consumer confusion, and that confusion might reach to an infringement based on following consumer decision making theories. These theories even though controversial, have vastly expanded the scope of infringement when analyzing the likelihood of confusion.

Sponsorship and affiliation confusion theory states that if a trademark is used for a product or service and the consumer knows that it is not part of the core activities of the trademark holder, he or she assumes that the trademark holder has sponsored, endorsed, or otherwise approved of defendant's use of the mark. A likelihood of confusion can happen when a link between trademark and sponsor is suggested but does not really exist.⁷ Initial interest confusion takes place when the purchaser is initially confused and during the purchase he knows he is purchasing a product from another source than he initially intended.⁸ The post-sale confusion doctrine, which makes actionable the confusion of non-purchasers based on their post-sale interaction with a product, similarly has been enabled by search costs rhetoric. Courts have recognized post-

⁶ See generally, Visser, Dirk Johan Gerard, *Misrepresentation And Misappropriation : Two Common Principles Or Common "Basic Moral Feelings" Of Intellectual Property And Unfair Competition Law* in COMMON PRINCIPLES OF EUROPEAN INTELLECTUAL PROPERTY LAW. 247-254 (2012); Misrepresentation is the basis for the English tort of passing off and is based on the principle against deceit and the rules against cheating. Deceit and cheating destabilize human interaction and society. If there is no trust and if you cannot rely on others, there can be no cooperation and no exchange of goods, services and ideas will take place. Misrepresentation is the basis of the prohibition on creating confusion in all trade mark laws, regulations, directives and treaties. Misrepresentation is the basis of the prohibition on creating confusion in rules (including directives and treaties) against unfair competition. See also Article 16 TRIPs, Article 6 (2)(a) of the Unfair Commercial Practices Directive reads as follows: 2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves: (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. Article 10bis of the Paris Convention for the Protection of Industrial Property (Unfair Competition): (1) the countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.

⁷ DANNY FRIEDMANN, TRADEMARKS AND SOCIAL MEDIA: TOWARDS ALGORITHMIC JUSTICE 33 (2015).

⁸ *Id.* at 34.

sale confusion primarily in cases involving luxury goods,⁹ where despite the near identity of the products and/or the marks at issue consumers are unlikely to be confused because of the context in which they encounter the goods. As pointed out by Mc Kenna, consumers who buy twenty dollar “Louis Vuitton” handbags on Canal Street, for example, know well that the bag they are buying was not made by Louis Vuitton. Aside from the fact that it is for sale on Canal Street, the price undoubtedly signals to them that the bags are fakes.¹⁰ Reverse confusion doctrine states that if a consumer believing that the product he intend to purchase is well known for long from the advertisement given to the brand, but it isn’t and is similar to an already registered trademark of a lesser known long existed brand and the consumer might think that the lesser known long existed brand is the infringer.¹¹

When a person uses the trademark of an authorized person without permission and using it to obtain unfair advantage, it will affect detriment the distinctiveness of the mark thereby obtaining unfair advantage. This act amounts to misappropriation of a mark.¹² The two-common form of

⁹ See, e.g., *Hermès Int’l v. Lederer de Paris Fifth Avenue*, 219 F.3d 104, 106, 108 (2d Cir. 2000) (handbags); see also *Polo Fashions v. Craftex, Inc.*, 816 F.2d 145, 147 (4th Cir. 1987) (clothes); *United States v. Gantos*, 817 F.2d 41, 42–43 (8th Cir. 1987) (watches); *United States v. Torkington*, 812 F.2d 1347, 1349 (11th Cir. 1987) (watches); *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 822 (9th Cir. 1980) (jeans); *A.T. Cross Co. v. Jonathan Bradley Pens*, 470 F.2d 689, 690, 692 (2d Cir.1972) (pens); *Reebok Int’l v. Sung Hwa Int’l Corp.*, 6 U.S.P.Q.2d 1233, 1234 (S.D.N.Y. 1987) (shoes); *Rolex Watch U.S.A. v. Canner*, 645 F. Supp. 484, 493 (S.D. Fla. 1986) (watches); *United States v. Gonzalez*, 630 F. Supp. 894, 895–96 (S.D. Fla. 1986) (watches); *Lois Sportswear U.S.A. v. Levi Strauss & Co.*, 631 F. Supp. 735, 745 (S.D.N.Y. 1985), aff’d 799 F.2d 867 (2d Cir. 1986) (jeans); *T&T Mfg. Co. v. A.T. Cross Co.*, 449 F. Supp. 813, 823 (D.R.I. 1978), aff’d 587 F.2d 533 (1st Cir. 1978) (pens). Other cases have not relied on the arguably special case of status goods. See generally *Motors Corp. v. Keystone Auto. Indus.*, 453 F.3d 351, 358 (6th Cir. 2006) (car parts); *Bos. Prof’l Hockey Ass’n v. Dall. Cap & Emblem Mfg.*, 510 F.2d 1004, 1012 (5th Cir. 1975) (professional hockey team’s symbol on an embroidered emblem).

¹⁰ Mark P. McKenna, *A Consumer Decision-Making Theory Of Trademark Law* 98(67) VIRGINIA LAW REVIEW 102, 67-142 (2012).

¹¹ *Westward Coach Mfg. Co. v Ford Motor Co.* 388 F.2d 627 (7th Cir. 1968).

¹² See generally, Visser, Dirk Johan Gerard, *Misrepresentation And Misappropriation : Two Common Principles Or Common "Basic Moral Feelings" Of Intellectual Property And Unfair Competition Law* in COMMON PRINCIPLES OF EUROPEAN INTELLECTUAL PROPERTY LAW. 247-254 (2012); Misappropriation is a concept which often occurs together with misrepresentation, but which is clearly distinct from it, because it typically does not require any misleading of, or confusion on the part of the public. In fact, for misappropriation to occur, the state of mind of the public as such is not relevant at all. See also, ECJ, *L’Oréal SA Lancôme parfums et beauté & Cie Laboratoire Garnier & Cie v. Bellure NV Malaika Investments Ltd Starion International Ltd*, Case C-487/07 (Court of

misappropriation that gives clarity to what has been stated are; dilution of a mark by blurring and dilution of a mark by tarnishment.

The use of a same brand name by different manufacturers over variety of products other than the original registered product, the distinctiveness of the marks will be blurred as these marks will be inevitably lost in the public domain despite its originality and ingenuity of their contrivance.¹³ Dilution by tarnishment happens when an association arising from the similarity between a mark or trade name and a famous mark harms the reputation of the latter.¹⁴

Table IV.1- Advertising Brands with Trademark- Comparison

Trademark	Traditional Advertising	Social Media Advertising
Meaning	Distinctiveness Authorized user	Distinctiveness Authorized user
Usage	Used in products, flyers, magazines, newspapers, radio and television. Difficult for unauthorized user to carry on infringing activity	Used in social networking sites as product promotion page, fan pages. Used in blogs as product promotion page, fan pages, discussion forums, review blogs Used in collaborative products for purchasing keywords, ad words and for search engine optimization Used in content communities as semitransparent overlay ads, skippable video ads, non skippable video ads and sponsored cards. Easier for unauthorized user to carry on infringing activity

Appeal (England and Wales) (Civil Division) 2009), The ECJ ruled “that the taking of unfair advantage of the distinctive character or the repute of a mark, within the meaning of that provision, does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark or, more generally, to its proprietor.” In other words, no proof of misrepresentation is required.

¹³ DANNY FRIEDMANN, *Supra note 7* at 37.

¹⁴ *Id.* at 38.

Related Issues	Misrepresentation	Misappropriation	Misrepresentation	Misappropriation
	Sponsorship confusion Quality confusion	Affects genuineness Affects reputation	Sponsorship confusion Quality confusion	Affects genuineness Affects reputation
	Monitoring process by owner is less complicated		Monitoring process by owner is complicated	

Considering traditional advertisement and social media advertisement, the definitional meaning for trademark do serve both the realms. The definition carries the infringement principles that can occur, misappropriation and misrepresentation. The application of these infringement principles is often used by the Courts in determining an unauthorized use, both in traditional and social media advertising. The complexity with respect to brand advertising using trademarks are because of the different mode of advertising supported by social media platforms. The technologically advanced social networking platform with large number of users, their continuous presence and dependence on the platform enables an infringer to create confusion and thereby gain advantages. The countless number of blogs and illegal search engine optimization makes it nearly impossible for the owner to monitor his brand name usage by perpetrators. In traditional advertisement, the use of trademark is made on the product as such and on flyers. Even though the perpetrator uses trademark on them illegally, the accessibility, reach of the product or its information to wide range of consumers is limited. Also, the identity of the infringer is relatively difficult to mask.

4.3. TRADEMARK INFRINGEMENT: GENERAL PRINCIPLES

Even though trademark infringement based on misrepresentation and misappropriation doctrines have been developed, it required few tests or principles that Courts can apply to identify properly the infringement factors. These general principles have uniqueness as it is applicable to any sort of infringement occurring in real world or through the most modern social media platforms.

In *Polaroid Corp. v. Polarad Elect. Corp.*,¹⁵ the plaintiff Polaroid corporation filed a trademark infringement case against polarad electronics;¹⁶ the major questions before the United States Court of

¹⁵ 287 F.2d 492 (2d Cir. 1961).

¹⁶ Plaintiff, Polaroid Corporation, a Delaware corporation, owner of the trademark Polaroid and holder of 22 United States registrations thereof granted between 1936 and 1956 and of a New York registration granted in 1950, brought this action in the Eastern District of New York, alleging that defendant's use of the name Polarad as a trademark and as part of defendant's corporate title infringed plaintiff's Federal and state trademarks and constituted unfair competition. It sought a broad injunction and an accounting. Defendant's answer, in addition to denying the allegations of the complaint, sought a declaratory judgment establishing defendant's right to use Polarad in the business in which defendant was engaged, an injunction against plaintiff's use of Polaroid in the television and electronics fields, and other relief. The name Polaroid was first adopted by plaintiff's predecessor in 1935. It has been held to be a valid trademark as a coined or invented symbol and not to have lost its right to protection by becoming generic or descriptive, *Marks v. Polaroid Corp.*, D.C.D.Mass.1955, 129 F.Supp. 243. Polaroid had become a well known name as applied to sheet polarizing material and products made therefrom, as well as to optical desk lamps, stereoscopic viewers, etc., long before defendant was organized in 1944. During World War II, plaintiff's business greatly expanded which included the sale of Schmidt corrector plates, an optical lens used in television; research and development contracts for guided missiles and a machine gun trainer, both involving the application of electronics; and other research and development contracts for what plaintiff characterizes as 'electro-optical devices employing electronic circuitry in combination with optical apparatus.

Defendant was organized in December, 1944. Originally a partnership called Polarad Electronics Co., it was converted in 1948 into a New York corporation bearing the name Polarad Television Corp., which was changed a year later to Polarad Electronics Corp. Its principal business has been the sale of microwave generating, receiving and measuring devices and of television studio equipment. Defendant claimed it had arrived at the name Polarad by taking the first letters of the first and last names of its founder, Paul Odessey, and the first two letters of the first name of his friend and anticipated partner, Larry Jaffe, and adding the suffix 'rad,' intended to signify radio. In 1953, defendant applied to the United States Patent Office for registration of its trademark Polarad for radio and television units and other electronic devices; in August, 1955, when this application was published in the Official Gazette of the Patent Office, plaintiff for the first time took action by filing a notice of opposition, which was overruled by the Examiner in April, 1957.

Plaintiff relies on its sales of Schmidt corrector plates, used in certain types of television systems, first under government contracts beginning in 1943 and to industry commencing in 1945; on its sale, since 1946, of polarizing television filters, which serve the same function as the color filters that defendant supplies as a part of the television apparatus sold by it; and, particularly, on the research and development contracts with the government referred to above. Plaintiff relies also on certain instances of confusion, predominantly communications intended for defendant but directed to plaintiff. Against this, defendant asserts that its business is the sale of complex electronics equipment to a relatively few customers; that this does not compete in any significant way with plaintiff's business, the bulk of which is now in articles destined for the ultimate consumer; that plaintiff's excursions into electronics are insignificant in the light of the size of the field; that the instances of confusion are minimal;

Appeals for the Second Circuit were; whether public has purchased products or services from the defendant believing that they were those of the plaintiff? If not, is there a likelihood of confusion that that may occur in the future? Has the defendant, through and by reason of the similarity of the names of the parties, competed unfairly with the plaintiff?

The United States Court of Appeals for the Second Circuit formulated the ‘Polaroid factors’ to determine whether a likelihood of confusion exists. The Polaroid factors are the strength of plaintiff’s marks, similarity of competing marks, competitive proximity of the products, likelihood that the plaintiff will ‘bridge the gap’ and offer a product like defendant’s product, actual confusion, defendant’s good faith, quality of defendant’s product and sophistication of the buyers.

In *AMF, Inc. v. Sleekcraft Boats*,¹⁷ wherein AMF and Nescher both manufacture recreational boats. AMF uses the mark Slickcraft, and Nescher uses Sleekcraft. The crux of this appeal is whether concurrent use of the two marks is likely to confuse the public. United States Court of Appeals for the Ninth Circuit came up with few factors in determining whether confusion between related goods is likely. The strength of the mark, the vicinity of the goods, the similarity of the marks, evidence of actual confusion, the marketing channels used, the type of goods, the defendant’s intent in selecting the mark, and the likelihood of expansion of the product lines must all be considered.

In *Virgin Enterprises Ltd. v Bodtrade*, the principles established in regard whether a similar trademark for identical or similar products can co-exist were;¹⁸ the likelihood of confusion must be appreciated globally. All relevant factors and the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question.

that there is no evidence that plaintiff has suffered either through loss of customers or injury to reputation, since defendant has conducted its business with high standards; and that the very nature of defendant’s business, sales to experienced industrial users and the government, precludes any substantial possibility of confusion. Defendant also asserts plaintiff’s laches to be a bar.

¹⁷ 599 F.2d 341, 348-9 (9th Cir. 1979).

¹⁸ 54 (pty) Ltd. (BL 0-216/09) 2009, *Id.* at 58.

In India, the facets of misrepresentation and misappropriation are perceived in the form of passing off and statutory trademark infringement, the main difference between passing off and infringement has been laid down by the Honorable Supreme Court in *Kaviraj Pandit Durga Dutt Sharma v Navaratna Pharmaceutical Laboratories*;¹⁹

While an action for passing off is a common law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade mark in relation to those goods. The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off but is the sine qua non in the case of an action for infringement.

Thus, a plaintiff, who is unable to prove infringement of any statutory right may still have a remedy in common law, where the defendant by imitating the mark, claimed by the plaintiff as a trademark, has been guilty of passing off.²⁰

Passing off cases are often cases of deliberate and intentional misrepresentation, and in order to prove passing off instances the elements to be looked into are goodwill of the plaintiff's product, misrepresentation by the defendant creating consumer confusion and damages caused due to such misrepresentation.²¹ In case of an action for passing off, for deciding

¹⁹ AIR 1965 SC 989., see also Anamika Bhaduri, *Trademark: Infringement And Passing Off* 1(1) RGNUL STUDENT LAW REVIEW 122, 122-150 (2005)

²⁰ PILLAI ATCHUTHEN P S, LAW OF TORT 301, 435 (8TH ed., 1987).

²¹ *Laxmikant V. Patel vs. Chetanbhai Shah*, (24) PTC 1 (SC 2002), Considering the passing off action certain facts are to be looked into; Proof of fraudulent intent not essential; See *Horlicks Ltd. Vs. Bimal Khamrai*, 26 PTC 241 (Del. 2003), Passing off is not only limited to sale of goods but also restrains a defendant from trading under a particular name though the defendant trader is not selling the goods; see *Sales Affiliates lts. Vs. Le Jean Ltd.*, 64 RPC 103 (1947), false representation made by the defendant, whether expressly or otherwise, must be proved as a matter of fact in each case. Absence of actual deception is not conclusive. The ultimate question of whether the deception is likely to cause confusion remains a question of fact for the Courts to decide in the light of available evidence. In passing off action, it is unimportant whether the plaintiff and the defendant trade in the same field or trade in different products. Remedies in the form injunction was granted in favour of the plaintiff on the basis of an action of passing off even though the plaintiff and defendant were trading in altogether different products, See *Honda Motors Co. Ltd. Vs. Charanjit Singh*, (26) PTC 1(2003), The first user in the sale of goods is owner and senior user. In order to succeed, the

the question of deceptive similarity certain factors has to be looked into;²² the nature of the marks, i.e., whether the marks are word marks or label marks or composite marks, i.e., both words or label works, the degree of resemblance between the marks, phonetically similar and hence similar in idea, the nature of goods in respect of which they are used as trademarks, the similarity in nature, character and performance of goods of the rival traders, the class of purchasers who are likely to buy the goods bearing the marks they are likely to exercise in purchasing and/or using the goods, the mode of purchasing the goods or placing orders for the goods, any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

When considering misappropriation under Indian law, the Indian Courts may grant compensatory and punitive damages; rendition of accounts; or delivery of the infringing goods, labels, marks for destruction/erasure. The basic tests for determining infringement of trademarks are;²³ whether there is any special aspect of the common feature which has been copied, whether the modes in which parts are put together are different. When there are common elements, one should pay more regard to the parts which are not common, while at the same time not disregarding the common parts. What is the first impression?²⁴ The test of an average person with imperfect recollection.²⁵

One of the most positive developments initiated by the Indian judiciary has been the awarding of damages for trademark infringement. The trend began with *Time Incorporated v. Lokesh Srivastava*,²⁶ in which the Delhi High Court awarded both compensatory and punitive damages for infringement of the trademark TIME. The Court drew a distinction

plaintiff have to establish user of the mark prior in time than the impugned user by the respondents.

²² *Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.*, AIR 2001 SC 1952. See also ADRIAN ZAHL, *INTERNATIONAL PHARMACEUTICAL LAW AND PRACTICE* 9.08(2) (MADELEIN KLEYN, LOUIS VAN WYC ed. 2004).

²³ Gunjan Paharia and Komal Kaul, *Indian Courts on Trademark Infringement: An Overview* 70(11) *Inta Bulletin* (June 15, 2015), https://www.inta.org/INTABulletin/Pages/IndianCourtsonTrademarkInfringement_7011.aspx

²⁴ See *S.M. Dyechem Ltd v. M/s Cadbury India Ltd.* AIRr 2000, SC 2114.

²⁵ See *Torrent Pharmaceuticals Ltd v. The Wellcome Foundation Ltd.* 30 PTC 3 (Del. 2005).

²⁶ 30 PTC 3 (Del 2005). The trend continued with few significant cases, See *Microsoft Corporation v Mr Kiran and Anr*, 214, 35 PTC 748 (Del. 2007), *Microsoft Corporation v Mr Rajendra Pawar*, CS (OS) No 530 of 2003 (Del. 2003), *Microsoft Corporation v Deepak Raval*, CS (OS) No 529/2003 (Del. 2006), *Hero Honda Motors Limited v Shree Assuramji Scooters*, 32 PTC 117 (Del. 2006), *Toubró Limited v. Chagan Bhai Patel*, (39) PTC 538 (Del. 2009), *Société des Produits Nestlé S.A. v. Montu Sadhu*, CS (OS) 3500/2012. (Del. 2014).

between compensatory and punitive damages. According to the decision, the former should be awarded to compensate the plaintiff for the losses suffered, whereas the latter should be awarded to deter the infringer from violating the law again. The Court believed, in this case, it was not only Time Incorporated that suffered losses, but also the readers who mistook the defendant's magazine to be a publication of Time incorporated. Further, since the infringers knew very well that they were violating the law, it was unlikely that they would have kept a correct account of their profits.²⁷

In *M/S Allied Blenders & Distillers Pvt. Ltd. v. Shree Nath Heritage Liquor Pvr. Ltd.*,²⁸ the Delhi High Court relied on consumer psychology and associative thinking to conclude that a "Collector" could be confused with an "Officer."²⁹ This Associative Memory Test forms a new test which is distinct from the traditional test to determine infringement.

²⁷ Gunjan Paharia and Komal Kaul, *Supra* note 23.

²⁸ CS (OS) 2589/2013 (Del. 2014).

²⁹ The Plaintiff filed a suit for permanent injunction against the Defendant alleging that the mark "COLLECTOR'S CHOICE" is deceptively similar with the mark "OFFICER'S CHOICE". The Plaintiff is engaged in the business of manufacturing and marketing of alcoholic beverages including Indian Made Foreign Liquor. They have adopted the trade mark "OFFICER'S CHOICE" in the year 1988 and is the registered proprietor of the mark since 2007. The Plaintiff alleged that the Defendant is also engaged in the business of blending, manufacturing, producing, bottling and selling alcoholic beverages and is selling whisky under the mark "COLLECTOR'S CHOICE" which is deceptively similar to its trade mark "OFFICER'S CHOICE". The Defendant submitted that the trade mark registrations claimed by the Plaintiff do not give the Plaintiff any exclusive right over the use of the word "Choice"; the registrations granted to the Plaintiff are conditional i.e. the registration is subject to the condition that the Plaintiff shall not claim any rights on the words "Choice" or "Whisky". The Defendant further submitted that the Plaintiff cannot claim monopoly rights over the common dictionary word "Choice" and it is open to all traders to adopt such word and use the same in such a manner that their trade mark is distinguishable from the other trader's mark. The Court held that the customer's/ consumer's memory is likely to mix "Officer" with "Collector", the possibility of trademark "OFFICER'S CHOICE" of the Plaintiff being remembered/recalled as "COLLECTOR'S CHOICE" cannot be ruled out. A Collector is the highest point of officialdom/authority in a district and with whom nearly every citizen of that district comes in contact with or knows of. For a resident of a district who may not in his entire life time be stepping out of that district (and of which there is a large number), the Collector is the only officer and to them the other authorities in the country hold no meaning. The possibility of a customer/consumer of the alcoholic product of the plaintiff remembering the product of the Plaintiff as Collector's Choice cannot be ruled out. Not only so, even if the customer remembers the mark "OFFICER'S CHOICE", he can be easily fooled into buying a superior product of the same manufacturer or another product of the same manufacturer and is likely to again be fooled by the association between „Officer“ and „Collector“.

These solid and sound arguments and principles have proved efficient for traditional trademark infringement. But the complexities posed by social media advertising, the liability of online service providers, the anonymity of perpetrators remain an ambiguity in the Indian law, these principles can somewhat clear the legal conundrums relating to trademark infringement, but not everything related to social media advertising. How a brand is advertised through social media, how a trademark is being used and abused via social media will be dealt in the coming paragraphs.

4.4. BRAND BUILDING THROUGH SOCIAL MEDIA AND USE OF TRADEMARK

Social media have changed the brand building process. The consumer purchase decision making process have drastically changed over time. The needs and wants of the customer is properly defined now, the information relating to a product or service that can be gathered from social media is one of the major reason for this drastic change. The earlier trend of marketers to simply use the offline advertising strategy to online environment is outdated, they ought to adapt in the new environment to deal with customer needs and wants. Users have the possibility to interact both with organizations as well as with other users and to participate in the branding of a product or service.³⁰

Social media redefined the traditional decision making with respect to consumer products. As the digital version of word-of-mouth, social media characterizes the embodiment, storage, and retrieval of word-of-mouth content online. Additionally, it is crucial to empower consumers to encourage interaction and collaborative product development. Social media have created a new form of dialogue between companies and consumers. Traditional forms have been business-to-business (B2B) and business-to customer (B2C), whereas new forms are customer-to-business (C2B) and customer to- customer (C2C).³¹

The brand owners need to understand and adapt to the social and psychological behavior of the consumers, their interconnectivity through the social media platforms about the brands, and then they device accordingly the modes to advertise or promote a brand. The traditional theories could be effective prototypes for learning and explaining how

³⁰ Christodoulides, G. *Branding in the post-internet era*. 9 (1) MARKETING THEORY 141-144 (2009).

³¹ CHAFFEY, D. & SMITH, P. R. *EMARKETING EXCELLENCE: THE HEART OF E BUSINESS* 119 (2d ed. 2005).

people form networks, express their opinions, and pass information among each other regarding a brand. The strategy of the brand owner to make consumers have a feeling of belonging and identification of a brand, thereby creating a customer satisfaction for positive reviews being channeled through extremely interactive social media platforms enables a positive and favorable brand building. The traditional theories that could be effective archetypes for learning for the brand owners are; psychological ownership theory and perceived control, social exchange theory, social network theory and McLuhan's media theory.

4.4.1. Psychological Ownership Theory and Perceived Control

Psychological ownership theory attempts to explain the psychological state of ownership. Psychological ownership theory integrates essential human relationship variables, such as sense of belonging, identification, and perceived control, as the antecedents of marketing.³² The theory also relates psychological ownership to several practically important consequences, such as relationship intentions, word-of-mouth communications, competitive resistance, and willingness to pay. This helps in enhancing loyalty and relationship in marketing.³³

The manner in which the theory function is;³⁴ the sense of ownership is manifested in "the meaning and emotion associated with my or mine and our." psychological ownership represents a relationship between an individual and an object both material and immaterial. An individual perceives the object i.e., a firm to have a close connection with the self. The state of psychological ownership is complex and consists of both affective and cognitive components

Social media platforms now allow consumers to access personally expressive assessments not only from friends and relatives but from strangers. Customers develop feelings of connections with firms they are loyal to that manifest into a sense of ownership, as evidenced by the 'mine', 'my', 'our' language they use in their reviews they post on social media. In such circumstances, one would assume that a loyal guest would provide positive feedback to others, directing their negative feedback to

³² Vahagn S. Asatryan, Haemoon Oh, *Psychological Ownership Theory: An Exploratory Application in The Restaurant Industry* 32 JOURNAL OF HOSPITALITY & TOURISM RESEARCH 363, 363-386 (2008).

³³ *Id.*

³⁴ Pierce, J. L., Kostova, T., & Dirks, K. *The state of psychological ownership: Integrating and extending a century of research.* 7(1) REVIEW OF GENERAL PSYCHOLOGY, 84-107 (2003).

management. However, where no such loyalty exists, the motive to write either a negative or positive review may be a desire to control or influence the business indirectly by communicating with its future potential customers.³⁵ According to Pierce, Kostova, and Dirks,³⁶ the desire by the consumer to control through such communications may result in feelings of efficacy, intrinsic pleasure, and extrinsic satisfaction in providing such advice to others.

4.4.2. Social Exchange Theory

Social behavior is not just exchange of goods, material goods but also non-material ones, such as the symbols of approval or prestige. Persons that give much to others try to get much from them, and persons that get much from others are under pressure to give much to them.³⁷ This process of influence tends to work out at equilibrium to a balance in the exchanges. For a person in an exchange, what he gives may be a cost to him, just as what he gets may be a reward, and his behavior changes less as the difference of the two, profit, tends to a maximum.³⁸

The reasons why people engage in a social exchange have been posited as an expected gain in reputation and influence on others, an anticipated reciprocity on the part of others, altruism and direct reward. The first three reasons appear to have relevance to why people participate in social media. This basic reason can be made advantageous with respect to marketing and promotion of a brand. Social media's capability to augment these human behavior benefits the brand owners to form a cloud of trust with respect to a brand and spread them economically to a wider geography.

4.4.3. Social Network theory

Social network theory is the understanding of how people, organizations or groups intermingle with others inside their network.

³⁵ Pan, B., & Crotts, J. *Theoretical models of social media, marketing implications, and future research directions*. In SIGALA, M., CHRISTOU, E., & GRETZEL, U. (EDS.). *SOCIAL MEDIA IN TRAVEL, TOURISM AND HOSPITALITY: THEORY, PRACTICE AND CASES* 73-86 (2012).

³⁶ Pierce, JL, T Kostova, and KT Dirks, *Supra* note 34.

³⁷ COTT APPELROUTH, LAURA DESFOR EDLES, *CLASSICAL AND CONTEMPORARY SOCIOLOGICAL THEORY: TEXT AND READINGS* 453 (2008).

³⁸ Homans, GC, *Social behavior as exchange*. 63 *AMERICAN JOURNAL OF SOCIOLOGY* 606, 597-606 (1958). *See also* Emerson, RM, *Social exchange theory*, *ANNUAL REVIEW OF SOCIOLOGY* 335-362 (1976).

Buckner's theory on rumor transmission indicates the accuracy and speed of rumor passing were affected by the structure of the network and the mental sets of individual actors in the network. Connecting this aspect with social network, the idea of advertising by promoting themselves through organic word-of-mouth can be applied.³⁹ Social networks can form in many levels, from individual people, to families, communities, and nations. They can connect with each other, the marketing company can use the social network analysis reports to improve the network structure and help increase the efficiency of information flows in the network, thereby enabling a brand reputation to gain the nature of a wildfire.

4.4.4. McLuhan's Media Theory

McLuhan's famous quote "the media is the message." He argues that the content is not what is going to change the behavior, it's the interactivity and frequency of new communication pattern will change our behavior forever. Thus, the media's effects on society are much greater than the content of the media. He separates media into "cool" media and "hot" media.⁴⁰ The former one requires a viewer to exert much effort and participation in understanding the content, such as television, seminars, or cartoons; the latter refers to those media that enhance one sense, so the viewers do not need to exert much effort, such as films, radio, and photography.⁴¹ Adapting the essence to social media, the complexity of its functions does make social media a hot media where participation and understanding of the viewers are high. Brand owners can depend on these characteristics of social media to promote their brand at higher frequency and levels that consumer can respond to without doubts.

These traditional theories are used by the brand owners in social media thereby enabling marketing interactions, driving it advantageous to their sale. The resultant behavior becomes the feedback data, which is used by them to tune their business strategies. The traditional theories which defines and explains the nature of marketing interactions and resultant behaviors can be applied equally to the social media platform

³⁹ Pan, B., & Crotts, J. *Supra* note 35.

⁴⁰ MCLUHAN, MARSHALL, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN. 29 (1964). *See Generally* STEPHANIE KATHRYN BREHE, MIND OVER MEDIA: CONSCIOUS AND UNCONSCIOUS RESPONSES TO MEDIA MESSAGES (2012).

⁴¹ *See generally* MC LUHAN, M. UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1995)

owing to its respective features like people participation and information dissemination.

Table IV.2- Nature and type of marketing interactions

Traditional theories used by brand owners in social media	Nature of marketing interactions and resultant behaviors	Application Examples
Psychological Ownership Theory and Perceived Control	Moderate B2C High C2B High C2C	Brand Blogs and forums , Social Networking sites, Social bookmarking sites,
Social Exchange Theory	High B2C	Brand blogs, Social networking sites and Content communities
Social Network theory	High C2C High C2B High B2C	Social networking sites
McLuhan's Media Theory	High B2C	Brand blogs, Content communities

The brand blogs, the fan pages in social networking sites, the reviewing and brand suggesting social bookmarking sites are used by the customers owing to their favoritism towards the brand which develop through time. As stated customers develop feelings of connections with firms they are loyal to that manifest into a sense of ownership, as evidenced by the 'mine', 'my', 'our' language they use in their reviews they post on social media. So, brand owners depending on such social media website to gather a perceived control will have high customer to business and customer to customer interactions. Their positive review will have a positive effect on the potential future customers.

Brand blogs, social networking sites and content communities are used by the brand owners in different way to enhance the marketability of their product to wider public at cheaper cost at an effective manner. A brand owner can plant in the mind of the people about their product's origin and genuineness and satisfaction it can guarantee. In this case, the business to customer interaction will be high.

Social networking sites, with its community forming nature has a very high communicating capacity. Using this capability, the brand owner can communicate their product's standards to a wider audience, explain the geographical availability of the product, maintain a cordial feedback relation with the customers and monitor the customer reviews periodically and thereby make improvements. In this case the business to customer, customer to business and customer to customer interaction will be high.

In brand blogs and content communities, the participation and understanding of the viewers are high owing to the richness of the content transmitted. With an effective transmission of a content related to a product in a catchy manner can improve the business to customer relation thereby effecting the product sale exponentially. The way a brand owner uses the various social media elements are explained in the succeeding paragraphs.

4.5. TRADEMARK HOLDER'S USE OF SOCIAL MEDIA AND INSTANCES OF TRADEMARK INFRINGEMENT

Social media marketing can mainly be used by the brand owner for "building brand awareness, identifying opinion leaders known in social media as influential, driving traffic to brand Web sites, spreading specific messages virally, developing customer databases, instilling credibility and trust in a brand, and enhancing a brand's image, among others".⁴² Social media have turned the previous passive consumers into active producers and distributors of content, the so called prosumers. The new consumer is an "empowered, impatient customer who has a short attention span, a lot of choices, and a low barrier to switching."⁴³

Trademark holders can benefit from social media by setting up their own pages, advertising and buying data for behavioral targeting. Social media which has been classified into five categories are used by trademark holders in different way to promote and advertise their brands

Collaborative projects: collaborative projects are a special form of social media application that allow the joint and concurrent creation of knowledge related content by many end-users.⁴⁴ On the basis of

⁴² TUTEN, T. L., ADVERTISING 2.0. SOCIAL MEDIA MARKETING IN A WEB 2.0 WORLD. 26 (2008).

⁴³ CHAFFEY, D. & SMITH, P. R. EMARKETING EXCELLENCE: THE HEART OF E BUSINESS 119 (2d ed. 2005).

⁴⁴ Andreas Kaplan, Michael Haenlein, *Collaborative projects (social media application): About Wikipedia, the free encyclopedia* 57 BUSINESS HORIZONS 618, 617—626 (2014).

functionality collaborative projects are classified into four types; the first type is wikis, second type is social bookmarking sites,⁴⁵ online forums and message boards⁴⁶ and fourthly review sites.⁴⁷ The advertising company can use these functionality to describe a product on the web and enhance its efficiency through intra company collaborative projects,⁴⁸ create a product/ fan page, create an ad page which is interactive, to obtain consumer feedback respectively.⁴⁹

⁴⁵ *Id.* at 619; Also known as collaborative tagging services. They allow users to assign tags to bookmarks of web documents that can subsequently be organized in the form of tag clouds: visual representations of tags, the importance of each indicated by its font size or color. The resulting classification of content is sometimes referred to as folksonomy, a portmanteau of folk and taxonomy. The most widely known representative of this type of collaborative project is probably Delicious, which was founded in 2003 and today has more than 5 million users and 1 billion linked bookmarks.

Id. at 624; the social bookmarking site Pinterest, which was founded in March 2010. Pinterest allows users to share visuals taken from the Internet and to group them into thematic clusters. This can be of interest for companies since it helps to create a virtual storefront, the online equivalent of a display window. As revealed by jewelry and accessories retailer Boticca.com, customers acquired this way are likely to be particularly worth chasing. The firm compared 50,000 shoppers referred from Pinterest to 50,000 shoppers referred from Facebook and found that its revenue per customer is more than twice as high (\$180 vs. \$85) for customers directed from Pinterest.

⁴⁶ *Id.*, Online forums or message boards, via which people can hold conversations in the form of posted messages. As opposed to wikis, forums usually do not allow users to edit content posted by others, but rather only respond to or discuss this content within their own postings. The right of editing is limited to forum administrators or moderators. Also, forums only count as collaborative projects when their focus is on the joint creation of knowledge.

⁴⁷ *Id.*, websites that focus on exchanging feedback regarding firms, products, and anything else of relevance in human life.

⁴⁸ *Id.* at 623; Collaborative projects in general and wikis in particular may be used for knowledge management within the company. One method entails using wikis to share existing knowledge, similar to traditional intranet or document management systems. In this context, wikis are often preferred as they tend to be easier to use and are less expensive than a commercial solution. Commercial projects may also be used for generating new ideas. The results of crowdsourcing can be remarkable; instead of relying on a predefined task force or project team, those in the organization who are most motivated to perform the task contribute to its solution. Finnish handset manufacturer Nokia uses wikis to trade ideas and provide its 100,000+ employees with project updates. Other firms prefer to rely on different types of collaborative projects. The American computer software company, Adobe, maintains a list of bookmarks and company-related websites on Delicious, and computer manufacturer Dell has an internal idea generation forum called Employee Storm.

⁴⁹ *Id.* at 624; Forums, which can be a valuable source of market information for companies. Since forums are usually highly specialized—for example, FlyerTalk, an online forum, centers on frequent-flyer and hotel loyalty programs—they are a good place to find opinion leaders who can subsequently serve as ambassadors for the introduction of new products. Alternatively, firms can systematically analyze conversations on such forums to gain insights

Blogs: Blogs include personal blogs, community blogs, microblogging, corporate blog and genre blog. These blogs enable subscribers to broadcast short messages to fellow subscribers, which when considered in a different aspect, is used by companies and brand owners for advertising and promoting a product.

Content Communities: Content communities are sites that allow users to upload and share various kinds of media. Owing to wide variety of contents and viewership of various content posted, companies and brand owners use this social media platform the most, for advertising purpose. The most popular content community is 'YouTube', any person can advertise on YouTube in different ways as provided by the website. The different ad formats include display ads, overlay ads, skippable video ads/ Non-skippable video ads and long, non-skippable video ads and sponsored cards.⁵⁰

Social Networking Sites: Social network sites are web-based services that allow individuals to construct a public or semi-public profile within a bounded system, articulate a list of other users with whom they share a connection, and view and traverse their list of connections and those made by others within the system.⁵¹ A social network is a social structure made up of a set of social actors such as individuals or organizations and a set of the dyadic ties between these actors. The social network perspective provides a set of methods for analyzing the structure of whole social entities as well as a variety of theories explaining the patterns observed in these structures.⁵² Generally spoken, five different

that would be difficult to obtain through traditional means in a process usually referred to as netnography. But even without such strategic actions, communities can be beneficial for brands. Participation not only leads to higher loyalty for the brand but also to the creation of 'oppositional loyalty,' or adversarial views on competing brands.

⁵⁰ Display ads appear to the right of the feature video and above the video suggestions list. For larger players, this ad may appear below the player, Overlay ads are Semi-transparent overlay ads that appear on the lower 20% portion of your video, Skippable video ads are ads that allow viewers to skip ads after 5 seconds, if they choose. Inserted before, during, or after the main video, Non-skippable video ads must be watched before your video can be viewed and Long non-skippable video ads may be up to 30 seconds long, these ads can appear before, during, or after the main video, and finally Sponsored cards display content that may be relevant to your video, such as products featured in the video. Viewers will see a teaser for the card for a few seconds. They can also click the icon in the top right corner of the video to browse the cards. <https://support.google.com/youtube/answer/2467968?hl=en>.

⁵¹ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 (1) J. COMPUTER-MEDIATED COMM 211, 210-230 (2008).

⁵² STANLEY WASSERMAN AND KATHERINE FAUST, *SOCIAL NETWORK ANALYSIS IN THE SOCIAL AND BEHAVIORAL SCIENCES: METHODS AND APPLICATIONS* (1995).

types of social networks can be distinguished. General networks like Facebook, professional networks like LinkedIn, interest-based or vertical social networks like Flickr, horizontal networks like TripAdvisor, Affinity networks like iVillage, Sponsored communities like eBay.⁵³

Facebook's marketing system is based on three elements and on the concept of a transparent client as organizations which can access user's published personal information to target exactly the right audience. The first elements are ads, which consider user's personal information and online behavior. Every ad includes a text line, title and a picture, which is limited in length and size respectively. Depending on the set budget, ads are either displayed in the news feed, which are more effective, or in the advertising space of each site. As soon as a user clicks on the ad, the user is directed to a website or to a website within Facebook. Facebook's ad system is based on the possibility to target the exact audience marketers want to approach. The filters that can be used for targeting are "country, state, city, gender, age, any interest keywords, educational status, workplace, relationship status and interested in."⁵⁴ The second element is pages, which are free company profiles or fan pages. Pages offer organizations more features than regular profiles. Users can interact with organizational pages and can become fans of a page instead of becoming friends with other users. Users interact with brands through pages because they are looking for incentives and to build a relationship with a company. The last part of Facebook's marketing system is the social graph system. The social graph is a free word-of-mouth system, which allows users to inform other users about their favorite products and services. This so-called friendvertising is the strongest advantage of Facebook marketing because organizations can use this system of connections through the social graph to reach as many users as possible. Friendvertising is successful because consumer behavior always reflects their network and users are most likely to copy the behavior of their friends and opinion leaders because they trust them.⁵⁵ Nielsen market research measured that people notice brands in Facebook's news feeds

⁵³ Acquisti, A. & Gross, R. *Imagined communities: Awareness, information sharing, and privacy on the Facebook*. in *PRIVACY ENHANCING TECHNOLOGIES* 36-58 (Danezis, G. & Golle, P. ed., 2006).

⁵⁴ See generally Tom Fanelli, *How to Build a Better Target Audience for Your Facebook Ads*, *Social Media Examiner* (Dec 8, 2015), <https://www.socialmediaexaminer.com/how-to-build-a-better-target-audience-for-your-facebook-ads/>

⁵⁵ Christian Maurer, Rona Wiegmann, *Effectiveness of Advertising on Social Network Sites. A Case Study on Facebook*, https://www.researchgate.net/publication/221357477_Effectiveness_of_Advertising_on_Social_Network_Sites_A_Case_Study_on_Facebook.

thirty percent better than brands using advertisements that have not been endorsed by the connections of a Facebook user.⁵⁶

Virtual World: A virtual world is an online community that takes the form of a computer-based simulated environment through which users can interact with one another and use and create objects.⁵⁷ Virtual worlds are platforms that replicate a three-dimensional environment in which user can appear in the form of personalized avatars and interact with each other as they would in real life. Ads are promoted through famous virtual world websites and applications. It is not a popular medium for advertising as it is in the developmental stages and serves purpose to a lesser population only.

4.5.1. Trademark Infringement and Social networking sites

Trademark holders often set up a social network site account with a publicly-available “page” or “profile” and use their brand name or other trademarks in their username or respective pages to identify themselves on these sites.⁵⁸ The common modes of infringement are brand jacking, username squatting or impersonations or vanity URLs and fake social network site page that create confusion among customers wherein trademark names or trademark logos are used without authorization.

Under the various cases so mentioned it is important to analyze whether the infringement activities properly comes under the trademark legislative feature of ‘trademark use’ in social media and whether the trademark legislative feature creates a proper distinction between general trademark use and use of trademark logo in social media so that the judiciary find it easier to rule out the infringement activity and the fair use defenses related to it. The purpose is to understand how judiciary use the existing legislations and to analyze the applicability of existing legislation in the social media platform.

In *Nine West Dev. Corp. v. Does*,⁵⁹ defendants in this case, have used without authorization or license from the plaintiffs, have knowingly

⁵⁶ Jack Neff, *Nielsen: Facebook's Ads Work Pretty Well*, ADVERTISEMENT AGE, (Apr. 19, 2010), http://adage.com/digital/article?article_id=143381.

⁵⁷ Jonathan Bishop, *Enhancing the understanding of genres of web-based communities: the role of the ecological cognition framework*, 5(1) INTERNATIONAL JOURNAL OF WEB-BASED COMMUNITIES 4- 17 (2009).

⁵⁸ Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders* 58 BUFFALO LAW REVIEW 852, 851- 929 (2010).

⁵⁹ 1-10, No. 07-cv- 7533 (S.D.N.Y. 2007); <http://www.counterfeitchic.com/Cases/cic/3/ninewest.pdf>.

and willfully used, reproduced and/ or copied the nine west mark in connection with a fraudulent scheme to make it appear as though plaintiffs were conducting auditions for young female models when that is not the case. As part of the scheme, defendants requests that those who respond to their phony ad submit a picture.⁶⁰ The legal action was to recover the damage caused by and to prevent further damage arising from defendant's fraudulent, deceptive and misleading advertisements that solicit young females to send photographs of themselves to defendants, by pretending to be nine west, and by infringement of the nine west mark. The claim for relief under trademark infringement, the statement has been put forth stating that defendants had an intentional plan unfairly to capitalize on the business reputation and good will associated with plaintiff's nine west mark, defendants created an account on the social media platform; the Facebook using the alias "Nine West Shoes" without knowledge or authorization of plaintiffs is likely to cause confusion or to cause mistake or to deceive public in violation of 15 USC Section 1114.⁶¹ Misleading advertisement in a new platform was identified and ruled out in this case, the Court has ordered permanent injunction owing to the fact that defendants advertisement are false and deceptive and constitute a misrepresentation in commerce in violation of 15 USC Section 1125 (a) (1) (B) and the act involved dilution by tarnishment as their act would cause irreparable harm, damage and injury to plaintiff. The defendant was immediately ceased from using the trademark with respect to any advertisement or promotion via the Facebook page.

It is pertinent to note in this case that the claims were with respect to trademark infringement under 15 USC Section 1114 and under 15 USC Section 1125 (a) regarding false description, false representation and false designation of origin. The provisions under Section 1114 makes it clear that the trademark use in this case is a commercial use and since it is used

⁶⁰ *Id.* at 7.

⁶¹ Approximately 400 facebook members had joined the Nine West Audition Group as of July 16, 2007. Plaintiff learned of defendant's fraudulent facebook announcement when facebook members contacted plaintiff's customer relations department to inquire about the auditions advertised in the facebook announcement. Facebook later took down the fraudulent page. Nine west asserted claims for; 1. Trademark infringement under section 32 of the Lanham Act, 15 USC S 114; 2. False designation of origin and false description and representation under Section 43 (a) of the Lanham Act, 15USC S 1125 (a), 3. Dilution by tarnishment under Section 43 (c) of the Lanham Act, 15 USC s 1125 (c); 4. Deceptive trademark practices and false advertising under Sections 349 and 350 of the New York General Business Law; and 5. Dilution under Section 360-1 of the New York General Business Law. Nine west sought for preliminary and permanent injunctive relief and compensatory and punitive damages.

and displayed in sales or advertising, the Lanham Act has adequate remedy. But it is important to note in this case that the dilution by tarnishment under 15 USC Section 1125 (c) (2) (C), the action of defendant causing irreparable harm, damage and injury must be analyzed with respect to the use of trademark as well as trademark logo upon social media. The United States District Court of Southern District of New York did not make a distinction with respect to that aspect even though permanent injunction was granted. It is important to analyze trademark dilution provision as well as defense provisions related to it so that jurisprudence with respect to trademark logo use in social media can be ruled out because the impact of using trademark names and trademark logos are different.

In *Grooms v. Legge*,⁶² the defendant used social networks like Facebook and Myspace for advertising and taking up of orders for business. The advertisement so reached, and orders so made were by customers believing the products to be plaintiff's because they have created page using trademark and names like the plaintiff's.

To prove a Lanham Act origin of goods claim, a plaintiff must show a valid and protected mark and that Defendant's use of a similar mark is likely to cause confusion. In this case it is undisputed plaintiffs owned a valid, protectable trademark before September 2008 and the plaintiff has dependent on the Ninth Circuit's eight factors test to determine the likelihood of confusion.

United States District Court of Southern District of California finds that plaintiffs had a valid and protected mark, plaintiffs' mark is strong, the goods are proximate because plaintiffs and defendants are competitors in the same market, defendants' mark bears a strong resemblance to plaintiffs' mark. In the instant case, plaintiffs have shown a likelihood that defendants have committed cybersquatting in violation of the Anti-cybersquatting Consumer Protection Act. The defendants registered a domain name that is identical to the distinctive Knukle trademark, with the bad faith intent to profit from the trademark. As discussed above, the Legges' bad faith is evidenced by their covert control of the website, the use of the infringing Knukle Two mark on social websites such as Facebook and Myspace, and the exclusion of plaintiffs from their own company's website. Defendants have a bad faith intent to profit from the trademark by using the site and, they have used social media websites facebook and Myspace to gather customers which is evident from the

⁶² *Grooms v. Legge*, WLR 962067 (S.D. Cal. 2009).

emails so received from the customers by the plaintiff regarding orders so made without the knowledge of the plaintiff.⁶³

The Court upon reaching on conclusions gathered from the above analysis have ordered a preliminary injunction to the defendant from the unauthorized use of the Knukle Marks in commerce, the unauthorized use of the Knukle names in commerce, the unauthorized use of the domain name and website, www.knukleinc.com and finally the unauthorized use of photographs, graphics, and designs bearing the Knukle marks and/or names whether published or not published including, the worldwide web, "www.knukleinc.com", "www.knukleincclothing.com", Facebook, MySpace, traditional media channels, word of mouth, or in any other type of marketing or advertising.⁶⁴

Like the judgment made in *Nine west* case, the Court had restricted the defendants and enjoined them from using the marks but made no attempt to analyze the nature of which the trademark was used. The Court specifically considered and applied the commercial use criteria and trademark dilution aspect to a general concept of trademark infringement. Application of the traditional infringement rules upon social media trademark infringement requires a re look owing to its difference in nature of usage.

In *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*,⁶⁵ Plaintiff The New York City Triathlon, LLC has filed a motion for a preliminary injunction, to prevent and restrain Defendant NYC Triathlon Club ("NYC Triathlon Club") from using "NYC Triathlon Club," "NYC Tri Club," and "New York City Triathlon Club" as names, trade names or trademarks, or as a domain name on the social media platform; Facebook, or in any other way that is likely to cause confusion with Plaintiff or its trade name and trademarks.⁶⁶

In ruling on NYC Triathlon's motion for a preliminary injunction, the United States District Court of Southern District of New York first analyzed the infringement claim. It considered each of the Polaroid

⁶³ On February 5, 2009, plaintiffs received an email from a representative retailer based in Bakersfield named "Fatal Impact." Fatal Impact stated he was excited to receive his shipment of new "Knukle, Inc." apparel. Grooms and Phelan never received an order from Fatal Impact. Fatal Impact requested a status update via MySpace on March 8, 2009. Further, a retailer named "Skin" posted a MySpace message stating he enjoyed meeting Knukle representatives. Skin had only meet defendants' representatives.

⁶⁴ *Grooms V. Legge*, CASETEXT, <https://casetext.com/case/grooms-v-legge>.

⁶⁵ F. Supp. 2d ___, 2010 WL 808885 (S.D.N.Y. 2010).

⁶⁶ *2010 Case Summaries Under The Trademark Dilution Revision Act 2*, <http://www.inta.org/Advocacy/Documents/INTA2010TDRACaseSummaries.pdf>.

factors, finding that: (i) NYC Triathlon's marks were strong as a result of its exclusive ten year use of the marks and the amount of media coverage that the race generates; (ii) the name that the club planned to adopt was identical to NYC Triathlon's marks; (iii) the organizations were in the same channels of trade; (iv) there was evidence of actual confusion even in the short time the club had used the new name; (v) the club changed its name in bad faith in order to trade on NYC Triathlon's goodwill; (vi) the club has a reputation of poor business practices; and (vii) many of the NYC Triathlon's racers are first-time triathletes, which magnified the likelihood of confusion. Because each of the relevant factors favored a finding of likelihood of confusion, the Court found that it was likely that NYC Triathlon would prevail on its claim of trademark infringement.⁶⁷

Next the Court analyzed the federal dilution claim. First, it held that the "NYC TRIATHLON" marks are famous as a result of the extent of the publicity associated with the race and the large number of applicants the race gets each year. Second, it held that there was no doubt that the club was using the marks in commerce, and third, that such use started after NYC Triathlon had made them famous.⁶⁸

The Court then held that, upon consideration of each of the statutorily prescribed factors, and with reference to its earlier infringement analysis, NYC Triathlon was likely to prove dilution by blurring. The evidence revealed that there existed little difference between the names and marks, and that it was clear the club attempted to create an association with NYC Triathlon. The Court also found that it likely that NYC Triathlon would be able to prove dilution by tarnishment because of the club's poor reputation for customer service.⁶⁹

The Court found that NYC Triathlon would suffer irreparable harm absent the injunction, holding that a presumption of such harm flows from a finding of likely dilution and likely confusion. Finally, the Court determined that the balance of hardships weighed in favor of NYC Triathlon because it had used the marks for over ten years and had spent a long time building up goodwill in the marks, while the club had only recently started using the marks, and therefore had little to no goodwill established in them. Therefore, the Court granted NYC Triathlon's motion for a preliminary injunction.⁷⁰

⁶⁷ *Id.* at 2.

⁶⁸ *Id.* at 3.

⁶⁹ *Id.*

⁷⁰ *Id.*

In *TDC Int'l Corp. v. Burnham*,⁷¹ the United States District Court for the Eastern District of Michigan Southern Division ordered an injunction to the defendant upon the unauthorized use of plaintiff's marks on Twitter under 15 USC Section 1125. The underlying dispute arose out of Defendant's use of the mark "Quick and Easy Moving" in connection with his moving services, which conflicted with plaintiff's established use of the mark "EZ Moving/Moving and Storage." On November 14, 2008, plaintiff filed a complaint in this Court. The parties entered into a settlement agreement in May 2009, and a consent judgment was filed on June 22, 2009. Because plaintiff presented evidence of defendant's failure to comply with the terms of the settlement agreement and consent judgment, on May 3, 2010, the Court issued the injunction, which required compliance and proof of compliance. The injunction required defendant to "remove all internet postings, websites, email addresses, advertisements, online business listings, YouTube accounts, Twitter accounts, and any other online material associated with him" such as to have "zero internet presence." In addition, the injunction required defendant to pay Plaintiff \$10,178 in the amount of at least \$100 per week.

Similarly, in *In Quia Corp. v. Mattel*,⁷² United States District Court, Northern District of California held that defendant's aggressive use of social-media advertising could show that the plaintiff's product and defendant's product has similar marketing channels, thus increasing the likelihood of consumer confusion.⁷³

⁷¹ 2:08-cv-14792 (E.D. Mich. 2009), <https://casetext.com/case/tdc-international-corp-v-burnham-2>.

⁷² *Quia Corp. v. Mattel*, WLR 2749576 (N.D. Cal. 2011).

⁷³ Plaintiff *Quia Corp.* ("Quia") sold web-based study materials for students in prekindergarten to eighth grade under the federally registered mark IXL covering "educational services, namely, online instruction in the fields of math, science, English and foreign languages for use in the future." Defendant *Mattel, Inc.* ("Mattel") developed an educational handheld device called the "IXL LEARNING SYSTEM." In January 2010, Mattel filed a trademark application for the mark iXL for "[c]hildren's educational toys and devices, namely, handheld learning systems featuring interactive digital books, games, art activities, music players, writing tools, and photo albums." Learning of Mattel's application, Quia sent a cease-and-desist letter to Mattel. A few days later, Mattel abandoned its application and filed a new application for the mark IXL removing any reference to the "educational" aspect of its device. This new application covered "handheld mobile computer incorporating a music player, camera, digital notebook and electronic photo album," among other goods. Mattel then engaged in an extensive social-media campaign to promote its product, including email blasts, Facebook applications, YouTube channels, and tie-ins with "mommy bloggers." Quia sued for trademark infringement under theories of both reverse and forward confusion, and Mattel moved for partial summary judgment.

Other than instances where Court has ordered permanent injunction or enjoined defendants from using the marks, there are instances where complaints were filed on similar grounds and later voluntarily dismissed or abandoned by parties upon agreement. In *Hasbro, Inc. v. RJ Softwares et al*,⁷⁴ Plaintiff Hasbro, Inc. alleged that defendants RJ Softwares, Rajat Agarwalla and Jayant Agarwalla infringed on plaintiff's trademark and copyright by creating and publicly displaying an online game in the social networking site Facebook that copies the essential and original elements of the Scrabble board game and promoting and profiting from it in commerce in the United States under the confusingly similar Scrabulous name.⁷⁵ The trademark infringement against the defendant stated that the "Scrabulous" name, SCRABBLE game board design, SCRABBLE titles, as well as use of SCRABBLE name in met tags and Facebook pages and otherwise in promoting their game are likely to cause confusion, mistake, deception, or create the misleading impression that defendants are licensed by, affiliated with, endorsed by, or in some way associated with Hasbro. Hasbro has abandoned its legal action against the makers of the popular Facebook word game after it was removed from the social-networking site not long after the lawsuit was filed.

In *Oneok Inc. v. Twitter Inc.*,⁷⁶ Oneok Inc., a natural gas distribution company, brought suit against Twitter in Oklahoma federal Court claiming trademark infringement over a Twitter account allegedly posing as the company's official account.⁷⁷ Similarly in *La Russa v. Twitter Inc.*,⁷⁸ La Russa's suit not only addresses tort-based legal claims,

⁷⁴ *Hasbro Inc. v. RJ Softwares*, No. 2008-6567 (S.D.N.Y. 2008).

⁷⁵ The game manufacturer, which owns the rights to Scrabble in the United States and Canada, filed the suit against India-based brothers Rajat and Jayant Agarwalla, and their company, RJ Softwares. The game, which rose to fame when its creators turned it into an embeddable Facebook application, was a word game that resembled the classic board game Scrabble. The game boasted an astonishing half-million daily users on Facebook. The suit had asked Facebook to pull the game, citing the Digital Millennium Copyright Act. See Steven Musil, *Hasbro drops 'Scrabulous' lawsuit*, CNET, (Dec 15 2008), <https://www.cnet.com/news/hasbro-drops-scrabulous-lawsuit/>

⁷⁶ No. 09-597 (N.D. Okla. 2009).

⁷⁷ See Robert Mchale, *Navigating Social Media Legal Risks: Safeguarding Your Business* (2012); ONEOK, INC., a natural gas distributor, after unsuccessfully attempting to have the twitter account @ONEOK transferred to it, ONEOK, Inc, sued twitter for trademark infringement for assigning this twitter handle to a third party. According to the complaint, the ONEOK Twitter account holder had tweeted atleast twice with information regarding ONEOK, Inc. voluntarily dismissed its action against twitter, and the twitter account was transferred to the company.

⁷⁸ No. 09-2503 (N.D. Cal. 2009).

but also addresses claims of trademark infringement against a social network.⁷⁹ La Russa filed suit for the following causes of action: trademark infringement; false designation of origin; trademark dilution; cybersquatting; misappropriation of name; misappropriation of likeness; invasion of privacy; and, intentional misrepresentation.⁸⁰ Later Twitter removed the case to the United States District Court for the Northern District of California, La Russa filed a notice of voluntary dismissal after the parties settled the case.

In *Complexions Inc. v. Complexions Day Spa and Wellness Center, Inc.*,⁸¹ plaintiff Complexions filed suit against Facebook in the District Court for the Northern District of New York because Facebook took down Complexions's business page after Complexions Day Spa and Wellness Center sent a takedown notice. Among other claims, Complexions sought injunctive relief to restore its Facebook page, and alleged that the Facebook page was an asset to its business and its loss resulted in sales and marketing potential losses that could not be fully remedied by money damages. The Court, however, never reached the merits of the case, because Complexions voluntarily dismissed the action with prejudice.⁸²

⁷⁹ On June 5, 2009, Tony La Russa, the manager of the St. Louis Cardinals, filed a complaint against Twitter, accusing Twitter of cybersquatting. The dispute centered on a Twitter profile that used La Russa's name, had a picture of La Russa, and had a headline that said "Hey there! Tony La Russa is now using Twitter." The profile encouraged users to "join today to start receiving Tony La Russa's updates." Unfortunately for the users who followed these tweets, the status updates were vulgar and derogatory. La Russa argued that the author of the profile intended, in bad faith, to divert Internet traffic away from La Russa's website and make a profit from the injury to La Russa's mark. La Russa's complaint alleged that the fake Twitter page constituted trademark infringement and dilution, cybersquatting, and misappropriation of name and likeness.

⁸⁰ Jillian Bluestone, *La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks*, 17 (2) JEFFREY S. MOORAD SPORTS LAW Journal 577, 573-604 (2010).

⁸¹ *Complexions Inc. v. Complexions Day Spa and Wellness Center, Inc.* 1:11-cv-00197-GLS-DHR (N.D.N.Y., 2011)

⁸² In *Complexions Inc. v. Complexions Day Spa and Wellness Center, Inc.* the case involves a spa in New York which has been operating under the names "Complexions" and "Complexions Spa for Beauty and Wellness," since 1987, but with no federally registered service mark. Enter "Complexions Day Spa" which began doing business in California in 2001 and applied to register several "Complexions"-based marks in 2007 with the U.S. Trademark Office. The New York Complexions did not seek federal registration until 2010. Both spas have Facebook pages and the similar names in social media created confusion to the customers. Complexions Day Spa- California requested that Facebook take down the site for Complexions-New York. Facebook complied and removed plaintiff's page. Complexions- New York responded by filing a suit for a declaratory judgment of its

In India, in *Burberry Limited & Anr. v. 99 Labels.Com & Ors.*,⁸³ it came to plaintiff's knowledge that the defendants were dishonestly selling/counterfeit plaintiff's products through their website and also defendants were advertising their infringing/counterfeit plaintiff's products on social networking site; Facebook.⁸⁴ The High Court of Delhi granted permanent injunction restraining the defendants, their companies, their directors, partners or proprietors, as the case may be, its officers, servants, agents, associates and representatives or anyone who may be acting for and on its behalf from advertising, selling, offering for sale, marketing, trading, directly or indirectly dealing in any products bearing the trademarks on their website or through Facebook. Decree of damages against the defendants and in favour of the plaintiffs were granted.

In a similar case, *M/S Ht Media Ltd & Anr v. Navneet Chaturvedi & Anr.*,⁸⁵ defendants not only used a trade mark that is identical to the trade mark „HINDUSTAN TIMES“ which is registered trade mark of the plaintiff but also makes use of a mark identical to the plaintiff's trade mark „HT“ and the HT Logo. They have used the trademarks identical to the plaintiff's without the permission of the plaintiffs and the defendant have extended the illegal use of the plaintiffs' trademarks over various other social networking platforms, viz Facebook, Twitter and LinkedIn and thus have caused substantial harm to the plaintiffs by misrepresenting to the target audience that the defendants' business is related to that of the plaintiffs. The High Court of Delhi has granted compensatory damages

trademark rights and for an injunction requiring Facebook to restore the disputed page stating that the particular page is alleged to be “a valuable trade asset”.

⁸³ *Burberry Limited & Anr. vs 99 Labels.Com & Ors.* CS(OS) 2306/2013 & I.A.No.18933/2013 (Del. 2017), <https://indiankanoon.org/doc/26729376/>.

⁸⁴ Plaintiffs have valid registration for the mark 'BURBERRY' in numerous jurisdictions around the world including the United Kingdom, CTM, China, Australia, and Indonesia. In India alone, the mark 'BURBERRY' is registered in classes 3, 9, 14, 18, 24 and 25. Further, the plaintiffs' mark 'BURBERRY CHECK' in classes 18, 24 and 25 and Equestrian Knight Device is registered under classes 18, 24. In July 2013, it came to plaintiff's knowledge that the defendants were dishonestly selling/counterfeit 'BURBERRY' and 'BURBERRY CHECK' products and also unauthorizedly using the aforesaid trademarks on their website www.99.labels.com without the permission and authorization from the plaintiffs. She further states that defendants were offering for sale counterfeit BURBERRY merchandize like men's shirts, hand bags etc. which are bearing the plaintiffs' registered trade mark BURBERRY CHECK and Equestrian Knight Device with photographs of counterfeit products on their website www.99labels.com. She also states that defendants were advertising their infringing/counterfeit BURBERRY products on social networking sites i.e. www.facebook.com.

⁸⁵ *M/S Ht Media Ltd & Anr vs Navneet Chaturvedi & Anr* CS(OS) 1883/2014 & CCP (O) No.7/2015 (Del. 2017).

and awarded punitive damages. A decree for a sum of `5,00,000/- in favour of the plaintiffs and against defendants, jointly and severally, is passed because of infringing the registered marks, logo, label etc. of the plaintiffs despite the restraint order. The plaintiff was also made entitled to interest @ 12% pa on the damages so awarded from the date of filing of the suit till the date of realization.⁸⁶

⁸⁶ See also *Industria De Diseno Textile Sa vs Oriental Cuisines Pvt. Ltd.* CS (OS) No. 1472/2013 (Del. 2015), <https://indiankanoon.org/doc/112719454/>. Plaintiff is an internationally reputed company engaged in the manufacture, design, sale and distribution of fashion and related lifestyle products in various classes of International Classification of Goods and Services. In India, the Plaintiff carries out commercial operations through its associate company, Inditex Trent Retail India Private Limited, a joint venture between the Plaintiff and Trent Limited of well-known Tata Group Company. It is the case of the Plaintiff that the Plaintiff coined, conceived and adopted ZARA as its trademark in 1975 and opened first ZARA shop 38 years ago in A Coruna, Spain. The domain name zara.com was registered by the Plaintiff on 29th May, 1997 and the same has since been in continuous use of the Plaintiff.

Defendants' emphasis is on the use of the mark ZARA and the Defendants misrepresented to the public at large on social media like Facebook and Twitter by addressing themselves as ZARA, ZARA CHENNAI, ZARA CATHEDRAL, ZARA KOLAKTA, ZARA AIRPORT, etc. to induce the public to visit their establishment situated in Chennai and Kolkata. Defendant's indiscriminating use of the mark ZARA has irreparably damaged the reputation and goodwill of the Plaintiff by tamishing its most valuable ZARA mark.

Court held that; the Defendants' adoption of the mark ZARA TAPAS BAR and ZARA, the Restaurant and Bar has been found to be adopted dishonestly and fraudulently. The explanation as to the manner of adoption of the name and that it has a dictionary meaning is found to be not convincing. The mark ZARA (word) is being used prominently with very small words "TAPAS BAR" which indicates the Defendants' intention to ride on the Plaintiff's reputation as ZARA was a well known mark even in the year 2003 having its presence in over 44 countries and annual turnover of 3 million Euros. Thus, the Plaintiff, in my considered opinion, has a good prima facie case entitling it to protection of the mark even in relation to dissimilar goods and services. And *Tata Sons Limited vs Gina Kilindo & Ors.* on 6 January, 2014, The plaintiff is the proprietor of the trademark TATA by virtue of priority in adoption, long, continuous and extensive use and advertising, and the reputation consequently accruing thereto in the course of trade. The plaintiff and companies promoted by them have exclusively used TATA as a trademark so that it is uniformly perceived as indicative of the source of the products/services i.e. the plaintiff and the companies promoted by the House of TATA. The plaintiff is the proprietor of several trademarks comprising/containing the word TATA as well as the "T within a circle" device under various classes. As a result of the continuous and extensive use of the plaintiff's trademark TATA over a long period of time spanning a wide geographical area coupled with extensive promotion and publicity, the said trademark enjoys an unparalleled reputation and goodwill and has acquired the status of a "well-known" trademark. The present case pertains to the impugned domain names and also the use of plaintiff's mark on popular social networking websites such as Facebook and Twitter. In this case, if an interim order is not passed, the plaintiff would suffer an irreparable loss and injury. Thus, till the next date, Court ordered the

Table IV.3 – Infringement nature and relevant legislative feature comparison- Social networking sites

Case Title	Trademark Infringement Nature	Relevant Trademark Legislative Feature
Nine West Dev. Corp. v. Does	Unauthorized use. Deceptive similarity. Trademark dilution. Cybersquatting. Misleading advertisement. Use of trademark in commerce by infringer.	Commercial Uuse, Displayed in the sale or advertising, Dilution by tarnishment
Grooms v. Legge	Unauthorized use. Deceptive similarity. Cybersquatting. Misleading advertisement. Use of trademark in commerce by infringer.	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment
New York City Triathlon, LLC v. NYC Triathlon Club, Inc	Unauthorized use. Deceptive similarity. Trademark dilution. Misleading advertisement. Use of trademark in commerce by infringer.	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment, Dilution by blurring
TDC Int'l Corp. v. Burnham	Unauthorized use. Deceptive similarity. Cybersquatting.	Commercial use, Displayed in the sale or advertising, Dilution by

defendants, their partners or proprietors, as the case may be, their officers, servants and agents are restrained from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any business whatsoever under the corporate name Tata Agro Holding Ltd. The ex parte ad interim injunction is also passed against the defendants to be in force during the pendency of the present proceedings, directing the defendants to immediately take down their Facebook, Twitter and such other web pages and also directing the impugned domain names www.tataagro.com, www.tataagro.biz, www.tataagro.org and www.tataagro.net to be put on hold.

	Trademark dilution. Misleading advertisement. Use of trademark in commerce by infringer.	tarnishment, Dilution by blurring
Quia Corp. v. Mattel	Unauthorized use. Deceptive similarity. Misleading advertisement. Use of trademark in commerce by infringer.	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment.
Hasbro, Inc. v. RJ Softwares et al	Unauthorized use. Deceptive similarity. Use of trademark in commerce by infringer. Misleading Metatag.	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment.
Oneok Inc. v. Twitter Inc	Unauthorized use. Deceptive similarity. Trademark dilution. Cybersquatting. Misleading advertisement. Use of trademark in commerce by infringer.	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment.
La Russa v. Twitter Inc	Unauthorized use. Deceptive similarity. Username squatting.	Displayed in the sale or advertising, Dilution by tarnishment.
Complexions Inc. v. Complexions Day Spa and Wellness Center, Inc	Unauthorized use. Deceptive similarity. Trademark dilution. Cybersquatting. Misleading advertisement. Use of trademark in commerce by infringer.	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment. Dilution by blurring

Burberry Limited & Anr. v. 99 Labels.Com & Ors	Unauthorized use. Deceptive similarity. Trademark dilution. Misleading advertisement. Sale of counterfeit products. Use of trademark in commerce by infringer.	Use in the course of trade, Displayed in the sale or advertising, Detrimental to the repute of the trademark
M/S Ht Media Ltd & Anr v. Navneet Chaturvedi & Anr	Unauthorized use. Deceptive similarity. Trademark dilution. Cybersquatting. Misleading advertisement. Use of trademark in commerce by infringer.	Use in the course of trade, Displayed in the sale or advertising, Detrimental to the repute of the trademark, Detrimental to the distinctive character of the mark.

From the above table it can be understood that the major trademark legislative features that are applied for infringement cases in social networking are the use in commerce, trademark dilution principle. The Courts in these aspects have applied the traditional principles of trademark law features on social media infringement cases. It is important to analyze in detail as to the applicability of these features in social media. Whether these provisions are properly framed to adapt with the complex nature of social media platforms and an analysis must be made with respect to its automatic application in these platforms. The corresponding defenses to these features must be sorted out, as the fair use nature in social media deviates from the traditional trademark fair use defenses. The analysis will be made in Chapter VI of this book.

4.5.2 Trademark infringement in collaborative projects and blogs

Social media marketing can attract more people to a desired website thereby enhancing the branding process. Some of the best

marketing techniques are; effective use of an Email marketing technology, get ranked at the top in major search engine through proper search engine optimization,⁸⁷ publish and advertise the product in blogs, interact with current and potential customers through forums get socially bookmarked in more social media platforms.⁸⁸

As mentioned formerly, search engine optimization is an underlying factor with respect to online marketing. The way search engine optimization can be done is through purchase of keywords, use of collaborative projects and blogs. Even though search engine is not theoretically a social media platform, its purpose is to act as a gateway to numerous social media platforms. The search results provided by the search engine upon the query made by the user decides the traffic to a social media website. So, considering online advertisement, search engines form a crucial part in deciding a brand's growth. One of the important aspect with respect to trademark infringement via social media is 'commercial use' of the mark or 'displaying mark in the sale or advertisement' in a social media platform or the search engine result page resulting in consumer confusion.

Collaborative projects and blogs are very dynamic social media platforms. Users rely on it for various purposes depending on its nature. Social bookmarking is a form of collaborative project which allows users to add, annotate, edit, and share bookmarks of web documents which can be used by advertising companies to advertise their product. The users of such social bookmarking sites get your product in front of a larger audience with ease. The sharing of bookmark enables a product owner's advertisement to be a part of the search engine optimization. Social bookmarking popularizes the website and using rich tags for the bookmarks enables search engine optimization. Even the linking of a particular webpage on a blogs, forums or message boards can enable traffic to the particular brand enhancing the possibility of customer checking out and product's marketability. Having official blog, helps to post company updates and product release. When a blog is submitted with a proper keyword tag in an online directory, enhances the blog listing.⁸⁹ And once the customer gets hands on to the product or service, his review will be posted with another bookmark on a review website, positive or

⁸⁷ The process of maximizing the number of visitors to a particular website by ensuring that the site appears high on the list of results returned by a search engine.

⁸⁸ SHASHIKANT NISHANT SHARMA, BEST TIPS AND TRICKS FOR BLOGGERS AND WEBMASTERS (2013).

⁸⁹ *Id.*

negative, which further affects or enhances the product's marketability. The following paragraphs will explain the search engine optimization process using advertising services like keyword advertising, the jurisprudence related to it and then search engine optimization using the social media functionality of hash tagging advertisements and finally search engine optimization using the social media websites like social bookmarking pages.

4.5.2.1. Search Engine optimization through advertising services: Keyword advertising

When an internet user performs a search, the search engine will display two sets of results. The first set, known as natural results, are provided based on objective criteria determined by the search engine. The search engine then displays the sites that best correspond to the search terms in decreasing order of relevance. The second set of results are paid advertisements displayed alongside the natural results and are provided because the search terms the internet user entered match keywords purchased by advertisers.⁹⁰

Advertisers gain an advantage by using keywords because keyword-linked ads can circumvent search engine's common site ranking system for non-sponsored links. While ads are still subject to ranking among themselves, they gain priority over non-sponsored links on search engine's results pages. And, because the ads are displayed besides search results that have been subject to the usual page ranking algorithms and often do not expressly indicate that they have been sponsored, internet users may assume that the ads represent the most relevant search results. Thus, in order to attract users to click on them, the ads trade on search engine's reputation for providing the most appropriate search results, while making a potentially worldwide advertising audience available at very low financial and technical cost.⁹¹

Keyword trademark infringement is a term given to a situation wherein a company holding trademark rights alleges infringement thereof when the mark is used by other competitor companies as keywords in online searches or other collaborative websites to promote their own goods or services. This misleads customers to the wrong websites and if

⁹⁰ Lazaros G. Grigoriadis, *Comparing The Trademark Protections In Comparative And Keyword Advertising In The United States And European Union*, 44 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 149-205 (2014).

⁹¹ *Id.* at 107.

the latter company wants, it can cause severe damage to the original company's reputation. So, as a result, the latter company can also profit from the goodwill of the former.⁹²

Popular brand blogs, positive review pages when linked to a keyword will enable search engine optimization with respect to that brand. Unauthorized use of a keyword may occur, and that will amount to trademark infringement if a plaintiff can prove that the keyword has a valid mark that is entitled to protection under the relevant legislation, and another person had made use in commerce of plaintiff's registered trademark without his consent and the use has caused confusion, or likely to have caused a confusion, or has deceived as to the origin, sponsorship, characteristics, or qualities of his or another's goods.⁹³

U.S. Courts have generally held that in order to find trademark infringement under section 32(1) of the Lanham Act, the following conditions must be met: (1) the trademark must be valid; (2) the accused infringer must have used the trademark in commerce and in connection with the sale or advertising of goods or services; (3) without authorization; and (4) this unauthorized use is likely to cause confusion. The controversy over trademark infringement via keyword advertising in U.S. case law has mostly centered on the second and fourth elements.⁹⁴

With respect to an act amounting to non-infringement under this category the act must come under the general fair use or the nominative fair use criteria. In a social media platform if an undertaking uses a trademark without authorization of the trademark holder, uses the word in a mere descriptive meaning, it can invoke the classic fair use defense. The descriptive fair use defense can be used by social media providers to limit their liability with respect to infringement by bringing in the concept of mere descriptive use.⁹⁵ Nominative fair use permits use of another's trademark to refer to the trademark owner's actual goods and services associated with the mark. Nominative fair use generally is permissible as long as⁹⁶ (1) the product or service in question is not readily identifiable without use of the trademark - subsidiary principle (2) only so much of the mark as is reasonably necessary to identify the product or service is

⁹²Shashank Shekar, *Keyword Trademark Infringement - A Countrywise Analysis* <http://www.legalservicesindia.com/article/article/keyword-trademark-infringement-a-countrywise-analysis-794-1.html>.

⁹³Civil liability and civil action, section 32(1)(a), 43, 45 of the Lanham Act.

⁹⁴Lazaros G. Grigoriadis, *Supra* note 90 at 141,142.

⁹⁵DANNY FRIEDMANN, *Supra* note 7 at 123.

⁹⁶New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302 (9th Cir. 1992).

used - proportionality principles and (3) use of the mark does not suggest sponsorship or endorsement by the trademark owner-passivity principle.

In *Hearts on Fire Co., LLC v. Blue Nile, Inc.*,⁹⁷ plaintiff Hearts on Fire Company, a wholesaler of diamonds that sold only to authorized dealers, owned the federally registered HEARTS ON FIRE mark. Hearts on Fire advertised via its heartsonfire.com website at which it promoted its diamonds and directed customers to its authorized resellers. Defendant Blue Nile, an online diamond and jewelry retailer, was not an authorized reseller of plaintiff's diamonds. Blue Nile purchased the HEARTS ON FIRE mark as a search engine keyword to trigger the display of sponsored advertisements that linked to Blue Nile's website. Some of these sponsored ads contained the HEARTS ON FIRE mark in the ad text, while others did not. Hearts on Fire further alleged that Blue Nile's own website search functionality returned a list of Blue Nile web pages when the phrase "HEARTS ON FIRE" was searched. These returned pages, however, featured combinations of the words "hearts" and "on fire," but did not display the exact phrase "HEARTS ON FIRE." Hearts on Fire sued for trademark infringement and unfair competition, among other claims. Blue Nile moved to dismiss those claims based on its purchase of HEARTS ON FIRE as a keyword and on the search results using the Blue Nile website's search functionality.⁹⁸

The United States District Court, District of Massachusetts denied Blue Nile's motion to dismiss. It first addressed whether Blue Nile's purchase of the HEARTS ON FIRE mark as a keyword to trigger sponsored ads constituted a "use in commerce." The Courts relied on the broader "use" definition in Lanham Act regarding the "use in commerce" of "any reproduction . . . of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services." Based on this definition, the Court here found that the purchase of trademarks as keyword triggers "is precisely such a use in commerce, even if the trademark is never affixed to the goods themselves."⁹⁹

Hearts on Fire Company had offered sufficient allegations to support its claim that consumers were likely confused and potentially misled by Blue's use of the mark as a trigger for its sponsored links. While these ads may not have displayed the mark itself, the surrounding context supplied a sufficient basis to support allegations of consumer

⁹⁷ *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, WL 794482 (D. Mass. 2009).

⁹⁸ *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, INCONTESTABLE https://www.finnegan.com/files/Upload/Incontestable_Apr09_5.html.

⁹⁹ *Id.*

confusion. A consumer entering a search for Hearts on Fire Company diamonds could easily believe that Blue Nile was an authorized retailer when presented with Blue's sponsored link.

It is evident from this case that the defendant act involved a commercial use under the Lanham Act as they displayed the trademark in advertising and also the unauthorized use had led to consumer confusion. But in another case *S&L Vitamins v Australian Gold*,¹⁰⁰ Trademark owner distributed its tanning products through independent distributors pursuant to a distribution agreement that permitted sales of the product only to specialized tanning salons. Trademark owner provided extensive training to tanning salon operators on the proper use of its products. Competitor obtained trademark owner's products from tanning salon owners, not from licensed distributors. Competitor purchased keywords, incorporate trademark owner's marks in metatags, and used trademark owner's marks on the website in a visible manner in together with photographs of trademark owner's products to sell authentic products.¹⁰¹ The question before the United States District Court, Eastern District of New York was; does use of a competitor's trademark as a search engine keyword that triggered a "sponsored link," or a website metatag constitute "use" sufficient to state a claim for trademark infringement or unfair competition?

The Court held that by purchasing keywords and sponsored links and using the marks in its metadata, the competitor (re-seller of trademark owner's products) had not "used" the marks in the trademark sense and thus does not provide an independent basis for a trademark infringement claim. Trademark infringement under the Lanham Act required use of a trademark in connection with the sale of goods or services in a manner likely to lead to consumer confusion as to the source of such goods or services. Using a trademark to trigger a sponsored link or as a metatag does not constitute such use because it is not visible to the public. The Court followed the reasoning of the Second Circuit in *1-800 Contacts, Inc.*,¹⁰² and agreed that "a company's internal utilization of a trademark in

¹⁰⁰ 521 F. Supp. 2d 188 (E.D.N.Y. 2007).

¹⁰¹ *Cases Addressing the Use of Another Party's Mark as a Keyword to Generate Sponsored Links in Internet Search Engines* 91, 92 <http://www.inta.org/Advocacy/Documents/INTA%20Keyword%20Jurisprudence.pdf>.

¹⁰² *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 2005), Second Circuit found there was no "use" of the trademarks and overturned District Court's decision. A company's internal use of a trademark in a way that doesn't communicate it to the public, does not violate the Lanham Act.

a way that does not communicate it to the public is analogous to an individual's private thoughts about a trademark."

It can be understood from these cases that a mere purchase and a company's internal use of a keyword does not amount to trademark infringement as under the Lanham Act, the use of the keyword must create a consumer confusion, which occurs only when the keyword is used in a communication to the public.¹⁰³

In *CJ Products LLC v. Snuggly Plushez LLC*,¹⁰⁴ plaintiffs CJ Products and Ontel Products sought a preliminary injunction against defendants Snuggly Plushez. The claim alleged false designation of origin, and false advertising. The Eastern District of New York granted the plaintiffs' preliminary injunction motion.¹⁰⁵

The Court granted the preliminary injunction with respect to plaintiff's copyright, false advertising, false designation of origin, and trademark infringement claims and enjoined defendant's use of the term "Pillow Pets" and "My Pillow Pets" in the Google AdWords Program. The Court only discussed AdWords and keywords with respect to Plaintiff's trademark infringement claim and noted the similarity between the two marks and the prominence with which defendants used the pending mark "Pillow Pets" in its website and AdWords advertisements. Additionally, the Court rejected defendants' argument that the use of keyword advertising was either a permissive, descriptive use or comparative advertising protected by the First Amendment.

Plaintiff's evidence of actual confusion regarding similarity, the Court found that Plaintiff's marks and defendants' advertising on the search-results pages "were virtually identical in appearance, sound, and meaning." Moreover, the Court noted that defendants' website was nearly identical to plaintiff's website, including similar formatting, font, color

¹⁰³ See also *Merck & Co., Inc. v. Mediplan Health Consulting, Inc* 2006 WL 800756 (S.D.N.Y. 2006)

¹⁰⁴ 809 F. Supp. 2d 127 (E.D.N.Y. 2011).

¹⁰⁵ Plaintiff CJ Products develops, produces, and sells toys. The most popular toy Plaintiff produces, and the subject of this action, is the Pillow Pet ("The Product"). The Product was introduced in 2003 and branded with several trademarks including: "My Pillow Pets," a Pillow Pets logo, and "It's a Pillow, It's a Pet...It's a Pillow Pet." Plaintiff had applied for registration of the "Pillow Pets" mark (or "pending mark") at the time of the action. Defendants, Snuggly Plushez and Berkant Keiskbas, are also in the business of producing toys, including merchandise quite similar to Plaintiff's Pillow Pet product line. Defendants were apparently using marks similar to Plaintiff's registered and pending marks and had purchased and used these marks through Google AdWords to direct potential customers to Defendants' website. Accordingly, Plaintiff brought suit and sought a preliminary injunction.

scheme, and domain names (pillowpets.co compared to pillowpets.com). Regarding actual confusion, the Court found it weighed heavily in plaintiff's favor because the website viewer data confirmed a precipitous increase in defendant's website traffic following the use of plaintiff's mark as an AdWord.

In *World Entertainment Inc. v. Brown*,¹⁰⁶ plaintiff World Entertainment ("WE") is a music production company that provides entertainment for weddings and other events. All bands managed by WE have the federally registered trademark "CTO" in their names. Defendants, former WE employees and members of the WE band CTO Tribeca, left WE to start Grand Entertainment, a music production company. Part of defendants' new venture included rebranding its former band as Tribeca Grand. However, defendants continued to use the CTO mark in promotional materials to endorse their new venture. In addition, defendants used the CTO mark to divert internet traffic to Grand Entertainment's website through search engine phrase matching using Google AdWords and metatags. Defendants continued to infringe WE's mark despite receiving several cease and desist letters, a summons in the instant action, and an eventual entry of default judgment against them.

Following the default judgment, the United States District Court, Eastern District of Pennsylvania considered the assessment of damages. The Court entered monetary damages in excess of \$400,000 based on this "exceptional case of knowing infringement." In addition, the Court granted an injunction restraining defendant from, among other things, "purchasing or using any form of advertising including use of keywords or Meta tags in Internet advertising containing plaintiffs' CTO trademark."

In *Radiance Found., Inc. v. NAACP*,¹⁰⁷ the United States Court of Appeals for the Fourth Circuit held there was no infringement in using the mark "NAACP" in an online article criticizing the NAACP. The Court held that use in social criticism and commentary is not use in connection with the sale of goods or services, as required for trademark infringement even if the site solicited donations. A web search for "NAACP" might lead to the page, but that was not the consumer confusion that the Lanham Act guards against. Nor was there "tarnishment," a form of trademark dilution. The Lanham Act limits the dilution cause of action with the defense of using the mark in "identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the

¹⁰⁶ 2011 WL 2036686 (E.D. Pa. May 20, 2011).

¹⁰⁷ No. 14-1568 (4th Cir. 2015)

famous mark owner.” In short, a trademark owner cannot limit criticism of it by preventing others from directly referring to it. Similarly, use of a trademark in keyword advertising has been held not to infringe, where there was a strong inference “that the purpose of defendants’ use of the marks was to disparage Plaintiff and endorse defendant,” which would reduce any likelihood of confusion.¹⁰⁸

4.5.2.2. Direct liability and contributory liability of keyword providers

Content provider liability also applies to online advertisements. A use that violates the rights of a third party concerns the advertiser rather than the search engine. The content and keywords of an advertisement are provided by the advertiser. A search engine generates list of advertisements based on keyword searches and acts as an intermediary listing the online advertisements for internet users. When an internet user performs a keyword search, the search engine displays the advertisements that correspond to those words. These are referred to as the ‘natural’ results of the search.¹⁰⁹ The advertiser is responsible for the keywords, categories and/or other channeling mechanisms; the advertisement produced by or for the advertiser; and the services or products in the advertisement. The search engine places the advertisement on the sponsored section of the results page. The short text that appears on each search result is automatically generated by computer processed algorithms created by third parties. Therefore, the internet service provider that allows an advertiser to use a third party trademarked keyword and then displays the advertisement is not violating the trademark rights of a third party.¹¹⁰ The internet service provider cannot store data information and cannot control the data, and therefore, it cannot be responsible for the data kept upon the advertiser’s request. A connection between a keyword and a search word shall not be evaluated as if a search engine has the authority to control such data. Additionally, an internet service provider that stores a keyword sign identical to a trademark and organizes the advertisement

¹⁰⁸ Goldline, LLC v. Regal Assets, LLC, No. 14-03680, 2015 U.S. Dist. LEXIS 52417, 7 (C.D. Cal. 2015).

¹⁰⁹ European Court of Justice, C-236/08 and C-238/08 Google France and Google [2010] ECR I-0000 para. 22; European Court of Justice, C-278/08 BergSpechte [2010], para. 5-7.

¹¹⁰ In Google v. France, the European Court of Justice held that, “an internet referencing service provider which stores, as a keyword, a sign identical with a trademark and organizes the display of ads on the basis of that keyword does not use that sign within the meaning of Article 5(1) of Directive 89/104 or of Article 9(1)(a) and (b) of Regulation No 40/94”. European Court of Justice, C-236/08 and C-238/08 Google France and Google [2010] ECR I-0000 para. 99.

display on the basis of that keyword is not using that sign in the course of trade for its own goods or services.¹¹¹ Online advertisements, although a successful component of a search engine's business model, generate similar results to other search engine based lawsuits; search engine are not liable for a third party's content and excessive monitoring expectations are unrealistic. A landmark decision on this topic is the European Court of Justice's *Google v. Louis Vuitton* decision.¹¹² The Court held that an internet referencing service provider which stores, as a keyword, a sign identical with a trade mark and organizes the display of advertisements on the basis of that keyword does not use that sign,¹¹³ thereby not holding Google liable for trademark infringement. The Court reasoned that the proprietor of a trademark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trademark or goods or services identical with those for which that mark is registered.¹¹⁴ Secondly, the Court held that if an internet referencing service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored, that service provider (i.e. Google) cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

Two powerful doctrines applied to decide upon search engine liability under American jurisprudence are trademark use and initial interest confusion. Unlike traditional infringing uses of trademark, Google's use is invisible to consumers, though it profits from the sale of keywords. Therefore Courts have considered the keyword sale transaction separate from the consumer's purchase of the advertised goods or services and have found that AdWords's use of the trademark is not a "use in commerce".¹¹⁵ But other Courts, such as the United States Court of Appeals for the Second Circuit in *Rescuecom Corp. v. Google Inc.*¹¹⁶ have taken the view that it does qualify as a use in commerce on the

¹¹¹ See generally Gürkaynak, Gönenç & Yılmaz, İlay & Durlu, Derya. *Understanding search engines: A legal perspective on liability in the Internet law vista*. 29 COMPUTER LAW & SECURITY REVIEW 40–47 (2013).

¹¹² 46 European Court of Justice, C-236/08, *Google France SARL, Google Inc. v. Louis Vuitton Malletier SA* [23 March 2010] (Joined cases: C-236/08 to C-238/08).

¹¹³ *Id.* at para. 121(2).

¹¹⁴ *Id.* at para. 121(1).

¹¹⁵ Ramyaa Veerabathran, *Adwords? - Competition And IPR Law Implications Of Google'S Search/Advertising Platform* INDIAN J. INTELL. PROP. L. 83, 81-92 (2012).

¹¹⁶ *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123 (2d Cir., 2009).

reasoning that the sale to advertisers is not an internal, non-commercial use.¹¹⁷

With respect to likelihood of confusion, Rosetta StoneV Google inc, Rosetta Stone contends that Google’s policies concerning the use of trademarks as keywords and in ad text created not only a likelihood of confusion but also actual confusion as well, misleading Internet users into purchasing counterfeit ROSETTA STONE software. United States Court of Appeals for the Fourth Circuit reversed summary judgment in Google’s favor because Plaintiff put forth sufficient evidence that Google may have directly and indirectly infringed and diluted its trademarks, and Google did not establish a fair use of defense. Court was able to identify the Initial Interest Confusion, Evidence Regarding Confusion, Actual Confusion and the intent to confuse making google liable.¹¹⁸

¹¹⁷ Rescuecom, a computer repair company, sued Google on the grounds that Google’s sale of Rescuecom’s trademarks as keywords in AdWords constitutes trademark infringement, false designation and dilution under the Lanham Act. Relying on the Second Circuit’s opinion in 1-800 Contacts v. WhenU.com, the district Court dismissed Rescuecom’s complaint on the grounds that Google’s use of Rescuecom’s mark was not a “use in commerce.” Specifically, the Court rejected Rescuecom’s claim that Google used its mark in commerce when it sold the mark to advertisers, which caused their ads to appear in response to user queries containing the mark, and when it recommended that advertisers purchase Rescuecom’s mark in its Keyword Suggestion Tool.

On appeal, the Second Circuit reversed the dismissal, holding unequivocally that a search engine’s sale of a trademark-bearing keyword to an advertiser does constitute use of the trademark by the search engine. The Court devoted quite a bit of ink to distinguishing the facts in 1-800 Contacts from those in the case at hand. The pop up advertisements at issue in 1-800 Contacts were triggered by the content of the website address that a computer user entered into their browser. The pop-up program sorted the ads into various categories, and displayed ads from categories that matched the website address entered by the user. The software provider did not sell any trademarks to the advertisers, since the pop-up ads were not triggered by trademarks. Google, by contrast, did sell to advertisers the right to have their ads triggered by the appearance of a given trademark a Google search engine query. Moreover, Google’s Keyword Suggestion Tool even encouraged advertisers.

¹¹⁸ Rosetta Stone v. Google, 676 F.3d 144 (4th Cir. 2012), The Court vacated summary judgment for Google on the direct infringement claim because genuine issues of material fact existed as to Google’s intent, instances of actual confusion, and the appropriate level of consumer sophistication. While not expressing an opinion on whether Google used the marks under the Lanham Act, the Court held a reasonable jury could find Google intended to confuse consumers based on internal Google reports that indicated about 7% of Google’s total revenue originated from trademark keyword sales and searches and there was “significant source confusion among internet searchers when trademarks were included in the title or body of the advertisements.” Similarly, the Court found Rosetta Stone presented sufficient evidence of actual confusion based on the deposition testimony of five consumers who actually suffered confusion, internal Google reports indicating “high” consumer confusion when trademarks are used in sponsored links, and survey reports showing a 17%

In India, The High Court of Judicature in Madras grappled with the IPR implications of AdWords in a trademark infringement suit, *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd.*¹¹⁹ The Plaintiffs, BharatMatrimony.com, had registered in their name a series of trademarks such as ‘Telugu Matrimony’, ‘Urdu Matrimony’, ‘Tamil Matrimony’ etc. defendant Google India Pvt. Ltd., was sued for trademark infringement owing to its ‘Keywords Suggestion Tool’, which in its search result page suggested the use of the plaintiff’s registered trademark for Google’s ‘Ad-words’ program. Other defendants involved in running rival matrimonial websites, were using the Plaintiff’s registered trademarks as keywords thereby displaying their advertisements as sponsored links on the Google search page. The text of the ‘Ad-words’ advertisement while providing a link to defendants’ website would also display the text of the Plaintiff’s registered trademarks.¹²⁰

The main ‘questions of law’ before the Court were; whether the plaintiff’s trademarks were descriptive or generic thereby diluting the strength of such a trademark? Whether the defendants were ‘using’ the trademark as understood in Sections 2(2)(b) & (c) and Section 29 of the Trade Marks Act, 1999? Whether Google was liable for contributory trademark infringement for including the plaintiff’s trademarks in its ‘Keyword Suggestion Tool’?

On the question of descriptive trademark question, the Court ruled in favor of defendants. Court observed that the trademarks were found to be descriptive and not substitutable, hence neither the competitors nor

confusion rate. The Court also found the district Court improperly inferred that consumers of Rosetta Stone’s products were sophisticated and could “distinguish between [Google’s] sponsored link pages and organic results” because such inferences are reserved for the jury and not a judge ruling on motions for summary judgment.

The Court also found the functionality doctrine did not protect Google from direct infringement liability because Rosetta Stone never used the mark in a functional manner, and Google’s use of the mark as a functional tool in its search engine was immaterial as only the trademark owner’s use of the mark matters.

The Court vacated summary judgment for Google on the contributory infringement claim because a question of fact still existed as to whether Google continued to supply its services to “identified” infringers it knew or had reason to know about. Specifically, the Court noted Google continued to allow advertisers who had previously been identified as counterfeiters to use Rosetta Stone’s mark on different websites as keyword triggers and in the text of the sponsored link advertisements, and that this could constitute contributory infringement.

¹¹⁹ *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd.* Indlaw MAD 2449 (Mad. 2010).

¹²⁰ Prashant Reddy, *Madras High Court hands Google ‘Adwords’ its first interim victory* SPICY IP (Oct 6, 2010), <https://spicyip.com/2010/10/madras-high-court-hands-google-adwords.html>.

Google could have used a substitute. Google therefore fell within the ambit of the exception under Section 29(8) which allows advertisements rendered in conformity with honest commercial practice and the defense of honest practices under commercial matters under Section 30 of Indian Trademark Act, 1999.¹²¹

On the question of whether the defendants were ‘using’ the plaintiff’s trademarks as understood in Section 2(2)(b) & (c) and Section 29 the Court found in favour of the defendants. Section 2(2) is a definitional provision which states when a mark may said to be used in the context of goods or services. Section 29 defines when exactly a trademark is infringed. The judgment draws a fine distinction between the various provisions of Section 29 which individually deal with situations of ‘use during trade’, ‘application of the mark’ and ‘advertisement of the mark’. In this case the Court held that the defendant’s actions would be classified as ‘advertisement of the mark’. The Court however also clarified that the same would qualify under the exception of Section 29(8) which excludes those advertisements that were rendered according to ‘honest practices’ in industrial or commercial matters. The Court also pointed out that Section 30 of the Trademark Act, allows ‘honest practices in commercial matters’ as a valid defence. In the case at hand the Court held that the defendants’ use of the marks was honest since there were no possible synonyms that the defendants could have used to honestly describe their services.¹²²

On the question of whether Google was liable for contributory infringement the Court found in favour of Google. The Court ruled that contributory infringement required intention and that in the present case since the trademarks were basically descriptive it could not be proved that Google had intentionally suggested these marks with a view to infringe the Plaintiff’s trademarks. The Court however held that if the keyword suggestion tool were to suggest an arbitrary, fanciful trademark then in that case it would possibly be held for contributory infringement.¹²³ The Madras High Court did not apply the initial interest confusion test, though it discussed the doctrine ‘s evolution.¹²⁴

¹²¹ Ramyaa Veerabathran, *Supra* note 115 at 88.

¹²² Prashant Reddy *Supra* note 120.

¹²³ *Id.*

¹²⁴ Ramyaa Veerabathran, *Supra* note 115 at 89.

4.5.2.3. Search Engine optimization through Hashtag advertising

A hashtag is a string of characters comprising a hash symbol and a sequence of letters, whether an acronym, a word, or a phrase. It adds a label to a comment, image, video, or any other type of content, enabling users to search for other posts containing the same uniform sequence of characters by clicking on the tag or typing it into a search box.¹²⁵ They are now supported on myriad social networking sites and social bookmarking sites and blogs, including Facebook, Instagram, Pinterest, Vine, Flickr, Google+, YouTube, Kickstarter, Delicious, and Tumblr.¹²⁶

Marketers use hashtags across and beyond social media platforms to launch campaigns, share information, generate discussion, engage customers, and increase loyalty. Consumers, in turn, use hashtags to engage with producers and other consumers; offer feedback; praise and criticize products; express themselves; and promote their content. Journalists and the public use hashtags to disseminate news; engage in activism; tag content relating to a topic; and append additional commentary. And hashtag use continues to shift and expand, online and offline.¹²⁷ Marketers are increasingly turning to social media to advertise to and engage with consumers directly. The hashtag, initially a way for social media users to group content and filter conversations,¹²⁸ dominates Twitter—97% of the top 100 brands that posted a tweet in the fourth quarter of 2014 included a hashtag.¹²⁹ Hashtags play an increasingly important role on other platforms, including Facebook and Instagram. Corporations have begun staffing employees or hiring outside agencies solely to create hashtags and track their usage, and companies are applying to register tagmarks they invented. At the same time, as user-

¹²⁵ Alexandra J. Roberts, *Tagmarks*, CALIFORNIA LAW REVIEW 603, 599-666 (2016).

¹²⁶ For basic introductions to the hashtag and the roles it plays on some of the major social media sites see Rebecca Hiscott, *The Beginner's Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), <http://mashable.com/2013/10/08/what-is-hashtag/>; Michael Patteron, *How to Use Hashtags on Every Social Media Network*, SPROUTSOCIAL (Aug. 15, 2014), <http://sproutsocial.com/insights/how-to-use-hashtags/>.

¹²⁷ Alexandra J. Roberts, *Supra* note 125 at 600.

¹²⁸ “The use of hashtags became mainstream after October 2007, when citizen journalists used them to give updates about a series of forest fires in San Diego.” Elana Zak, *How Twitter's Hashtag Came to Be*, THE WALL STREET JOURNAL (Oct. 3, 2013), <http://blogs.wsj.com/digits/2013/10/03/how-twiters-hashtag-came-to-be/>; *Using hashtags on Twitter*, TWITTER HELP CENTER, <https://support.twitter.com/articles/49309-using-hashtags-on-twitter>.

¹²⁹ Denise Lee Yohn, *Use Hashtags to Generate Greater Brand Engagement*, FORBES BLOG (Feb. 18, 2015), <http://www.forbes.com/sites/deniselyohn/2015/02/18/usehashtags-to-generate-greater-brand-engagement/>.

generated content proliferates on social media, producers small and large have sought to capitalize on hashtagged words and phrases created, popularized, and imbued with meaning by the public.

Companies are encouraged to make consumer-generated content work for them: “One of the most valuable outcomes of a hashtag campaign is the hundreds of thousands of powerful, authentic photos and messages that it generates, not to mention the valuable consumer data that can be collected.”¹³⁰ Online marketing and hashtag use are both influential in and emblematic of a broader evolution in how trademarks work. A great deal has been written on the expressive functions of trademark use, including how consumers use brands and marks to forge and express their identities, communicate ideas, and signal group membership, reputation, affiliation, or status.¹³¹

The common category of hashtag relevant for brand promotion are;¹³² Producer-selected hashtags: This category includes hashtag versions of existing trademarks, typically formed by placing a hash symbol at the front of a distinctive brand name. Footwear and apparel brand NIKE becomes #Nike and the Boston Red Sox, #RedSox. In these cases, the hashtag is equivalent to the registered mark, and likely perceived that way by consumers. Most hashtags in this category serve as trademarks first and hashtags later, usually well after they have acquired commercial strength.

Marketer-deployed hashtags: Marketer-deployed hashtags serve as slogans or denote marketing campaigns. They are designed by trademark owners or their advertising agencies to disseminate information about brands, goods, or services and foster discussion among consumers on social media. While some of these hashtags exist first as stand-alone text

¹³⁰ Nicole Fallon, *#Hashtagging 101: 4 Guidelines for Small Businesses*, BUSINESS NEWS DAILY (July 8, 2014), <http://www.businessnewsdaily.com/6742-hashtagging-best-practices.html>.

¹³¹ E.g., Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 750, 721-793 (2010) (“people routinely use brands and brand claims to establish their own identities and social positioning, and are understood as doing so by their audiences.”); Mark Bartholomew, *Advertising and Social Identity*, 58 BUFF. L. REV. 931, 931-976 (2010); Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 400-01, 397-424 (1990); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999); Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1505, 1491-1530 (2012) (“Trademarks are repositories of meaning that consumers use to construct a sense of personal identity and reputation”).

¹³² Alexandra J. Roberts, *Supra* note 125 at 11-19.

marks, most typically begin as online hashtags or are deployed simultaneously online and offline. This category also includes hashtags selected by producers or marketers that incorporate existing marks or serve as nicknames for those marks.¹³³

Consumer-generated hashtags: Consumer-generated hashtags discuss or respond to a producer's goods or services, with or without incorporating the producer's mark into the hashtag. Social media provides consumers opportunities to engage directly with brands, whether to offer criticism, commentary, or praise.

To protect a brand, trademark owners often send cease and desist letters¹³⁴ to third parties threatening legal action¹³⁵ if the unauthorized use of the trademark does not stop. Additionally, when a letter does not resolve the dispute, a trademark owner can file a complaint with a Court alleging trademark infringement and seeking remedies that routinely include an injunction against further infringement and monetary relief.

In August 2010, Mexican restaurant Taco John's sent a cease and desist letter to Iguana Grill, another Mexican restaurant, asking Iguana Grill to stop using their registered mark, "Taco Tuesday," in the hashtag "#tacotuesday." The letter maintained that Taco John's had trademark rights in the "Taco Tuesday" mark, and therefore Iguana Grill's hashtag containing the trademark infringed on those rights. Unfortunately for Taco John's, the story received extensive media attention resulting in many individuals using the hashtag in their tweets. Iguana Grill voluntarily stopped using the mark.¹³⁶

In *Starrbuzz Tobacco, Inc. v. Yousif*,¹³⁷ action concerns Defendant's infringement of Starrbuzz's trademarks. Defendant has

¹³³ Eg. #OreoSnackHacks, #HowDoYouKFC, #CaughtOnDropcam, and #McDStories, where OREO, KFC, and DROPCAM are registered trademarks (for cookies, pharmacies, and wireless video cameras respectively), and "McD" is an acknowledged nickname for registered trademark MCDONALD'S

¹³⁴ "A cease and desist (or demand) letter is correspondence that states or suggests that you are potentially infringing the trademark of another and demands that you stop using, or consider stopping use of, the accused mark. You should treat any such letter seriously. Before deciding how to proceed, consider your options as described below." I Received a Letter, UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/trademark/i-received-letter>.

¹³⁵ If a party owns the rights to a particular trademark, that party can sue subsequent parties for trademark infringement. 15 U.S.C. Section 1072 (2012).

¹³⁶ See *Policing a Trademark Used in a Hashtag by a Competitor*, Elizabeth A. Falconer, *#Canhashtagbetrademarked: Trademark Law And The Development Of Hashtags* 17 NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY 26,27, 1-42 (2016).

¹³⁷ WL 4653042 (C.D. Cal. 2014)

flagrantly disregarded Starbuzz's trademarks and used Starbuzz's name, without authorization, to promote electronic hookah products. Defendant has done so with the intent to steal the goodwill in Starbuzz's name and injure Starbuzz's reputation.¹³⁸

In *Fraternity Collection, LLC v. Fagnoli*,¹³⁹ the United States District Court, Southern District of Mississippi entered an Order stating: "hashtagging a competitor's name or product in social media posts could, in certain circumstances, deceive consumers."¹⁴⁰

In *Adjudicating Whether Hashtags Can Be Trademarks*, in the significant case *Elksouzian v. Albanese*,¹⁴¹ the United States District Court, Central District of California declared that hashtags are "merely descriptive devices, not trademarks, unitary or otherwise" is the correct interpretation of trademark law because the inability to function as a source identifier necessarily means the hashtag is not entitled to trademark protection.¹⁴²

¹³⁸ See Pleading Trademark Infringement when a Competitor Uses a Trademark in a Hashtag, Elizabeth A. Falconer, *Supra* note 136 at 26,27; On June 11, 2014, Starbuzz Tobacco, Inc. ("Starbuzz") filed a complaint with the Court alleging that defendant Souzie Yousif's use of their trademark in a hashtag constituted an infringement. In 2013, Starbuzz entered into a manufacturing agreement with PhD Marketing and E-Hose Technologies, LLC ("E-Hose"), providing E-Hose with exclusive manufacturing rights of electronic hookahs. Shortly thereafter, Starbuzz alleged that EHose started making miniature versions of electronic hookahs ("Mini E-Hose"). While Starbuzz markets the E-Hose, it "does not endorse, support, associate with, receive compensation for, or have anything to do with the manufacture, distribution or sale of the Mini E-Hose." As a result, Starbuzz filed this complaint alleging specifically that defendant's February 5, 2014, Facebook post marketing the Mini E-Hose with the description "EHose Mini from the makers of #starbuzz #ehose" improperly associates Starbuzz with the Mini E-Hose, which is likely to cause consumer confusion. On October 6, 2014, Starbuzz dismissed the suit.

¹³⁹ No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375, 1–2 (S.D. Miss.2015).

¹⁴⁰ *Fraternity Collection, LLC* filed a complaint against former employee and designer Elise Fagnoli for her use of "the terms '#fratcollection' and '#fraternitycollection' in her social media accounts to promote her designs for [a] competitor," seeking declaratory and injunctive relief from Fagnoli's improper use of their trademark. Fagnoli maintained *Fraternity Collection* failed to state a claim for trademark infringement. In response, both parties filed competing motions to dismiss. In March 2015, the United States District Court for the Southern District of Mississippi declined to dismiss the infringement claims. Instead, the district Court entered an Order stating: "hashtagging a competitor's name or product in social media posts could, in certain circumstances, deceive consumers." However, on June 17, 2015, the parties agreed to a settlement and the district Court entered an Order dismissing the suit. See Elizabeth A. Falconer, *Supra* note 136 at 28,29.

¹⁴¹ No. CV 13-00728-PSG-MAN, WL 4720478, 1 (C.D. Cal. 2015).

¹⁴² In 2013, plaintiffs filed an amended complaint against their former business partners alleging trademark infringement and a violation of the Lanham Act.186 Defendants ("Cloud

There exists a legal uncertainty with respect to trademark protection for hashtags. Until the legal status of hashtags has been further established, trademark owners should develop strategies to minimize the risk to their investment in hashtags and protect their brands from misuse on social media platforms.

4.5.2.4. Search Engine optimization through Social bookmarking

Social bookmarking has demonstrated a great deal of web information management through years. For a long time, search engines relied on three categories of content to describe data. These are page content, link structure and query or link through log data. Now there is a fourth type of data in the form of user generated content which has emerged strongly as a source of web page description data. Social bookmarking is one such service that generate the fourth type of data.¹⁴³

Social bookmarking helps in brand promotion. Social bookmarking sites helps to draw visitors to one's brand website. If the brand owner's page gets bookmarked often by several users, the chances of search engines listing the page will be high. Thereby enabling search engine optimization. Social bookmarks are developed using informal tags rather than traditional keyword, it gives users the option to describe their bookmarks and resources with their own vocabulary. These tags results in

Vapez”) filed a Motion to Dismiss, arguing the Plaintiffs (“CloudV” and “Vape A Cloud”) cannot bring a claim for trademark infringement because the mark used was jointly owned by a partnership between the Plaintiffs and Defendants. In Plaintiffs’ Opposition to the Motion to Dismiss, Plaintiffs claimed CloudV and Vape A Cloud are the owners of certain trademarks and that Defendants have infringed on those marks: “[a]s corporations with distinct identities from the partnership, CloudV and Vape A Cloud are entitled to maintain claims for infringements of their marks.” In response, Plaintiffs and Defendants entered into a settlement agreement (“SA”) that restricted both parties trademark use of ‘cloud’ in connection with ‘pen’ or ‘penz.’ However, on September 11, 2014, plaintiffs filed a Motion to Enforce Settlement Agreement claiming the Defendants violated the agreement when it used the “cloudpen” mark. In response, Defendant’s asserted that Plaintiff’s violated the SA when it used “#cloudpen” and “#cloudpenz” on social media. The Court explained that Plaintiff’s use of “#cloudpen” on social media was “merely a functional tool to direct the location of Plaintiffs’ promotion so that it [was] viewed by a group of consumers, not an actual trademark.” In other words, the SA restricted the party’s use of trademarks, and because a hashtag does not function as a trademark, the SA did not restrict Plaintiff’s use of the trademark in a hashtag on social media. The Court did not stop there; additionally, the Court made a much broader statement about hashtags in general: “Defendant’s argument fails because . . . hashtags are merely descriptive device, not trademarks, unitary or otherwise, in and of themselves.” Notwithstanding the SA, the Court held that hashtags are not trademarks.

¹⁴³ ADEYINKA TELLA, TOM KWANYA, HANDBOOK OF RESEARCH ON MANAGING INTELLECTUAL PROPERTY IN DIGITAL LIBRARIES 5,6 (2017).

folksonomies.¹⁴⁴ Social bookmarking sites even have rating and commenting systems.

Brands and business can be promoted using social bookmarks, but rogue users with the intent of tarnishing the brand can do so by using informal tags more often to a brand there by making the page having negative publicity and low rating and degrading comments. If such an activity can enhance the search engine optimization of that brand the brand value gets diminished thereby creating consumer confusion regarding the quality and genuineness of the product.

Table IV.4- Infringement nature and relevant legislative feature comparison-Collaborative projects

Case Title	Trademark Infringement Nature	Relevant Trademark Legislation Feature
Hearts on Fire Co., LLC v. Blue Nile, Inc	Misleading keyword advertisement. Use of trademark in commerce by infringer.	Commercial use
S&L Vitamins v Australian Gold	Misleading keyword advertisement. Use of trademark in commerce by infringer	Commercial use
CJ Products LLC v. Snuggly Plushez LLC	Misleading keyword advertisement. Use of trademark in commerce by infringer Trademark Dilution	Commercial use Dilution by tarnishment,
World Entertainment Inc. v. Brown	Misleading keyword advertisement. Use of trademark in commerce by infringer	Commercial use
Radiance Found.,	Misleading keyword	Commercial use

¹⁴⁴ User-generated system of classifying and organizing online content into different categories by the use of metadata such as electronic tags.

Inc. v. NAACP	advertisement. Use of trademark in commerce by infringer Trademark Dilution	Dilution by tarnishment,
Rosetta Stone v. Google inc, Rosetta	Use of trademark in commerce by infringer Direct and indirect liability of service providers	Commercial use Intermediary liability
Consim Info Pvt. Ltd. v. Google India Pvt. Ltd.	Misleading keyword advertisement. Use of trademark in commerce by infringer Trademark dilution Direct and indirect liability of service providers	Use in the course of the trade Detrimental to the repute of the trademark Intermediary liability
Starrbuzz Tobacco, Inc. v. Yousif	Unauthorized use of trademark Misleading hashtag usage Trademark dilution Consumer confusion	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment, Dilution by blurring
Fraternity Collection, LLC v. Fagnoli	Unauthorized use of trademark Misleading hashtag usage Trademark dilution Consumer confusion	Commercial use, Displayed in the sale or advertising, Dilution by tarnishment, Dilution by blurring

From the above table it can be understood that the major trademark legislative features that are applied for infringement cases in social bookmarking sites and blogs are the use in commerce, trademark dilution principle and intermediary liability principles. The Courts in these aspects have applied the traditional principles of trademark law features on social media infringement cases. It is important to analyze in detail as to the applicability of these features in social media. Whether these provisions are properly framed to adapt with the complex nature of social media platforms and also an analysis has to be made with respect to

its automatic application in these platforms. The corresponding defenses to these features have to be sorted out, as the fair use nature in social media deviates from the traditional trademark fair use defenses. The online service provider liability in case of trademark infringement and its liability limitation provisions also require thorough analysis. The analysis will be made in Chapter VI of this book.

4.5.3. Trademark infringement in Content communities

Content communities like Youtube and Flickr don't declare that using someone else's trademark in a username, in and of itself, is not necessarily infringing. But if there is content on a user page that would confuse viewers into believing that the trademark owner created or sponsors the page or content, then the trademark owner's rights are likely being infringed, and hence an instance of trademark infringement. similar to the case of collaborative projects, if adwords, metatags and hidden texts used in content communities sites directly are likely to affect the trademark owner's rights then there is trademark infringement. The Youtube provides for trademarking of a Youtube channel. The name, logo, or slogan that one is using to promote Youtube channel can be trademarked.

4.6. CONCLUSION

From the above study it can be concluded that trademarks are used widely in social media sites for advertising and e-commerce. The issues pertaining to online branding affects the trademark rights of the owners. The social media sites have enhanced the rate of trademark infringement cases. Even though the trademark infringement nature has mostly remained the same when compared to traditional media, the platform where infringement occurred has changed creating technical and legal complications.

It can be observed that the trademark infringement nature, even though of traditional form, has transformed itself to new complexity owing to the platform of occurrence. So, it is imperative that a comparative analysis of the trademark law features like trademark use, trademark dilution principles, its respective defenses and intermediary liability and its limitations must be made within U.S. trademark legislations such as the The Lanham Act of 1946, Federal Trademark Dilution Act of 1995, and Trademark Dilution Revision Act of 2006 to understand its applicability in the social media platforms. Similarly, an

analysis must be made within E.U. trademark legislations such as Directive (EU) 2015/2436, Regulation (EU) 2017/1001, Directive on electronic commerce 2000 Directive 2000/31/EC and Intellectual Property Rights Enforcement Directive 2. A comparative study of trademark law features of U.S. and E.U must be made with Indian trademark legislations such as Trademarks Act, 1999 and Information Technology Act, 2000 to understand the applicability of the provisions in social media and its effectiveness.

Whether the trademark law features grant automatic protection to use of trademark in social media, whether the trademark dilution principles are recognized in the law and whether it is balanced with the public interest aspect must be analyzed. An adequate standard for safe harbor provisions must be ruled out if it is already ambiguous in current legislations. These aspects form the basis for the study made in Chapter VI that deals with regulations concerning protection of trademarks in social media.

INTERNATIONAL AND NATIONAL LEGISLATIONS REGULATING COPYRIGHTED CONTENT IN SOCIAL MEDIA

5.1. INTRODUCTION

The advancement in technology has led to the inception of social media and thereby changing the course of content dissemination process. The rapid content dissemination has posed various legal conundrum owing to the intellectual property affixed along with it. Even though the traditional International Treaties and Guidelines¹ advised national legislations to cop up with the changing pattern of copyrights, it became significant that an entirely new set of rights must be devised in a world wherein activities are dominated by use of technology. Post the TRIPS, the then existed norms were impotent to advocate clarifications to the concerns shaped by technology.

This chapter makes a comprehensive study of the International Treaties and regulations and its impact on national legislations that handle copyright and technological advancements. To understand the complexities and efficiency of the legislations, legislations from jurisdictions that of United States of America and United Kingdom will be methodically studied and an in-depth comparative analysis of these legislations with Indian legislations will be made to understand the effectiveness and weakness of Indian legislative mechanism.

¹ See generally Berne Convention for the Protection of Literary and Artistic Works, Brussels Convention Relating to the Distribution of Programme Carrying Signals Transmitted by Satellite, 1974. Convention Establishing the World Intellectual Property Organization, 1967. Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, 1971. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

5.2. THE INTERNET TREATIES

The most urgent task of the WIPO committees and the eventual diplomatic conference post- TRIPS was to bring in clarity to the existing norms and to construct norms to face up the difficulties posed by digital technology and internet. The issues addressed in this context were referred to as the “digital agenda.”² The purpose under which the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) were drafted was mainly to explain certain rights in the digital environment. The rights namely; The Right for Multiplicity, Right for Accessibility, Right for Technological Protection, Right for Protection of Copyright Management Information and Limitations and Exceptions in the Digital Environment.

Table V.1- Digital agenda features in internet treaties

Digital Agenda Features	Internet Treaties	
	WCT	WPPT
The Right for Multiplicity.	Article 1(4)	Article 7: Right of reproduction Article 11: Right of reproduction
Right for Accessibility.	Article 8: Right of communication to the public	Article 10: Right of making available of fixed performances Article 14: Right of making available of phonograms
Right for Technological Protection.	Article 11: Obligations concerning technological measures	Article 18: Obligations concerning technological measures

² International Bureau of WIPO, *The WIPO Copyright Treaty (WCT) And The WIPO Performances And Phonograms Treaty (WPPT)* 6), http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wct_wppt.pdf.

Right for Protection of Copyright Management Information.	Article 12: Obligations concerning rights management information	Article 19: Obligations concerning rights management information
Limitations and Exceptions in the Digital Environment.	Article 10: Limitations and exceptions	Article 16: Limitations and exceptions

5.2.1. The Right for Multiplicity

The right for multiplicity included the scope of the right of reproduction. The reproduction right, though not explicitly mentioned in WCT, the Diplomatic Conference, however, adopted an Agreed Statement³ with respect to Article 1(4) of WCT, which mentioned about the member countries complying with Articles 1 to 21 and the Appendix of the Berne Convention.⁴ This means that the concept of reproduction under Article 9(1) of the Berne Convention must be made applicable to digital environment as the Article's meaning which extends to reproduction "in any manner or form" regardless of the duration of the reproduction, must not be limited merely because a reproduction is in digital form through storage in an electronic memory, and is of a temporary nature. At the same time, the meaning that can be deducted from the first sentence is that, Article 9(2) of the Berne Convention is also entirely applicable, which suggests a suitable foundation to introduce any justified exceptions such as the cases of transient and incidental reproduction provisions in national legislation, on the basis of the "three-step test"⁵ provided for in that provision of the Convention.⁶

³ Agreed statement concerning Article 1(4): The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

⁴ Berne Convention for the Protection of Literary and Artistic Works, 1886.

⁵ *Infra* note 33.

⁶ International Bureau of WIPO, *supra* note 2 at 5.

Similarly, the reproduction right, though not explicitly mentioned in WPPT, the Diplomatic Conference, however, adopted an Agreed Statement which mentioned that the reproduction right and exceptions permitted there under fully apply in the digital environment. As set out in the Articles 7⁷ and 11⁸ of the WPPT, and the exceptions permitted thereunder through Article 16⁹ of the WPPT, it is clear that the provisions fully apply in the digital environment, and hence it is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.

5.2.2. Right for Accessibility

The right for accessibility included the scope of transmission of works in digital networks. The transmission of works in digital networks posed a dilemma as it was impossible to apply the traditional concept of distribution and communication to the public directly without clarifications. Firstly, it required clarity with respect to making available copies by making such copies through transmission of electronic signals in receiving computers and/or in terminals linked to them. Secondly Berne Convention does not provide for right of distribution for all categories of works, in all forms, the coverage of rights involved had to be complete. Thirdly, it will be difficult for various countries to select any one of the rights without allowing any alternative at national level.¹⁰

In view of these problems, a compromise solution was worked out which contained the following elements: (i) the act of interactive transmission should be described in an impartial way, free from specific

⁷ Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

⁸ Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

⁹ Article 16- Limitations and Exceptions: (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

¹⁰ Mihaly Fiscor, *Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption Based, Extended, Mandatory, Possible, Inevitable?* In PHILLIP LOUIS LANDOLT, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 52 (2006).

legal characterisation. (ii) such a description should not be technology specific and, at the same time, it should express the interactive nature of digital transmission in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available “to the public” also when the members of the public may access it at a time and at a place freely chosen by them; (iii) in respect of the legal characterisation of the exclusive rights- that is, in respect of the actual choice of the rights or rights to be applied- sufficient freedom should be left to national legislation: and (iv) the gaps in the Berne convention, in the coverage of relevant rights the right of communication to the public and the right of distribution, should be eliminated. This solution was denoted to as the ‘umbrella solution’, and it was accepted by the Diplomatic Conference as a foundation for the provision on the rights regarding interactive transmissions¹¹ and thus included in the WCT under Article 8.¹²

As far as the WPPT is concerned, the relevant ‘umbrella solution’ provisions are Articles 10 and 14, under which performers and producers of phonograms must enjoy the exclusive right of authorizing and making available to the public of their performances fixed in phonograms and of their phonograms by digital means supported by wire or wireless means in a way that may enable members of the public to access them from a place and at a time individually and independently chosen.”¹³

5.2.3. The Right for Technological Protection

The new digital era has changed the mode in which we used to create, disseminate access and use information for various purposes. The ability in this digital platform to duplicate content and disseminate to a larger group at low cost and lesser time has led to manifold opportunities

¹¹ *Id.*

¹² Article 8, Right of Communication to the Public: Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

¹³ The freedom granted to Contracting Parties to choose differing legal characterization of acts covered by certain rights provided allows the Contracting Parties to implement the relevant provisions not only by applying such a specific right but also by applying some other rights such as the right of distribution or the right of communication to the public as long as their obligations to grant an exclusive right of authorization concerning the acts described are fully respected.

for users, businesses, and the public at large for rapid, inexpensive, and global dissemination of information, knowledge, and entertainment. At the same time, the enabling technology also poses complex conceptual and practical challenges for intellectual property and related rights. The increased ability to copy and distribute information triggered by the internet has provoked a technological response. To gain back control, right holders have made use of so-called Technological Protection Measures including, for instance, Digital Rights Management (DRM) schemes.¹⁴

The provisions under the Internet Treaties- WCT and WPPT, set forth obligations concerning technological measures. It is of high importance to analyse the said provision to understand the effectiveness and depth of its application at national level under various jurisdictions.

Article 11 of WCT that contains obligations concerning technological measures mentions that, the member states shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors with respect to the exercise of their rights under this Treaty or the Berne Convention and that restrict certain acts, in respect of their works, which are not authorized by the authors concerned or allowable under the relevant law.

Article 18 of WPPT which consist of obligations to be followed by contracting parties concerning technological measures. From the Article it can be understood that the member states shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict certain acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or allowable under the relevant law.

By making a textual breakdown, the elements sorted out from these provisions forms the basis for the national legislations to create respective provisions to adapt with the technological changes. The effective technological measures so adopted by authors and other right holders to protect their content online and prevent and provide effective legal remedies against circumvention and restricts acts that are

¹⁴ Urs Gasser, *Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model* 4,5 (2006), <http://cyber.law.harvard.edu/publications>.

unauthorised and not permitted by law. So it is imperative to understand the interpretations given by the meaning of the term “effective technological measures;” the phrase “used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention;” the phrase “that restricts acts, in respect of their works, which are not authorized by the authors concerned or permitted by law;” and the term “effective legal remedies.”¹⁵

Under the treaty, the term ‘effective technological measures’ are not defined, as a defined sentence can limit the ability of the law to adapt with the technological change. So, to realise rapid technological developments and the need for adaptations in the law to handle the new technology and new threats that can circumvent technological measures cannot be limited by present day definitions. The term ‘effective’ can have numerous interpretations owing to broadness with respect to its practical implications. The term ‘effective’ generally means successful in producing a desired or intended result, in this aspect, it is difficult to speculate its meaning specifically. Commentators have given a wide range of possible interpretations to the term effective so that national legislators under various jurisdictions will have the discretion to implement ‘effectiveness’ criterion in numerous ways under their legislations. Some of the interpretations so made are;

Technological Protection Measures that can easily be circumvented should not be legally protected.¹⁶

Technological Protection Measures that can accidentally be circumvented should not be legally protected.¹⁷

Right holders must put some effort into protecting their works in order to deserve protection.¹⁸

Malfunctioning Technological Protection Measures need not be protected against circumvention.¹⁹

¹⁵ Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and US Experiences* 29 (11) COLUM. J.L. & ARTS 9, 1-26 (2005), see also Urs Gasser, *id.* at 7.

¹⁶ Jacques de Werra, *The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws*, 9 (2001) (manuscript on file with author) see also *Revue Internationale du Droit d’Auteur*, No. 189.

¹⁷ Kamiel Koelman & Natali Helberger, *Protection of Technological Measures*, *Institute for Information Law, Amsterdam*, 8 (1998), <http://www.ivir.nl/publicaties/koelman/technical.pdf>.

¹⁸ *Id.*

Technological Protection Measures is not effective, even if it functions properly, if access can be gained by other means, i.e., where another “door” exists that is not technologically locked down.²⁰

This part of the provision grants right holders and law makers a discretion to decide upon the technological measure that must be adopted and when it amounts to circumvention. A proper lay out of the interpretations of this provision can help in making a law that is contemporary in nature and with a future.

Under the Treaties, Technological Protection Measures are used by authors and other right holders in connection with the exercise of their rights. This expression illuminates that it is left to the authors and other rights holders²¹ to adopt whether to apply Technological Protection Measure or not. Furthermore, it is distinct from the text that the obligations under these provisions include Technological Protection Measures in connection with the exercise of any right that may be moral right or economic right.²²

Under the treaties, the use of the term ‘restrict acts’ provides for leeway for the legislators to incorporate within their laws limitations and exceptions. According to this term it means that there are acts which can be unrestrictive as it is not prohibited by law and is also authorised by the author or right holder. Only actions can be made against acts that are unauthorised and illegal, thereby enabling liability limitation provisions, fair use provisions under the national laws.²³

The WIPO Internet Treaties’ provisions on Technological Protection Measures require contracting parties to provide ‘effective legal remedies’ against acts of circumvention, but do not specify in detail what types of remedies must be implemented. According to one commentator, “it seems obvious that, in general, civil remedies are indispensable”²⁴ He also suggests that criminal sanctions are needed for preparatory activities (e.g., trafficking in circumvention devices and services) due to their “piratical” nature.²⁵ It has also been suggested that the TRIPS

¹⁹ Jane C. Ginsburg, *supra* note 15 at 15.

²⁰ *Id.*

²¹ See Mihaly Fiscor, *supra* note 10, see also Jane C. Ginsburg, *supra* note 15 at 5 and Jacques de Werra, *supra* note 16 at 10.

²² Mihaly Fiscor, *supra* note 10.

²³ Urs Gasser, *supra* note 14 at 9,10.

²⁴ Mihaly Fiscor, *supra* note 10.

²⁵ *Id.*

provisions on the enforcement of IPR can provide guidance as to the range of remedies that constitute effective relief.²⁶ However, it is important to note that the relevant provisions of the WCT and WPPT themselves are silent on this issue and, therefore, leave significant discretion to the contracting parties.²⁷

5.2.4. Right for protection of Copyright Management Information

Rights Management Information is another form of licensing systems which can certify the integrity and genuineness of works and phonograms. Owing to its collective application with other technology, they prove themselves to be a powerful tool against copyright infringements. The WIPO Treaties require effective legal protection of Rights management information.²⁸

Rights Management Information is a form of an electronic watermark placed in protected content which may provide the basis for additional user services, such as information associated with a radio transmission that provides artist detail, track number and purchase details about songs. It also attributes the author thereby granting the copyright owner to exercise his moral rights. The WIPO Internet Treaties protect all such Rights Management Information and extends to protection of information about terms and conditions related to the use of content which might be either details of a licence already granted or information as to how and under what conditions a licence can be obtained. To enjoy protection, Rights Management Information must be attached to or embodied in a copy of the work, phonogram or fixed performance. For intangible means of use, Right Management Information must appear in connection with the use of the work, phonogram or performance.²⁹

The Treaties themselves provide a strong and useful definition,³⁰ which might be useful for its addition in implementing legislation. The

²⁶ Jane C. Ginsburg, *supra* note 15 at 10.

²⁷ Urs Gasser, *supra* note 14 at 11.

²⁸ IFPI, *The WIPO Treaties: Protection of Rights Management Information* 1 (2003) <http://www.ifpi.org/content/library/wipo-treaties-rights-management-information.pdf>.

²⁹ *Id.*

³⁰ Article 12(2) of WCT defines “rights management information” as meaning “information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.” And Article 19 (2) defines “rights management information” means information which identifies the performer, the performance of the

treaty words do interpret protection against circumvention of Right Management Information such as the unauthorised removal and alteration of Right Management Information, unauthorised addition, distribution, importation for distribution, broadcasting or communicating to the public, without authority, making works or copies of works with the knowledge that electronic Rights Management Information has been removed or altered without authority. This knowledge test established by the treaties varies depending on the type of activity. About the removal or alteration of Rights Management Information without authorisation, the test is whether the person knew or had reasonable grounds to know, that such circumvention would induce, enable, facilitate, or conceal infringement of copyright or neighbouring rights.³¹

5.2.5. Limitations and Exceptions in the Digital Environment

Article 10 of WCT contains two parts.³² Part one deals with the types of limitations and exceptions that may be applied to the rights granted under the Treaty, while part two provides criteria for the application of limitations and exceptions to the rights under the Berne Convention. Both paragraphs depend on the ‘three-step test’³³ included in

performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

³¹ IFPI, *supra* note 28 at 2, *see also* Article 12 of WCT- Obligations concerning Rights Management Information and Article 19- Obligations concerning Rights Management Information.

³² Article 10 of WCT- Limitations and Exceptions; (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

³³ Exceptions or and limitations are only allowed (i) in certain special cases; (ii) provided that they do not conflict with a normal exploitation of the work; and further (iii) provided that they do not unreasonably prejudice the legitimate interests of the authors.

Article 9(2) of the Berne Convention to determine the limitations and exceptions allowed.³⁴

Article 16(1) of the WPPT, which corresponds in substance to Article 15.2. of the Rome Convention states that a Contracting Parties may provide for similar kinds of limitations or exceptions regarding the protection of performers and producers of phonograms in connection with the protection of copyright in literary and artistic works, as they provide for, in their national legislation. The ‘Three Step Test’ is a mandatory principle that must be used in determining limitations and exceptions if a country adheres to both the WCT and the WPPT.³⁵

5.3.UNITED STATES OF AMERICA

In the United States of America, the Copyright Act of 1976 was periodically updated with respect to the technological changes. The Digital Millennium Copyright Act introduced major changes with respect to technological advancement in Copyright Act incorporating the principles of Internet Treaties into the law, it recognised and established safe harbors for online service providers, allowed temporary copying of programs during computer maintenance, made various modifications to the Copyright Act, including modifications in law which facilitated internet broadcasting.

5.3.1. Digital Millennium Copyright Act (DMCA)

The DMCA is the most sweeping revision to copyright law since 1976, and it arguably represents the most dramatic change in the history of U.S. copyright law.³⁶ Title I of the DMCA was billed as an implementation of the Internet Treaties- WCT and WPPT. These provisions add the force of law to Technological Measures and Digital Rights Management Systems designed by copyright holders to prevent unauthorised use of copyrighted works. Users cannot circumvent any kinds of Digital Rights Management, even if their intention is otherwise non-infringing. The law also bans almost all acts of developing, marketing or offering technologies or services that circumvent Digital Rights Management Systems.³⁷

³⁴ International Bureau of WIPO, *supra* note 2 at 10.

³⁵ *Id.* at 20,21.

³⁶ BILL D HERMAN, THE FIGHT OVER DIGITAL RIGHTS: THE POLITICS OF COPYRIGHT AND TECHNOLOGY 37 (2013).

³⁷ *Id.*

Table V.2- Digital agenda features and DMCA

Digital Agenda Features	Digital Millennium Copyright Act (DMCA)
Right for Protection of Copyright Management Information.	Violations Regarding Circumvention of Technological Measures: 17 USC S 1201 (a) (1) (A), 17 USC S 1201 (a) (2), 17 USC S 1201 (b).
Right for Technological Protection.	Section 1201(a) (3) (B), Section 1201(b) (2) (B)

The two of the major digital agenda features incorporated in DMCA are the Right for Technological Protection and Right for Protection of Copyright Management Information. The idea and its practical application of the WCT and WPPT guidelines have further added exceptions and limitations features of the digital agenda to the DMCA.

5.3.1.1. Right for Protection of Copyright Management Information

Protection of Copyright Management Information, the anti-circumvention provisions of DMCA implements three different bans. The first ban prohibits circumventing Digital Rights Management to gain unauthorised access to copyrighted works. It reads, “no person shall circumvent a technological measure that effectively controls access to a work protected under this title.”³⁸ For example, if a computer programme requires a unique serial number during installation, this makes it illegal for a technically sophisticated user to defeat or hack this requirement and install the software without such a serial number. Although doing so for infringing copyright was already illegal, this clause bans it for nearly any reason- even if one has misplaced the serial number for a legally purchased software package and intends to install it on just one computer.

³⁸ 17 USC Section 1201 (a) (I) (A).

The statute itself makes few allowances for even the most benign of uses, such as efforts to preserve the data on a decaying disk.³⁹

The second ban (the access trafficking ban) prohibits manufacturing, importing and trafficking in tools that could help circumvent access controlling Digital Rights Management technology.⁴⁰ A technology is covered by this ban if it is developed, marketed, or primarily used for such circumvention. This ban prohibits computer repair services from assisting a librarian in the preservation of software stored on decaying media, and it prohibits librarians from developing a technology to facilitate circumvention.⁴¹

The third ban, additional violations ban prohibits trafficking in tools to facilitate the circumvention of Digital Rights Management if that Digital Rights Management protects any copyright holder's right.⁴² For

³⁹ BILL D HERMAN, *supra* note 36 at 43,44.

⁴⁰ 17 USC Section 1201 (a) (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

⁴¹ BILL D HERMAN, *supra* note 36 at 44.

⁴² 17 USC Section 1201 (b) ADDITIONAL VIOLATIONS.—(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

“(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

“(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

“(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

“(2) As used in this subsection—

“(A) to ‘circumvent protection afforded by a technological measure’ means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

example, the music industry has briefly experimented with Digital Rights Management- restricted compact discs. These discs are not easily copied by computers, but the Digital Rights Management system do not prevent access; CD players require no access key or code to play them and thus they generally play them without problems. This provision would ban a technology designed or marketed to circumvent this Digital Rights Management system- for instance, a tool that would allow a consumer to convert audio files from a CD into MP3 format on her hard drive. Thus, a determined end user would be well within her rights to circumvent the Digital Rights Management on a music CD, but it would be illegal for her to develop, sell, or market a service or software program that did so.⁴³

5.3.1.2. Right for Technological Protection

The term “Technological Measure” is not defined by the DMCA. However, Section 1201(a) (3) (B) principally defines a Technological Measure that controls access to a work as effective if to gain access to a protected work, it requires the authority from the copyright owner for another person to apply any information or use any process or treatment upon the technological protection measure so applied. In another similar approach under Section 1201(b) (2) (B), a Technology Measure effectively protects a right of a copyright owner even if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner.⁴⁴

Section 1201 divides Technological Measures into two categories: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying⁴⁵ of a copyrighted work. Making or selling devices or services that are used to circumvent access controlling technological measure is prohibited in every circumstance because the circumvention cannot be justified whereas under certain copy control technological protection measures it can be justified. This lack of similar approach was made to assure that the public will have the continued ability to make fair use of copyrighted works. Since under

“(B) a technological measure ‘effectively protects a right of a copyright owner under this title’ if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

⁴³ BILL D HERMAN, *supra* note 36 at 44.

⁴⁴ Urs Gasser, *supra* note 14 at 20.

⁴⁵ “Copying” is used in this context as a short-hand for the exercise of any of the exclusive rights of an author under section 106 of the Copyright Act. Consequently, a technological measure that prevents unauthorized distribution or public performance of a work would fall in this second category.

appropriate circumstances, copying of a work may be a fair use, Section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. The fair use doctrine is not a defence to the act of gaining unauthorized access to a work and hence the act of circumventing a technological measure to gain access is prohibited.

The obligation under the WIPO Internet Treaties to grant effective legal remedies against the circumvention of Technological Protection Measure is implemented through Section 1203, regarding civil remedies,⁴⁶ and Section 1204 DMCA, which provides criminal penalties.⁴⁷

5.3.1.3. Limitations and Exceptions in the Digital Environment

Requiring the limitation and exception features of digital agenda of the Internet Treaties, DMCA incorporates within itself exhaustive limitations and exceptions. Limitations under the act can be divided into three heads generally; the general saving clauses, No Mandate Provision mentioned in Section 1201(c)(3) and the general liability limitation provision explained under Title II of DMCA. The prohibitions contained in section 1201 are attached with several exceptions. One of which is an exception to the operation of the entire section, for law enforcement, intelligence and other governmental activities. The other exceptions narrate the provision dealing with the category of technological measures that control access to works.

⁴⁶ Section 1203 gives Courts the power to grant a range of equitable and monetary remedies similar to those available under the Copyright Act, including statutory damages. The Court has discretion to reduce or remit damages in cases of innocent violations, where the violator proves that it was not aware and had no reason to believe its acts constituted a violation. (Section 1203(c)(5)(A)). Special protection is given to nonprofit libraries, archives and educational institutions, which are entitled to a complete remission of damages in these circumstances. (Section 1203(c)(5)(B)).

⁴⁷ Under section 1204 penalties range up to a \$500,000 fine or up to five years imprisonment for a first offense, and up to a \$1,000,000 fine or up to 10 years imprisonment for subsequent offenses. Nonprofit libraries, archives and educational institutions are entirely exempted from criminal liability. (Section 1204(b)).

Table V.3- Limitations and exceptions under DMCA

LIMITATIONS		
General Savings Clauses	No Mandate Provision	Liability Limitation
Section 1201(c)(1) Section 1201(c)(2)	Section 1201(c)(3)	Title II of DMCA
EXCEPTIONS		
Exception to the Operation of the Entire Section	Exceptions related to category of technological measures that control access to works	
Law Enforcement, Intelligence, and Other Government Activities. (Section 1201(e))	Non-profit library, archive and educational institution exception. (section 1201(d)). Reverse engineering. (section 1201(f)). Encryption research. (section 1201(g)). Protection of minors. (section 1201(h)). Personal privacy. (section 1201(i)). Security testing. (section 1201(j)).	

Limitations

Section 1201 of DMCA contains 2 general saving clauses which forms the general limitations. Section 1201(c)(1) of the DMCA states that the anti-circumvention regime does not affect rights, remedies, limitations or defences to copyright infringement, including fair use. At a glance, the wording suggests that fair use activities will be protected, i.e., that it is a defence against a Section 1201(a) (1) claim to argue that the circumvention was done for legal purpose covered by fair use. However, “as Courts interpreting the provision have found, any rights and defences under copyright law are separate from and not affected by the new rights, remedies and exceptions of the anti-circumvention provisions.”⁴⁸

Section 1201(c)(3) of the DMCA contains a so-called “no mandate” provision aimed at clarifying that the prohibition of circumvention devices does not require manufacturers of computers,

⁴⁸ Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001).

consumer electronics, and telecommunications products to affirmatively design their products to respond to any technological measure. In other words, if a product does not affirmatively engage in circumventing a TPM or otherwise falls within the prohibitions, it will not violate section 1201.⁴⁹

Title II, The Online Copyright Infringement Liability Limitation Act (OCILLA) represents a compromise between online service providers and copyright holders. It seemed necessary to have limitation to service provider's liability in return for the anti-circumvention provision, as it was necessary to protect the business models of service providers against the infringements committed by their users if the service provider meets certain conditions.⁵⁰ OCILLA applies to service providers⁵¹ and non-profit institutions of higher education in their capacity as service providers. OCILLA provides safe harbors for service providers from monetary damages. The limitations are based on the following categories of conduct by a service provider: Transitory communications, System caching, Storage of information on systems or networks at direction of users and Information location tools.

To be eligible for any of the limitations, a service provider must meet two general conditions, it must adopt and implement a reasonable policy of terminating the accounts of subscribers who are continuous infringers under appropriate situations; and it must support and not restrict or inhibit any standard technical measures so adopted.⁵²

Limitation for Transitory Communications

While transmitting digital information from one point on a network to another ISPs act as a data conduit. If a user requests

⁴⁹ Urs Gasser, *supra* note 14 at 31.

⁵⁰ 17 USC Section 512.

⁵¹ "service provider" is defined in Section 512(k)(1)(A) as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." For purposes of the other three limitations, "service provider" is more broadly defined in section 512(k)(1)(B) as "a provider of online services or network access, or the operator of facilities therefore."

⁵² Section 512(i); "Standard technical measures" are defined as measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers.

information ISP's engage in the transmission, providing of a connection, or routing thereof. In general terms, section 512(a) limits the liability of service providers and brings them under the blanket of safe harbors if the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else's request. This safe harbor provision refuge acts of transmission, routing, or providing connections for the information and the creation of the intermediate and transient copies made automatically in the operation of a network.⁵³ The liability of the service provider will be limited if the transmission was originated from a third person and not by the service provider and the transmission, routing, connection process, or copying must be carried out by an automatic process which is technical and without service provider's voluntary involvement in material selection. Additionally, the service provider must not govern the receivers of the material and the intermediate or transient copies so created in the process must not ordinarily be available to anyone other than expected receivers, and the content should be transmitted without modification or the communication process and content availability must not be longer than reasonably necessary thereby disqualifying the transient nature of communication.⁵⁴

Limitation for System Caching

Section 512(b) provides a safe harbor and limits the liability of service providers involved in retaining transient copies of material that has been made available online by a person other than the provider and then transmitted to a subscriber at his direction. The purpose for which the service provider retains the material is to reduce the service provider's bandwidth requirement and quicken the communication process by making available the retained copy rather than retrieving the material from the originating source.⁵⁵ The person who makes the material available is responsible for its online presence and hence may establish rules about updating it.

The service providers liability will be limited if the content of the retained material, is made available to users of the system or network, is not be modified and the retention of the material is done through an automatic technical process. The provider must comply with a generally accepted industry standard data communication protocol concerning the

⁵³ *The Digital Millennium Copyright Act Of 1998, U.S. Copyright Office Summary* 10 (1998) <https://www.copyright.gov/legislation/dmca.pdf>.

⁵⁴ See Section 512 (a)- Transitory Digital Network Communications.

⁵⁵ *The Digital Millennium Copyright Act Of 1998, supra* note 53.

refreshing, reloading, or other updating of the material when indicated by the person making the material available online. The provider must not unnecessarily interfere with technology and must limit user's access to the material in accordance with the access rules executed by the person who uploaded the material. Proper take down process must be carried out by the provider once the service provider has been alerted.⁵⁶

Limitation for Information Residing on Systems or Networks at the Direction of Users

Section 512(c) limits the liability of service providers for infringing material on websites hosted on their systems and it applies to storage at the direction of a user. In this case the service provider is provided with a safe harbor if the provider does not have the required level of knowledge about the infringing activity and must not receive a financial benefit directly attributable to the infringing activity. Proper take down process must be carried out by the provider once the service provider has been alerted.⁵⁷

The statute also establishes procedures for proper notification, and respective rules as to its effects. Section 512(c) (3) explains; under the notice and takedown procedure, a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider's designated agent. Failure to comply considerably with the statutory requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider. If, upon receiving a proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability.⁵⁸ In addition, the provider is protected from any liability to any person for claims based on its having taken down the material.⁵⁹

Section 512 Subsection (g) (1) gives the subscriber the opportunity to respond to the notice and takedown by filing a counter notification. To qualify for the protection against liability for taking down material, the service provider must punctually inform the subscriber that it has disabled access to the material or removed the material. If the

⁵⁶ See Section 512 (b)- System Caching.

⁵⁷ See Section 512 (c)- Information Residing on Systems or Networks at Direction of Users.

⁵⁸ *The Digital Millennium Copyright Act Of 1998*, *supra* note 53 at 12.

⁵⁹ Section 512(g)(1).

subscriber complying with statutory requirement serves a counter notification, including a statement under penalty of perjury that the material was removed or disabled through mistake or misidentification. Unless the copyright owner files an action seeking a Court order against the subscriber, the service provider must put the material back up within 10-14 business days after receiving the counter notification.⁶⁰ Penalties are provided for making material misrepresentations in either a notice or a counter notice knowingly.⁶¹

Limitation for Information Location Tools

A service provider shall not be liable for the activity of linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link. The service provider's liability will be limited if he did not have the requisite level of knowledge of the infringing activity and must not receive a financial benefit directly attributable to the infringing activity. Liability will be limited if the service provider has the right and ability to control such activity and proper take down process is carried out by the provider once he has been alerted.⁶²

Special Rules Regarding Liability of Non-profit Educational Institutions

Educational institutions offering network or internet access to their students, faculty or staff are included within the scope of the act. The act protects the faculty member or student ("person other than the provider"), to bring within the safe harbor provision the institution in instances of transitory communications or system caching, from monetary, injunctive or other equitable relief for copyright infringement so long as the provider meets certain provisions within the Act. The conditions are that the infringing activity by the faculty member or graduate student's does not involve providing online access to course materials that were recommended during the past three years. The institution has not received more than two notifications over the past three years above the infringing activity and the institution provides all its users with informational

⁶⁰ *The Digital Millennium Copyright Act Of 1998*, *supra* note 53 at 12.

⁶¹ Section 512(f), *see also The Digital Millennium Copyright Act Of 1998*, *supra* note 53 at 12. Any person who knowingly materially misrepresents that material is infringing, or that it was removed or blocked through mistake or misidentification, is liable for any resulting damages (including costs and attorneys' fees) incurred by the alleged infringer, the copyright owner or its licensee, or the service provider.

⁶² Section 512(d).

materials containing detailed copyright disclaimers describing the compliance with copyright law.⁶³

Exceptions

The prohibitions contained in section 1201 are attached with several exceptions. One of which is an exception to the operation of the entire section, for law enforcement, intelligence and other governmental activities. The other exceptions narrate the provision dealing with the category of technological measures that control access to works.

Authorised law enforcement, intelligence and other government agencies were excluded from ban on acts of circumvention or the prohibition of trafficking in circumvention technologies mentioned in sec. 1201(a) and 1201(b).⁶⁴ The six other exceptions are for the non-profit libraries, archives, and educational institutions, in case of reverse engineering, for activities involving encryption research, exceptions regarding minors, for protection of personally identifying information and security testing.

A non-profit library, archives, or educational institution is exempted from circumvention activity under Section 1201(d) if it gains access to a commercially exploited copyrighted work solely in order to make a good faith determination as to whether they wish to obtain authorized access to the work and is not retained longer than necessary to make such good faith determination.

According to Section 1201 (f), a person who has legally obtained the right to use a copy of a computer program for reverse engineering purposes can legally circumvent and develop technological means for such circumvention. The reverse engineering activity which are recognized and permitted under copyright law must be used for purposes limited to isolating and examining elements of the program essential to achieve interoperability with other programs.

As per Section 1201 (g) (1) (A) activities necessary to categorize and examine errors and weaknesses of encryption technologies applied to copyrighted works are considered as encryption research. If activities like scrambling and descrambling of information using mathematical formulas or algorithms are carried out legally after obtaining a lawful copy or made a good faith effort to obtain an authorization, to improve the knowledge

⁶³ RACHEL GADER-SHAFRAN, INTELLECTUAL PROPERTY LAW DICTIONARY PART I C-11 (2006).

⁶⁴ 17 USC Section 1201(e).

level in the field of encryption technology or to develop and expand efficiency of encryption products does not constitute a copyright infringement.

According to the exception regarding minor's provision under Section 1201 (h), if in a technology, product, service, or device a technology is incorporated with an intention to prevent the access of minors to material on the Internet, the Court may consider while applying a prohibition, this necessity a relevant one.

Under Section 1201 (i), a process wherein a technological protection measure collects or disseminates personally identifying information of a natural person who seeks to gain access to the work protected as a part of its normal course of its operation is not a violation provided that the process must not provide information with respect to such collection or dissemination and the person is not granted a capability by the said technological protection measure to prevent such collection or dissemination

Authorized security testing for good faith testing, investigating, or correcting, a security flaw or vulnerability of a computer, computer system, or computer network is permitted and not a violation for a person to engage in an act of security testing.

5.3.2. No Electronic Theft (NET) Act of 1997 and Digital Theft Deterrence and Copyright Damages Improvement Act of 1999

The metaphor used to describe social practises and legal rules have a powerful impact on people's perception of them. For that reason, the copyright industry has assiduously promoted the notion that copyright is property and that all who make unlicensed use of copyrighted material are pirates or thieves.⁶⁵ In the move towards expanding copyright holder prerogatives with references to theft and piracy, the No Electronic Theft Act and Digital Theft Deterrence and Copyright Damages Improvement Act was passed.⁶⁶

The damage from piracy has grown over the years as technology has developed, making it easier and easier to produce higher quality copies of copyrighted works in various formats. Copyright owners today lose substantial sums of money to piracy. The advent of digital technology has the potential to exacerbate greatly the impact of piracy, as it allows users to make multiple perfect copies in an instant, without

⁶⁵ 6 FIONA MACMILLAN, NEW DIRECTIONS IN COPYRIGHT LAW, 12 (2007).

⁶⁶ *Id.*

requiring a major investment in physical manufacturing and distribution facilities. As it becomes easier to transmit large amounts of information quickly, it becomes easier for those without a commercial stake or profit motive, a disgruntled former employee, a dissatisfied customer, an internet user opposed to the fundamental concept of copyright law to inflict tremendous damage to the market for a copyrighted work. Unlike the traditional analog world, substantial commercial harm can be caused without a commercial aspect to the piracy itself. Moreover, for such infringers, civil remedies are less likely to serve as an effective deterrent and criminal sanctions may be needed to deter these individuals from causing serious harm to the value of copyrighted works.⁶⁷

In the case of *United States v. LaMacchia*,⁶⁸ the Court demonstrated that the lack of criminal penalties for wilful, non-commercial infringement has become a significant loophole in the digital environment. The Court itself decried this loophole, expressing frustration with the confines of section 506(a) as “One might at best describe the defendant’s actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values. Criminal as well as civil penalties should probably attach to wilful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. But, it is the legislature, not the Court which is to define a crime, and ordain its punishment.”⁶⁹

Section 2 of NET Act, under criminal infringement of copyrights, a new definition for the term ‘financial gain’ was introduced. The new definition brought clarity to the term by clarifying financial gain as “includes receipt of anything of value, including the receipt of other

⁶⁷ Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary United States House of Representatives 105th Congress, 1st Session September 11, 1997. *No Electronic Theft (NET) Act of 1997 (H.R. 2265)*, COPYRIGHT.GOV https://www.copyright.gov/docs/2265_stat.html.

⁶⁸ 871 F. Supp. 535-542 (D. Mass. 1994) , Court has drawn attention to current law’s shortcomings. David LaMacchia, a student at the Massachusetts Institute of Technology described by the Court as a “computer hacker,” created and operated electronic bulletin boards on the Internet and encouraged users to upload and download copies of popular copyrighted commercial software. The illegal copying that took place on the bulletin boards resulted in alleged losses to the copyright owners of over one million dollars. Because LaMacchia lacked a commercial motive, however, the government charged him with wire fraud rather than criminal copyright infringement. The Court dismissed the indictment, holding that copyright infringement can only be prosecuted under the Copyright Act. *See also* Statement of Marybeth Peters, *Supra* note 67.

⁶⁹ *Id.* at 545.

copyrighted works.” This language guarantees that criminal liability will not turn on the technicality of whether the infringing copies were sold for money, as opposed to other valuable benefits.⁷⁰

Section 2 (b) of the Act, included ‘for purposes of commercial advantage or private financial gain.’ The core of this sub section is its omission of any requirement of commercial purpose or financial motive thereby allowing criminal liability for wilful infringement to be based on the commercial impact on the copyright owner rather than the commercial purpose of the infringer.⁷¹ Thus NET Act brought file trading within the ambit of criminal copyright infringement and increased criminal penalties for such acts.

Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 amended Federal copyright law with respect to the statutory damages available for copyright infringement to increase. In the legislative history of the Digital Theft Deterrence and Copyright Damages Improvement Act, the house report reads; ‘ by the turn of the century the internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works. The advent of digital video discs, will enable individuals to store far more material than on conventional discs and, at the same time, produce perfect second hand copies . . . Many computer users are either ignorant that copyright laws apply to internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action. In light of this disturbing trend, it is manifest that

⁷⁰ Statement of Marybeth Peters, *Supra* note 67. The Copyright Office believes that the proposed clarification is desirable. The new definition will be particularly important in protecting copyright owners from piracy on the Internet, where a multitude of economic models have developed to compensate infringers for their illegal copies. It has become common, for example, for electronic bulletin boards to facilitate bartering systems where users contribute copies of infringing software in exchange for the ability to download copies of other software. *See, e.g.,* Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 927-28 (N.D. Cal. 1996); LaMacchia, 871 F. Supp. at 536., *see also* Section 2 (a) NET Act 1997.

⁷¹ *See generally*, 17 U.S. Code Section 506 - Criminal offenses. *See also* Section 3. Sentencing Commission Guidelines.

Congress respond appropriately with updated penalties to dissuade such conduct.⁷²

The increase in penalties would be an effective deterrent to would-be pirates of copyrighted works. This Act also directs the United States Sentencing Commission to issue sentencing guidelines to ensure that sentences for criminal offenses against intellectual property are sufficiently severe to deter such offenses.⁷³ Statutory damages available for copyright infringement was made to increase from the minimum damages from \$500 to \$750; and the maximum damages from \$20,000 to \$30,000.⁷⁴ Increases from \$100,000 to \$150,000 the maximum additional damages a Court may award for wilful infringement.

The underlying purpose for which No Electronic Theft (NET) Act of 1997 and Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 was introduced was that the copyright holders might do better to seek more effective means of receiving remuneration for uncontrolled uses than to criticize users for their unauthorised activities by reasserting proprietary control.⁷⁵ These Acts provide for criminal prosecution of individuals who engage in copyright infringement under certain circumstances to regulate unrestrained unauthorised use of copyright works by others.

5.4. EUROPEAN UNION (EU) AND UNITED KINGDOM (UK)

Copyright issues and related rights in general is regulated both at EU level and national level. Considering the issues of social media and its regulation the most important pieces of legislation are the directive 2001/29/EC, known as the European Copyright Directive (EUCD) and Electronic Commerce (EC Directive) Regulations 2002 which incorporates the EU Electronic Commerce Directive 2000/31/EC into the law of the United Kingdom.

⁷² See House Report No.: 106-216 (1999), 1999 WL 446444, at 3, *see also* SONY BMG MUSIC ENTERTAINMENT, et al.v. JOEL TENENBAUM, civil action no. 07-11446-rwz (D. Mass. 2012)

⁷³ See Statement on Signing the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 by William J. Clinton, President of United States of America. 1993-2001.

⁷⁴ See Section 2- Statutory Damages Enhancement.

⁷⁵ Fiona Macmillan, *supra* note 65 at 15.

5.4.1. European Copyright Directive (EUCD)

The purpose of EUCD was to harmonise European copyright regime and to incorporate the WIPO Internet treaties principles through standardizing exclusive rights, incorporating exclusive list of copyright exceptions and specifying obligations on safeguarding Technological Protection Measures. In the following paragraphs the application of the digital agenda features on EUCD will be analysed.

Table V.4- Digital agenda features and EUCD

Digital Agenda Features	European Copyright Directive (EUCD) Directive 2001/29/EC
The Right for Multiplicity.	Article 2 of the EUCD: Reproduction right
Right for Accessibility.	Article 3 of the EUCD: Right of communication to the public of works and right of making available to the public other subject-matter
Right for Technological Protection.	Article 6 of the EUCD: Obligations as to technological measures Article 8 of the EUCD: Sanctions and remedies
Right for Protection of Copyright Management Information.	Article 7 of the EUCD: Obligations concerning rights-management information
Limitations and Exceptions in the Digital Environment.	Article 5: Exceptions and limitations

5.4.1.1. The Right for Multiplicity

Article 2 of the EUCD mentions about the reproduction rights. It states member states to provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form for authors, performers, phonogram producers, for the producers of the first fixations of films and for broadcasting organisations for their respective works, performances phonograms and fixations.

5.4.1.2. Right for Accessibility

Considering the scope of transmission of works in digital networks, the directive explains the right of communication to the public and rights of making available to the public by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.⁷⁶

5.4.1.3. Right for Technological Protection

Regarding the legal protection of Technological Protection Measures, two provisions of EUCD are worth mentioning; Article 6 concerning obligations as to technological measures and Article 8 dealing with sanctions and remedies. EUCD obliges member states to provide adequate legal protection against the circumvention of any effective technological measures by the person engaged in circumvention carries out the process with knowledge, or with reasonable grounds to know, that the person is pursuing that objective, thereby clarifying at the inception that the act of circumvention itself is illegal.

The text of the directive explains what 'effective' 'technological measure' means. The expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC.⁷⁷ Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as

⁷⁶ Article 3 of European Copyright Directive.

⁷⁷ Article 6.3 of The European Copyright Directive, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029>.

encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.⁷⁸

It is obvious from the above definition that the concepts like access control and copy control are not distinctly defined separately. The vagueness in the definition of effectiveness also creates ambiguity with respect to framing of national laws. Contrary to Article 11 of WCT, Article 6 of EUCD clarifies that both acts of circumvention and preparatory acts shall be outlawed by the member states.⁷⁹ Article 6.2 of the directive obliges member states to provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.⁸⁰

From the reading of Article 6, it can be observed that the measures adopted are favouring right holders against the beneficiaries. Article 6.4 precludes beneficiaries from making use certain copyright exceptions provided under Article 5 due to legal constraints created by right holders via agreements and Digital Rights Management systems.⁸¹

⁷⁸ *Id.*

⁷⁹ Urs Gasser, *supra* note 14 at 17.

⁸⁰ Article 6.3 of The European Copyright Directive, <https://www.duo.uio.no/handle/10852/20114>.

⁸¹ Article 6.4 of The European Copyright Directive, Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by right holders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing right holders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

Legal remedies and sanctions are provided via Art 8 of the EUCD, wherein it obliges member state to provide appropriate, effective, proportionate and dissuasive sanctions and remedies and shall take all the measures necessary to ensure that those sanctions and remedies are applied. It obliges member states to take measures to ensure protection of interest of right holders whose interests are affected by an infringing activity and can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components.⁸² If at an instance of copyright or related right infringement by a third person occurs through a service provided by the intermediaries, member states shall ensure that right holders are in a situation to apply for an injunction against intermediaries.

5.4.1.4. Right for Protection of Copyright Management Information

Article 7 lays down the obligations concerning copyrights-management information. It obliges member states to deliver adequate legal protection against any person knowingly tampering any Rights Management Information.⁸³ The Article further obliges member states to deliver adequate legal protection against performing without authority the act of distribution, importation for distribution, broadcasting, communication or making available to the public of works or performing the acts of inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law.

The technological measures applied voluntarily by right holders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

⁸² Article 8 of The European Copyright Directive, <http://eurex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

⁸³ Article 7(2) of The European Copyright Directive - "rights-management information" means any information provided by right holders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

5.4.1.5. Limitations and Exceptions in the Digital Environment

Exceptions set out in Article 6.4 can be divided into two categories: the “public policy exceptions” on the one hand and the “private copying exception” on the other.⁸⁴ Article 6.4. states with regard to public policy exceptions including exceptions in relation to photocopying, the copy and archival purposes of educational facilities, broadcaster’s own ephemeral recordings, non-commercial broadcasts, teaching and research, use by disabled individuals, and public safety that Member states “shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation ...⁸⁵ the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work ... concerned.” While the public policy exceptions are mandatory, Recital 51 EUCD clarifies that Member states should take appropriate measures only in absence of “voluntary measures taken by right holders, including the conclusion and implementation of agreements between right holders and other parties”.⁸⁶

As far as the “private copying exception” is concerned,⁸⁷ member states may—but are not obliged to—take measures “unless reproduction for private use has already been made possible by right holders to the

⁸⁴ Nora Braun, *The Interface between the Protection of Technological Protection Measures and the Exercise of Exceptions To Copyright and Related Rights: Comparing the Situation in the United States and the European Community* 25(11) EIPR 499 (2003), Urs Gasser, *supra* note 14 at 18.

⁸⁵ Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) of The European Copyright Directive

⁸⁶ Recital 51, EUCD; The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by right holders, including the conclusion and implementation of agreements between right holders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that right holders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by right holders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection. *See also* Urs Gasser, *supra* note 14 at 18.

⁸⁷ Article 5.3 of The European Copyright Directive.

extent necessary to benefit from the exception or limitation concerned ... without preventing right holders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.”⁸⁸

It is essential to note that both categories of exceptions; public policy and private copying is inapplicable to works made available to the public on agreed contractual terms like the “on-demand”-services, in such a way that members of the public may access them from anywhere and anytime independently preferred by them.”⁸⁹

5.4.2. Directive on Electronic Commerce 2000

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, has introduced in its provision the safe harbor provisions. Articles 12, 13 and 14 that deals with intermediaries involved in activities as a “mere conduit”, caching and hosting respectively. The interesting feature with the “mere conduit” exception, is the supplementary presence of Article 12(3). This provision clarifies that the “mere conduit” exception shall not stand in the way of a Court or administrative authority requiring the service provider to terminate or prevent an infringement.⁹⁰ Article 18 of this Directive⁹¹ also casts an obligation upon member states to ensure that Court actions available under national law permit the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.⁹²

This Directive was transposed into the domestic law of U.K. by the insertion of Section 97A in the Copyright, Designs and Patents Act,

⁸⁸ See also Urs Gasser, *supra* note 14 at 18.

⁸⁹ See, e.g., Alvise Maria Casellati, *The Evolution of Article 6.4 of the European Information Society Directive*, 24 VLA J.L. & Arts 386 (2001), See also Urs Gasser, *supra* note 14 at 18.

⁹⁰ Article 12 (3) of the Directive on electronic commerce 2000 : This Article shall not affect the possibility for a Court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement. See also Ananth Padmanabhan, *Give Me My Space And Take Down His* 13, 1-16 (2013) <http://www.ijlt.in/archive/volume9/Ananth%20Padmanabhan.pdf>.

⁹¹ Article 18 (1) of the Directive on electronic commerce 2000-Court actions: Member States shall ensure that Court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

⁹² Ananth Padmanabhan, *Supra* note 90.

1988. This provision empowers the Court to grant an injunction against a service provider who has actual knowledge of another person using his service to infringe copyright, such as where the service provider is given sufficient notice of the infringement.⁹³

5.4.3. The Electronic Commerce (EC Directive) Regulations 2002

The Electronic Commerce (EC Directive) Regulations 2002 establishes legal rules that online retailers and service providers must comply with when dealing with consumers in the member countries of the European Union. Among the regulations enacted are the safe harbor defences for “information society service”⁹⁴ providers.

Regulations 17 to 19 create a defence for intermediary service providers from any liability incurred from the activities of mere conduits, caching and hosting in the circumstances set out in those regulations. Regulation 22 makes provision in relation to matters which a Court should have regard to when determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a).⁹⁵

5.4.3.1. Liability limitation with respect to Mere Conduit

When an information society service is involved in the transmission process or providing access in a communication network of information provided by a recipient of the service, the service provider shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction if in that transmission process the service provider

⁹³ Section 97A of CDPA, 1988- Injunctions against service providers: (1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.

(2) In determining whether a service provider has actual knowledge for the purpose of this section, a Court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to—

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013); and

(b) the extent to which any notice includes—

(i) the full name and address of the sender of the notice;

(ii) details of the infringement in question.

⁹⁴ Regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002; “information society services” means any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.”

⁹⁵ Explanatory Note of The Electronic Commerce (EC Directive) Regulations 2002.

did not initiate the transmission and did not select the receiver of the transmission. The service provider is not liable if he did not select or modify the information contained in the transmission. If the transmission process and access provision include the automatic, intermediate and transient storage of the information and done for the sole purpose of carrying out the transmission in the communication network, then also the service provider won't be liable.⁹⁶

5.4.3.2. Liability limitation with respect to Caching

The service provider shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and the service provider does not amend the information and conforms with conditions on access to the information and also with any rules regarding the updating of the information widely recognized and used by industry.⁹⁷

The service provider won't be liable if he acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a Court or an administrative authority has ordered such removal or disablement.⁹⁸

5.4.3.3. Liability limitation with respect to Hosting

The service provider shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction because of that storage where the service provider does not have actual knowledge of infringing activity or information. Further where a claim for damages is made, the service provider is not aware of facts or circumstances from which it would have been apparent that the activity or information was unlawful; or upon obtaining such knowledge or awareness. The service provider won't be liable if he acts expeditiously to remove or to disable access to the information, and if the recipient of the service was not acting under the authority or the control of the service provider.⁹⁹

⁹⁶ Regulation 17 of the Electronic Commerce (EC Directive) Regulations 2002.

⁹⁷ Regulation 18 of the Electronic Commerce (EC Directive) Regulations 2002.

⁹⁸ *Id.*

⁹⁹ Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002.

In determining whether a service provider has actual knowledge a Court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and the extent to which any notice includes the full name and address of the sender of the notice, details of the location of the information in question and details of the unlawful nature of the activity or information in question.¹⁰⁰

5.5. UNITED KINGDOM

5.5.1. Copyright, Designs and Patents Act, 1988

The legislations in UK are designed harmoniously with respect to the EU Directives and regulations, but the effectiveness of its implementation at national level are worth analysing to understand the depth in with the digital agenda features are incorporated. In the following paragraph the digital agenda features will be analysed within the Copyright, Designs and Patents Act, 1988.

Table V.5- Digital agenda features and CDPA

Digital Agenda Features	Copyright, Designs and Patents Act, 1988
The Right for Multiplicity.	Chapter II- Rights of a copyright owner
Right for Accessibility.	Chapter II- Rights of a copyright owner
Right for Technological Protection.	Section 296ZF- Interpretation of sections 296ZA 296ZA- Circumvention of technological measures

¹⁰⁰ Regulation 22 of the Electronic Commerce (EC Directive) Regulations 2002.

Right for Protection of Copyright Management Information.	Section 296ZB: Devices and services designed to circumvent technological measures Section 296ZD: Rights and remedies in respect of devices and services designed to circumvent technological measures
Limitations and Exceptions in the Digital Environment.	Section 296ZE: Remedy where effective technological measures prevent permitted acts

5.5.1.1. The Right for Multiplicity

Considering the reproduction right, the copyright owner can make copies in relation to a literary, dramatic, musical or artistic work by means of reproducing the work in any material form including storing the work in any medium by electronic means. The copyright owner can also perform, play or shown in public by means of apparatus for receiving visual images or sounds conveyed by electronic means.¹⁰¹

5.5.1.2. Right for Accessibility

Right for accessibility include communication to the public by electronic transmission, and in relation to a work include the broadcasting of the work and making the work accessible to the public by electronic transmission in such a way that members of the public may access from anywhere and at any time independently chosen by them.¹⁰²

5.5.1.3. Right for Technological Protection

Copyright, Designs and Patents Act, 1988 and clearly explain effective technological protection measure under its provisions. The Act defines “technological measures” as any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work other than a computer program. The Act defines protection of a work as the prevention or restriction of acts that are not authorised by the copyright owner of that work and are restricted by copyright.¹⁰³ The wordings of Section 296ZF(2) makes it clear that the technological protection measures are effective when an access control or

¹⁰¹ Chapter II- rights of a copyright owner.

¹⁰² Section 20 (2) of the Copyright, Designs and Patents Act, 1988.

¹⁰³ 296ZF (3) of the Copyright, Designs and Patents Act, 1988.

protection process such as encryption, scrambling or other transformation of the work, or a copy control mechanism is used by the copyright owner to achieve the intended protection. Section 296ZF(2) uses the same wordings as EUCD hereby including any type of technological measures aimed at protecting copyrighted works. Prior to the implementation of the EUCD, Act covered only copy control measures to protect works in electronic form. It is notable that Section 296ZF (3) (b) explains that the reference to the ‘use of work’ in Sec 296ZF (2) does not extend to any use of the work that is outside the scope of the acts restricted by copyright. This definition indicates that the provision does not cover situations where access or copy control technologies are used to prevent or restrain uses that are not relevant under U.K Copyright law, although the use in question may not be authorised by the right holder.¹⁰⁴

Under the Act both copyright owner and a person issuing copies of the work to the public or communicating it to the public have the same rights against an alleged infringement or infringer who does anything which circumvents technological measures knowing, or with reasonable grounds to know, that he is pursuing that objective.¹⁰⁵

5.5.1.4. Right for Protection of Copyright Management Information

Section 107 and Section 198 of the Act makes it a criminal offence to infringe copyright by communicating the work to the public during business or to an extent that prejudicially affect the right holder. These provisions apply to a situation where a pirate circumvents technological protection measures and, for instance, distributes the hacked file over Peer to Peer networks. Section 296ZB¹⁰⁶ and Section 296 ZD,¹⁰⁷

¹⁰⁴ Urs Grasser, Micheal Girsberger, *Transporting the Copyright Directive: Legal Protection of the Technological Measures in EU- Member States- A genie Stuck in the Bottle*, 14, 15, 1-31 (2004) <https://cyber.harvard.edu/media/files/eucd.pdf>.

¹⁰⁵ See generally Section 296 ZA (1), (2), (3) of the Copyright, Designs and Patents Act, 1988.

¹⁰⁶ See Section 296ZB of the Copyright, Designs and Patents Act, 1988 - Devices and services designed to circumvent technological measures, 296ZB transposes Article 6(2) of EUCD. This would create a criminal offence when a person commits one of the following acts: (a) makes for sale or hire, or (b) imports otherwise than for his private and domestic use, or (c) in the course of a business-- (i) sells or lets for hire, or (ii) offers or exposes for sale or hire, or (iii) advertises for sale or hire, or (iv) possesses, or (v) distributes, or (d) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner any device, product or component which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures.

create a new offence and a new civil remedy, respectively, in relation to trafficking in devices and services which circumvent effective technological protection measures.¹⁰⁷ Section 296ZB, makes it a criminal offence which is punishable by up to two years imprisonment to manufacture etc. any device, product or component which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures. Section 296ZD of the Act also gives the copyright owner a cause of action against anyone who manufactures or supplies any device which (1) is promoted for the purposes of circumvention, (2) has only limited commercially significant purposes or use other than to circumvent or (3) is primarily designed to enable circumvention.

5.5.1.5. Limitations and Exceptions in the Digital Environment

Certain acts like use for research and private study, copying by librarians etc. are permitted act which may be done in relation to copyright works, notwithstanding the subsistence of copyright and where the application of any effective technological measure to a copyright work other than a computer program prevents a person from carrying out a permitted act in relation to that work then that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State.

Under the scheme set forth in Section 296ZE a complainant may issue a complaint to the Secretary of state, acting through the U.K Patent Office, who will open an investigation to explore “whether any voluntary measure or agreement relevant to the copyright work the subject of complaint subsists.” If this investigation leads to the conclusion that there is no subsisting voluntary measure or agreement, the Secretary may give a direction requiring the copyright holder or the exclusive licensee to ensure that the complainant can benefit from the permitted act.

5.6. INDIA

As stated in the introductory portion, For understanding the complexities and efficiency of the legislations, the Indian law relating to copyrighted content in social media has to be methodically studied for making comparative analysis. The major legislations include the

¹⁰⁷ See Section 296ZD of the Copyright, Designs and Patents Act, 1988- Rights and remedies in respect of devices and services designed to circumvent technological measures.

¹⁰⁸ Urs Grasser, Micheal Girsberger *supra* note 104 at 27, 28.

Copyright Act of 1957 and the Information Technology Act of 2000. The incorporation of digital agenda features in these respective legislations will be made in the coming paragraphs.

5.6.1. The Copyright Act, 1957

Table V.6-Digital agenda features and the Indian Copyright Act

Digital Agenda Features	The Copyright Act, 1957
The Right for Multiplicity.	Section 14: Meaning of Copyright
Right for Accessibility.	Section 2(ff): Communication to the public Section 14: Meaning of Copyright
Right for Technological Protection.	Section 65 A: Protection of Technological Measures
Right for Protection of Copyright Management Information.	Section 65B: Protection of Right Management Information
Limitations and Exceptions in the Digital Environment.	Sections 52 (1) (b), (c) read with Rule 75 of the Copyright Rules 2013 Section 65B of the Copyright Act.

5.6.1.1. The Right for Multiplicity

Various rights are guaranteed under the exclusive rights¹⁰⁹ and the major being the right of reproduction which comprises of making available of the work in any material form including the storing of it any medium by electronic means.

5.6.1.2. Right for Accessibility

Considering the aspect of communication to the public, the same has been brought under the exclusive right provisions and made

¹⁰⁹ Section 14 (1) (a) (i), (c) (i) (A) (d) (i) (B), (e) (i) of the Copyright Act, 1957. *See also* Poonam Dass, *Reproduction Right In Digital Medium And Free Use For Educational Purpose- An Analysis Of National And International Obligations Of India To Provide Education To All Viz. A Viz. Protecting Copyright in* COPYRIGHT LAW IN THE DIGITAL WORLD: CHALLENGES AND OPPORTUNITIES (Manoj Kumar Sinha, Vandana Mahalwar ed. 2017).

modification in the definition of communication to public¹¹⁰ so as to include the online context. This has been done by specifying that the right includes making the work available at such place and time individually chosen by the person accessing such work. This means that the author of the work has the right to make the work available to the public at large or to a category of the public. This in turn confers on the author a right to grant or deny access to a work, in relation to the whole world or any specified group.¹¹¹

5.6.1.3. Right for Technological Protection

The Copyright (Amendment) Act, 2012 introduced provision related to protection of technological measures. The amendment inserted Section 65A specially managing protection of technological measures with specified exceptions laterally. Thus Section 65 A reads; “Any person who circumvents an effective technological measure applied for protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.”

From the analysis of the text, it is noteworthy that neither the term ‘circumvention’ nor the terms ‘technological measure’ or ‘effective technological measures’ have been defined in the Act. The absence of definitions for terms like ‘technological measure’ in the Indian amendment, creates a gap because it is not clear as to whether the provision relates to access control measures or copy control measures or both. Furthermore, it being preceded by the term ‘effective’ necessarily implies that all technological measures are not effective. This further implies that circumvention of non-effective technological measures does not attract liability under this provision and if infringement is caused, liability can be attached only to infringement and not circumvention. But the proposed provision does not lay down any guideline as to how to differentiate between an effective technological measure and a non-effective technological measure. If the purpose of a definition is to give clarity as to what will be the activities that will be covered by the provision, the proposed amendment has failed in this aspect.¹¹² The usage of the term ‘who circumvents,’ without proper definition of the term

¹¹⁰ Section 2(ff) of the Copyright Act, 1957.

¹¹¹ Arathi Ashok , *Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment* 17 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 526, 521-531 (2012).

¹¹² *Id.* at 524.

circumvention, liability is only imposed on the person who does the act of circumvention. This removes from the meaning of the provision, any person who facilitates, by making available the circumventing technology, the act of circumvention, although it is possible to impose liability on such persons as abettors of infringement if it can be proved that they had the reasonable belief that the work is being circumvented for the purpose of infringing someone's copyright.¹¹³

The usage 'with the intention of infringing such rights,' establishes that the liability is applicable only to the person who actually circumvents an effective technological measure applied to protect the work.

The provision has specifically omitted activities such as manufacture or otherwise dealing with technology that will facilitate circumvention. Thus, all preparatory activities are excluded and consequently all persons who make such preparation.

The legal remedy provided under the Act is of criminal nature. Any person against whom violation of this provision is proved shall serve a prison term of maximum two years and is also liable to pay a fine for which no limits have been fixed.

5.6.1.4. Right for Protection of Copyright Management Information

According to Section 65B(i) of the Act, if any person knowingly removes or alters any rights management information without authority, he shall be imprisoned for up to two years and shall also be fined. Similar punishments are also prescribed for persons who distribute, import for distribution, broadcast or communicate to the public, copies of any work or performance without authority, knowing that the rights management information has been removed or altered without authority as per Section 65B(ii).¹¹⁴

The provision also specifically mentions that the criminal remedies provided are in addition to the civil remedies already provided under the Copyright Act for the copyright owners in such works. There are two factors which need to be highlighted: first, when compared to the provisions relating to protection of technological measures, the provisions relating to protection of rights management information takes a far more

¹¹³ *Id.* at 525.

¹¹⁴ Arul George Scaria, *Does India Need Digital Rights Management Provisions or Better Digital Business Management Strategies?* 17 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 465, 463-477 (2012).

rigid approach. This is visible from the absence of any explicit exceptions under the provision. Second, by explicitly mentioning the additional availability of civil remedies, the provision on protection of rights management information shows a stricter approach, compared to the provision against circumvention of technological protection measures.¹¹⁵ Both the provisions relating to Protection of Technological Measures and Rights Management Information illustrate a carefully drafted legislation meant to satisfy the minimum requirements of the WCT and the WPPT. They are also remarkable for not providing broad protection to subjects generally outside the purview of copyright protection.¹¹⁶

5.6.1.5. Limitations and Exceptions in the Digital Environment

Limitations and exceptions in the digital environment are laid down in the Indian Copyright Act under the Sections 52 (1) (b), (c) read with Rule 75 of the Copyright Rules 2013 and Section 65B of the Copyright Act.

Limitations under the act can be divided into two heads generally; the general limitation under the fair use provision, and the Liability limitation provision explained under Sections 52 (1) (c) read with Rule 75 of the Copyright Rules 2013. Section 52 (1) (b) states that the act of transient or incidental storage of work or performance purely in technical process of electronic transmission or communication of public shall not constitute an infringement. This general limitation pave way to the provisions relating to the liability limitation to the ISPs and information intermediaries.

The Copyright (Amendment) Act 2012 through the Sections 52(1)(b) and (c) introduced “safe harbors” for Internet intermediaries. These provisions limit the liability of intermediaries with respect to the “transient or incidental storage of a work or performance.” Clause (b) guards ISPs, cable/DTH providers and the like, while clause (c) guards “information intermediaries” such as Google, YouTube, or any other entity providing “electronic links, access or integration”.¹¹⁷

The information intermediary will be under a safe harbor provision if (1) The copyright holder has not expressly prohibited the intermediary’s provision of the “links, access, or integration”; and (2) The

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Prashant Reddy, *A look at the new notice and takedown regime under the Copyright Rules, 2013* SPICY IP (Apr 29, 2013), <https://spicyip.com/2013/04/guest-post-look-at-new-notice-and.html>.

intermediary has neither actual nor “red flag” knowledge that the transient storage is of an infringing copy. The basis for the notice and takedown process is contained in the proviso to clause (c) – it allows the holder to deliver a written complaint to the intermediary alleging that its transient storage is an infringement, in which case the intermediary must block access to the content until the complainant obtains a Court order restraining the intermediary from providing. If such an order is not obtained within 21 days, the intermediary may restore access to the transient copy.¹¹⁸

¹¹⁸ *Id.* See also Section 52 1 (c) and Rule 75 of Copyright Rules 2013- Storage of Transient or Incidental Copies of Works; (1) Any owner of copyright may give a complaint in writing under clause (c) of sub- section (1) of section 52, to a person who has facilitated transient or incidental storage of work for providing electronic links, access or integration to restrain from such storage of work.

(2) The written complaint shall contain the following particulars, namely:—

(a) the description of the work with adequate information to identify the work;

(b) details establishing that the complainant is the owner or exclusive licensee of copyright in the work;

(c) details establishing that the copy of the work which is the subject matter of transient or incidental storage is an infringing copy of the work owned by the complainant and that the allegedly infringing act is not covered under section 52 or any other act that is permitted under the Act;

(d) details of the location where transient or incidental storage of the work is taking place;

(e) details of the person, if known, who is responsible for uploading the work infringing the copyright of the complainant; and

(f) Undertaking that the complainant shall file an infringement suit in the competent Court against the person responsible for uploading the infringing copy and produce the orders of the competent Court having jurisdiction, within a period of twenty-one days from the date of receipt of the notice.

(3) On receipt of the written complaint, the person responsible for the storage of the copy, if satisfied from the details provided in the complaint that the copy of the work is an infringed copy, within thirty-six hours, take measures to refrain from facilitating such access for a period of twenty-one days from the date of receipt of the complaint or till he receives an order from the competent Court restraining him from facilitating access, whichever is earlier.

(4) The person responsible for storage shall display a notice giving reasons for restraining such access to persons requesting for access to the alleged infringing copy.

(5) The person responsible for storage may restore the storage of the work in case the complainant failed to produce the orders of the competent Court having jurisdiction, restraining him from facilitating access.

(6) In case the complainant fails to produce the orders of the competent Court having jurisdiction within the stipulated period, the person responsible for storage shall not be obliged to respond to any further notice sent by the same complainant on the same work in the same location.

Under the exception clause, Section 65 A provides that the doing of certain activities will not be considered as infringement by the law, as provided in Section 52. The major of these activities include – reproduction for fair use in literary, dramatic, musical and artistic work, but not computer programs; for private use including research, criticism and review; for purpose of reporting current events, for legislative and judicial proceedings; for educational and instructional purposes; for libraries; communication of the work through reading and recitation in public of reasonable extracts; by amateur clubs; religious institutions; etc. Specific exception has been provided in the use of computer programs for the making of backup copies, copies for utilization of the program for which it is provided, etc. For any of these above stated purposes an effective technological measure can be circumvented.¹¹⁹

5.6.2. Information Technology Act, 2000 (IT Act)

Section 79 of the Information Technology Act, 2000 deals with the exemption from liability of intermediary in certain cases. According to the Act an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted.¹²⁰ The act further enumerates liability limitation if the intermediary did not initiate the transmission or choose the receiver of the transmission and the information contained in the transmission was not selected or modified.¹²¹

¹¹⁹ Arathi Ashok, *supra* note 111 at 527, 528. Section 65 A (2) Nothing in sub-section (1) shall prevent any person from, (a) Doing anything referred to therein for a purpose not expressly prohibited by this Act: Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or (b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or (c) Conducting any lawful investigation; or (d) Doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; or (e) Operator; or (f) Doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or (g) Taking measures necessary to the interest of national security.

¹²⁰ Ananth Padmanabhan, *Supra* note 90.

¹²¹ Section 79 of the Information Technology Act, 2000: Exemption from liability of intermediary in certain cases.—

One of the important aspect of the act is that the intermediary must observe due diligence while discharging his duties under this Act. Thus it is mandatory for the Intermediaries to follow such due diligence to seek exemption under the IT ACT, 2000. The exemption provided under Section 79 read with the Information Technology (Intermediaries guidelines) Rules, 2011 can be said to be the generic version of DMCA safe harbor provision. Rule 3 (3) of the Guidelines states that the intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission. Following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information if temporary or transient or intermediate storage of information is an intrinsic automatic feature and immediate response is made by intermediary upon actual knowledge of the infringing activity.¹²²

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-section (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purpose of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.

¹²² Rule 3 (3) of the Information Technology (Intermediaries guidelines) Rules, 2011: The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2); provided that the following actions by an intermediary shall not amount to hosing, publishing, editing or

Rule 4, when read along with Rule 2(d) of the Information Technology (Intermediaries guidelines) Rules, 2011, mandates an obligation on the intermediary, upon actual knowledge, to disable any information within thirty six hours on whose computer system copyright infringing content has been stored, hosted or published.

5.7. JURISDICTIONAL LEGISLATIVE COMPARISON AND ANALYSIS OF DIGITAL AGENDA FEATURES

5.7.1. Right for Technological Protection and Protection of Copyright Management Information

The core aspect of the technological protection framework is that a proper definition of ‘Effective Technological Measure’ has to be made. Significant feature of the legislative framework would be its capability to draw a distinction between access control and copy control under the technological measures and mentioning of what effective technological measure means.

Table V.7-Technological Protection Measure- Legislative framework feature-Comparison

TECHNOLOGICAL PROTECTION MEASURE				
Legislative Framework Feature	United States of America	European Union	United Kingdom	India
Definition and Scope	Access Control and Copy Control substantively distinguished	Access Control and Copy Control analytically distinguished	Access Control and Copy Control analytically distinguished	No definition. Not substantively or analytically distinguished

storing of any such information as specified in sub-rule: (2) — (a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource; (b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorized by the intermediary pursuant to any order or direction as per the provisions of the Act.

Effectiveness	No definition, left entirely to the Courts to interpret.	No definition, Types mentioned. Vague	No definition, Types mentioned. Vague	No Definition.
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Making comparison, under the definition and scope of Technological protection measure provision, a substantive differentiation has been made with respect to access control and copy control under Section 1201 (a) (3) (B) and Section 1201 (b) (2) (B) respectively. The EUCD does not substantively differentiate but if we analyse the definition a distinction can be made out through application of an access control or protection process, such as encryption, scrambling, transformation etc. from copy control. The same principle has been incorporated United Kingdom CDPA under the Section 296ZF (2) (a), (b) respectively. Considering India, The absence of definitions for terms like ‘technological measure’ creates a gap because it is not clear as to whether the provision relates to access control measures or copy control measures or both.

The Second important legislative framework aspect is the concept of ‘Effectiveness’. Considering the legislative implementation three approaches can be taken; first, there are anti-circumvention laws that use the effectiveness criterion as well but leave its interpretation entirely to the Courts. Second, there is the possibility of not including it in the definition of TPM. Third, there are attempts in some jurisdictions to statutorily specify to some extent what effective technological measures are.¹²³

In the United States of America, the first approach have been undertaken. Under DMCA a technology measure effectively protects a right of a copyright owner under this title if the measure, in the ordinary course of its operation, prevents, restricts or otherwise limits the exercise of a right of a copyright owner under this title.¹²⁴ Thus effectiveness simply means that it restricts or prevents the copyright associated act. The usage of the term is still ambiguous and hasn’t really supported or advanced anything to the anti-circumvention provision. The European Union and the United Kingdom have taken a different approach by referring to the types of protected measures rather than defining them

¹²³ Urs Gasser, *supra* note 14 at 24.

¹²⁴ 17 USC Section 1201 (b) (2) (B).

leaving the provisions to be vague.¹²⁵ In India, term ‘effective’ necessarily suggests that all technological measures are not effective thereby suggesting that circumvention of non-effective technological measures are free from liability and can be attached only to infringement and not circumvention. The Provision under the Indian law does not provide for a substantive or analytical differentiation of effective and non-effective technological measure and it is vague in its nature of providing clarity.

Considering the circumvention of technological protection measure digital agenda feature, in order for the legislations to be effective must have clear definitional aspect with respect to circumvention and also clear idea of prohibited conduct provisions to clearly mark out the activities prohibited.

Table V.8-Circumvention of technological protection measure-
Legislative framework feature-Comparison

CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURE				
Legislative Framework Feature	United States of America	European Union	United Kingdom	India
Definition and Scope	Clear definition with respect to circumvention related to access control and copy control technologies	No specific definition to circumvention	No specific definition to circumvention	No specific definition to circumvention
Activities Prohibited	Provisions with respect to circumvention and preparatory activities partially included.	Provisions with respect to circumvention and preparatory activities included	Provisions with respect to circumvention and preparatory activities included.	Vague and Interpretative in nature. Weak provisions.

¹²⁵ Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

In the United States of America, DMCA have included provisions that define a circumvention. The Sections 1201 (a) (3) (A) and 1201 (b) (2) (A) clearly defines circumvention with respect to access control and rights control respectively. Whereas Neither EUCD nor CDPA provides for a clear definition for the circumvention of Technological Protection Measure. Indian legislation also fails to provide a definition for circumvention. From the drafting of the provision it is clear that it is left to judiciary to decide as to what will constitute circumvention. This is a policy decision that should have taken into account various facts like identification of all effective technologies that have minimum adverse effect on the legitimate interest of the public, recognition of all technologies that serve the need of the owners of copyrighted works protected by technology, etc.¹²⁶

The elements included in circumvention and preparatory activities are; circumvention of copy control mechanism, circumvention of access control mechanisms, import and use of trafficking devices and providing or facilitating circumvention services. In the United States of America, DMCA have included provisions with respect to circumvention and preparatory activities partially. Circumvention related to access control mechanisms are explained under the first ban that prohibits circumventing Digital Rights Management to gain unauthorised access to copyrighted works,¹²⁷ but there are no provisions with respect to circumvention of copy control mechanisms. The second ban prohibiting manufacturing, importing and trafficking in tools that could help circumvent access¹²⁸ deals with the illegal use and import of trafficking devices. The third ban additional violations ban prohibits trafficking in tools to facilitate the circumvention of DRM if that DRM protects any copyright holder's right.¹²⁹ Facilitating circumventing services by a third person is not included in the text of the legislation.

In European Union and United Kingdom, Article 6 relating to obligations as to technological measures and Article 7 relating to obligations concerning rights-management information deals with circumvention and preparatory activities. Under UK CDPA, Part VII, circumvention of protection measures deals with circumvention and preparatory activities. The provisions under EU and UK are definite and clear when compared to US and India.

¹²⁶ Arathi Ashok, *supra* note 111 at 525.

¹²⁷ 17 USC Section 1201 (a) (I) (A).

¹²⁸ 17 USC Section 1201 (a) (2).

¹²⁹ 17 USC Section 1201 (b): Additional Violations.

In India, the provisions are not direct and interpretative in nature rendering it vague in so many aspects. Since so many terms are not defined under the Act, the activities prohibited by the act also lacks clarity. Indian provision with the usage 'who circumvents' indicating the act of circumvention remains undefined. The words imply that there must be an actual act of circumvention and any other person facilitating circumvention activity will not be liable. Even though it is probable to enforce liability on such persons as abettors of infringement if it can be proved of their actual involvement and knowledge. This is in divergence with the provisions of the DMCA, EU Directive and UK law, all of which enforce liability on the person who facilitate in the circumvention of a technological measure. Indian provision expressly provides that a third party can help a person to circumvent a technological measure provided such circumvention is not to do any activity prohibited by the Act. In order to facilitate such circumvention and with a view to monitor the same, the section obligates that a record be kept of the person seeking such circumvention and also the reason for it.¹³⁰ This can lead to multiple consequences as the law is weak on the aspect of imposing of sanction owing to non-maintaining of records by third person performing circumvention. Another practical difficulty is that the law is silent on the corresponding use of the legally made circumvention technology by third person for illegitimate purpose. The prohibition circumvention of access control mechanism can be implicitly made out from Section 65 B (i) of the Act and circumvention of copy control mechanism can be implicitly made out from Section 65 B (ii) of the Act.¹³¹

¹³⁰ Section 65 A of Copyright Act, 1957.

¹³¹ According to Section 65B(i) of the Act, if any person knowingly removes or alters any rights management information without authority, s/he shall be imprisoned for up to two years and shall also be fined. Similar punishments are also prescribed for persons who distribute, import for distribution, broadcast or communicate to the public, copies of any work or performance without authority, knowing that the rights management information has been removed or altered without authority as per Section 65B(ii).

5.7.2. Limitations and Exceptions in the Digital Environment

Table V.9-Limitation and exceptions in the digital environment-
Legislative framework feature-Comparison

Limitations and Exceptions in the Digital Environment.				
Legislative Framework Feature	United States of America	European Union	United Kingdom	India
Exceptions	Exception to the operation of the entire section. Exceptions related to category of technological measures that control access to works.	Public policy exception. Private copying exception.	General exceptions.	General exceptions-Vague
Limitations	General savings clauses. No mandate provision. Liability limitation.	General Limitation based on fair use Liability limitation provisions and enforcement mechanism by Courts.	General limitation to be read with Section 97A of the CDPA, 1988: Injunctions against service providers for copyright infringement.	Liability limitation under Copyright Act-Limited Liability limitation Under I.T. Act. Weak and ambiguous provisions.

The DMCA set out several limitations and exceptions to the liability for acts of circumvention and/or preparatory acts, respectively. These exceptions are essentially a defence to a prohibited circumvention related act, while there are no statutory obligations placed on right holders to provide beneficiaries with the means of taking advantage of the exceptions and privileges.¹³² The general exceptions laid down includes exception to the operation of the entire section and exceptions related to category of technological measures that control access to works.

¹³² Urs Gasser, *supra* note 14 at 28.

The most important aspect with respect to social media relating to copyright infringement and liability is the detailing of provision relating to liability limitation or the safe harbor provisions. Liability limitation are sorted out under various categories in the Title II, The Online Copyright Infringement Liability Limitation Act (OCILLA) which represents a compromise between online service providers and copyright holders. The limitations are based on the following categories of conduct by a service provider: Transitory communications, System caching, Storage of information on systems or networks at direction of users and Information location tools which is very exhaustive and detailed.

Art. 6.4 of the EUCD, by contrast, “does not introduce exceptions to the liability of the circumvention of technological measures in a traditional sense, but rather introduces a unique legislative mechanism which foresees an ultimate responsibility on the right holders to accommodate certain exceptions to copyright or related rights.” With regard to the public policy exceptions of EUCD¹³³ invites right holders to take voluntary measures, including agreements between them and “other parties concerned,” in order to ensure that the beneficiary of an exception or limitation can benefit from the respective exceptions or limitations. In the absence of such voluntary measures or agreements within a reasonable period of time, member states are obliged to “take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law ...the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject matter concerned.”¹³⁴

Against this backdrop, the European framework leaves member states with two options. First, Member states might immediately take steps to ensure that the beneficiaries of copyright exceptions can in fact benefit from the exception despite technical protection measures and the lack of voluntary measures on the part of right holders. Second, member states due to uncertainty about future technological developments and business practices in the field of protection measures might pursue a “wait-and-see” strategy and only intervene later if practical need for legislation has become evident. In the context of the EUCD’s public

¹³³ Part I.B.1, Article 6.4.1 of EUCD.

¹³⁴ Article 6.4.1 of EUCD, *see also* Urs Gasser, *supra* note 14 at 28.

policy exceptions, one can distinguish three approaches: mediation, administrative complaints procedure, and direct access to Courts.¹³⁵

The United Kingdom, however, has introduced a special administrative procedure to ensure the observance of copyright exceptions. Section 296ZE(2) of the Copyright Act, Section 296ZE(3)(a), Section 296ZE(6) forms the basis of this administrative procedure.

The Electronic Commerce (EC Directive) Regulations 2002 establishes legal rules that online retailers and service providers must comply with when dealing with consumers in the member countries of the European Union. Among the regulations enacted are the safe harbor defences for “information society service”. Regulations 17 to 19 create a defence for intermediary service providers from any liability incurred from the activities of mere conduits, caching and hosting in the circumstances set out in those regulations. Regulation 22 makes provision in relation to matters which a Court should have regard to when determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a).

In view of the safe harbor provision in India, the law permits only one safe harbor for intermediaries; the transient and incidental storage, which is not defined anywhere in the act. Where as in the DMCA and The Electronic Commerce (EC Directive) Regulations, there are couple of safe harbors for intermediaries, each directed at an exhaustive intermediary activity. So, intermediaries must come across different conditions to be relieved from liability for damages for Transitory communications, System caching, Storage of information on systems or networks at direction of users and Information location tools. In The Electronic Commerce (EC Directive) Regulations intermediaries must meet different conditions to be exempted from liability for damages for mere conduits, caching and hosting. Even though clauses (b) and (c) of section 52 refer to the intermediary activities of transmission and providing links and search, the liability limitation provisions does not wholly protect these activities as they only protect the making of transient copies in accordance to such activities thereby limiting the ambit of safe harbor provisions under the Indian law.

Exception under Indian law are still the traditional fair use category. The works in the digital world requires a different set of exceptions, but it is absent in the Indian law as the law is even silent on

¹³⁵ *Id.*

various definitional aspect of technology. It will be nifty to introduce the system used in the EUCD in the Indian law as it seems to be more advanced and adaptive to the everyday changing technological advancements. The introduction of administrative provisions which foresees an ultimate responsibility on the right holders to accommodate certain exceptions to copyright or related rights. In the absence of such voluntary measures or agreements within a reasonable period, government is obliged to “take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided in the copyright law.

Considering the notice and take down procedure under Indian law, on receipt of the complaint and if satisfied, the ISP within 36 hours must refrain from facilitating access for a period of 21 days or until he receives a Court order restraining him from facilitating access. This gives the intermediary wide power with respect to takedowns thereby devaluing the principle of liability limitation, balance between online service provider’s freedom and copyright holder’s rights. The DMCA gives copyright holders a robust benefit, as it is considerably more detailed and less ambiguous. The intermediary must always take down the allegedly infringing work, unless it receives a “counter-notice” from the uploader contending that the work was taken down by mistake or misidentification. It also allows the uploader to partake in the notice and takedown process thereby increasing the transparency thereby creating a healthy safe harbor for intermediaries and equalises it by granting copyright holders a strong power to demand takedowns. Indian law goes on the other hand fashions a weak safe harbor and giving intermediaries the wide powers on takedowns.

Understanding and harmoniously interpreting the provisions of the IT Act and the Guidelines therein along with the recent amendments to the Copyright Act, is to contend that the issue of copyright infringement by “mere conduit” ISPs is governed by Section 52(1)(b), which completely absolves them of any liability, while that of enforcement of copyright through the medium of such ISPs is governed by the IT Act.¹³⁶ This bifurcation suffers from the difficulty that Section 79 of the IT Act is not an enforcement provision. It is a provision meant to exempt intermediaries from certain kinds of liability, in the same way as Section 52 of the Copyright Act.¹³⁷

¹³⁶ Ananth Padmanabhan, *supra* note 90 at 14.

¹³⁷ *Id.*

Section 52(1)(b) is a blanket “mere conduit” exemption from liability for copyright infringement that stands uninfluenced by the presence of Section 79 of the IT Act or the Intermediaries Guidelines. In the absence of a legislative scheme for enforcement in India akin to Section 97A of the U.K. Copyright, Designs and Patents Act, 1988, Indian Courts cannot grant an injunction directing such “mere conduit” ISPs to block access to websites in general or infringing content in particular, and any such action is not even maintainable in law post the insertion of Section 52(1) (b).¹³⁸ It can be inferred that The IT Act is an unsuitable system for website blocking.

5.8. CONCLUSION

Complexities posed by technology are numerous, the Intellectual Property Rights in a technologically advanced platform will have qualms and worries. The digital agenda principles put forth by the Internet Treaties were a sensible intervention to decipher the concerns. Many a jurisdiction have made use of those principles, applying them to their national legislations, thereby regulating the copyrighted contents online almost effectively.

Considering India and her pace in technological advancement and usage of social media, it is vital to have a look on the effectiveness and adaptability of the legislations that regulates copyrighted contents in social media. The digital agenda principles; the right for multiplicity and accessibility, the Indian law has adapted to bring in the change recognising various parameters related to it.

A content in a social media can have an identity only when it can be attributed to an owner and when it can be protected against tampering by unauthorised individuals. The digital agenda principle of right for technological protection seems to be feeble and indefinite in Indian law owing to the absence of proper definitions thereby limiting its scope within the national copyright law. It can be understood from the analysis made earlier that there is no substantive or analytical distinction of the Technology Protection Measures limiting the effectiveness of its ambit.

The digital agenda principle related to the right for protection of copyright management information seems to be vague and weak under the Indian law because of the absence of proper definition of circumvention and prohibited acts within. The exception provisions under the Indian law with respect to circumvention, which is of great importance in this

¹³⁸ *Id.* at 15.

technologically developing era, is not contemporary in nature. The law relating to the service providers who are the gatekeepers for this technology platform, are weak under the Copyright Act and Information Technology Act when compared and analysed with jurisdictions that of United States of America and United Kingdom.

From all the above submissions it can be inferred that it's high time to get accustomed to technological changes or re modify the Indian legislations that regulate copyright contents online.

REGULATIONS CONCERNING PROTECTION OF TRADEMARK IN SOCIAL MEDIA

6.1. INTRODUCTION

The advancement in technology has improved the way advertising is carried out. The new technology have indeed supported the brand owners in promoting their product in a short span of time. But these technological improvements have affected the brand owners tremendously. The unauthorised use of marks thereby leading to the distinctiveness getting affected and the intentional use of marks to affect the reputation of the marks have increased in the social media platform. The regulations of international and national nature have provided with basic support to control and prevent the unauthorised use of marks.

Even though trademark protection was guaranteed by the Madrid Agreement Concerning the International Registration of Marks, 1891 Paris Convention for the Protection of Industrial Property, 1883¹ Trademark Law Treaty, 1994 and other treaties.² But solving issues of internet were of far reach under these treaties.

¹ Article 10 bis of Paris Convention for the Protection of Industrial Property, 1883 mention about unfair competition which states, acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor, false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor, indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods etc shall be prohibited. And Article 10 ter guarantees legal remedies for acts like goods unlawfully bearing a mark, false indication and unfair competition.

² See generally Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989. Singapore Treaty on the Law of Trademarks, 2006. Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, 1973.

Article 16 of the TRIPs provision deals with the rights conferred to the owner of a registered trademark. The law provides exclusive right to the registered trademark owner to prevent all third parties from using identical or similar signs during trade or on goods or services without the owner's consent where in such use would result in a likelihood of confusion owing to identical or similar nature to those already registered marks. Likelihood of confusion is presumed in case of the use of an identical sign for identical goods or services.³

Article 17 of the TRIPs allow members of the WTO, to provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.⁴ So TRIPs provides a two-step limitation to trademark right. Firstly, with respect to limited exceptions that deals with fair use concept and secondly, considering the legitimate interest of the trademark holder and of third parties.⁵

Article 61 of the TRIPs states that in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, member states shall provide for criminal procedures and penalties to be applied. The available remedies shall include imprisonment and/or monetary fines adequate to provide a deterrent, which is consistent with the ambit of penalties generally applied for crimes of comparable magnitude. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, where they are committed wilfully and on a commercial scale.

³ Article 16.1 TRIPs- The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

⁴ DANNY FRIEDMANN, TRADEMARKS AND SOCIAL MEDIA: TOWARDS ALGORITHMIC JUSTICE 195 (2015). *See also* https://www.wto.org/english/docs_e/legal_e/31bis_trips_04_e.htm.

⁵ *Id.*

So, in general the TRIPS provisions grant for protection against trademark infringement, exceptions and limitations with respect to trademark infringement and remedial measures.

WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and other Industrial Property in Signs, on the internet was prepared by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications.⁶ The provisions of the Joint Recommendation was introduced with an aim at providing a transparent legal framework for the right holders of trademark who exploit their marks on the internet for commercial advantage.⁷ The purpose of the recommendation was to assist the application of existing laws relating to marks, and other rights in signs, on the internet, and to be applied in the background of determining whether, under the applicable law, use of a sign on the internet has contributed to the acquisition, maintenance or infringement of a mark or other property right in the sign, or whether such use constitutes an act of unfair competition; enabling owners of conflicting rights in identical or similar signs to use these signs concurrently on the internet; and determining remedies.⁸

Under Part III of the Joint recommendation, regarding the use of trademarks on the Internet, generally involve three categories of actors the trademark holders, internet intermediaries, which includes operators of internet auction sites, search engines, virtual worlds, and social media, and users of the services offered by the said internet intermediaries.⁹

Part III of the Recommendation deals with primary liability and secondary liability of internet intermediaries and services users with respect to use of trademarks as keywords on search engines, use of trademarks in virtual worlds and social media. The Joint Recommendation recognises the infringement natures, liability aspect and makes the reader aware of the threats posed by it.¹⁰

Article 7 of the Joint Recommendation states that, subject to certain exceptions, the unauthorised user of a sign on the internet will be held liable, under the applicable law, for trademark infringement, and

⁶ Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Trademarks And The Internet* http://www.wipo.int/edocs/mdocs/sct/en/sct_25/sct_25_3.pdf.

⁷ *Id.* at Para 3.

⁸ *Id.*

⁹ *Id.* at Para 31.

¹⁰ *Id.* at Para 57.

such use amounts to infringement under the applicable law. However the Joint Recommendation does not specify the conditions for determining whether such use in fact infringes a right which is protected under the law of a particular State. This determination must be made under the applicable law of that State.¹¹

Even though the joint recommendation recognises and mentions the use of trademarks and allied threats with respect to use in social media, outlines the aspects of infringement and remedies and rules out the need for exceptions and limitations, the thorough preparation of the law incorporating the factors mentioned in the joint recommendation is left to the national legislations.

The Internet Treaties- WCT and WPPT that contained within the digital agenda features, the ever-growing commerce and the dire need to control the illegal activities relating to trademark on the on social media has led to legislations and judicial pronouncements of advanced nature. In this chapter legislations of two jurisdictions are analysed US and EU, as the most recognised trademarks originate from these two jurisdictions and most of the social media were developed in the US. Further a comparison with the Indian Law is made to understand the merits and de merits of the Indian law regulating use of trademark in social media.

In this chapter, three aspects of trademark with respect to its applicability in social media will be analysed. The provisions will be studied to understand the applicability of those laws to a trademark being used in a social media. The three major aspects analysed are;

Use in commerce/Commercial Use, Trademark dilution principles and Intermediary liability.

6.2. UNITED STATES OF AMERICA

In United States of America, the major legislations that regulate trademarks in social media are The Lanham Act of 1946, Federal Trademark Dilution Act of 1995 (FTDA), Anti Cybersquatting Consumer Protection Act of 1999, and Trademark Dilution Revision Act of 2006 (TDRA). These legislations have brought major amendments to the United States Code, these provisions under the United States code will be analysed on the aspects trademark law features that are relevant considering the trademark use in social media.

¹¹ *Id.* at Para 23.

Table VI.1- Trademark law feature and U.S. legislation

Trademark law feature	United States of America
Trademark Use	Commercial use: 15 USC section 1114 Displayed In The Sale Or Advertising: 15 USC Section 1127 (2) Defences: Fair use: 15 USC Section 1115 (b) (4) nominative fair use: 15 USC Section 1115 (b) (4)
Trademark Dilution	Dilution by Blurring: 15 USC Section 1125 (c) (2) (B) Dilution by Tarnishment: 15 USC Section 1125 (c) (2) (C) Defences: Fair Use defence: 15 USC Section 1125 (c) (3)
Intermediary liability	15 SC Section 1114

6.2.1. Use in Commerce

In the US, the Lanham Act makes clear that if someone, without consent of trademark holder uses the trademark in a commercial way and this leads to a likelihood of confusion or actual confusion he will be held liable for trademark infringement.¹² So the use of trademark in a commercial way imposes liability for infringement and non-commercial use is a defence.¹³ According to 15 US Code Section 1127 the term used in commerce means, upon the goods, it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce.¹⁴ The sub clause (2) states; a mark is used in commerce with respect to services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce and the person rendering the services

¹² 15 USC section 1114.

¹³ Danny Friedmann, *supra* note 4 at 111.

¹⁴ See <https://www.law.cornell.edu/uscode/text/15/1127>.

is engaged in commerce in connection with the services.¹⁵ From these provisions it can be sorted out that the use of a trademark logo on social networking platform is the new form that accepts advertising in digital form or it could be seen as digital version of documents or advertising of services, for sale in digital form.

The major defence to this provision is the fair descriptive use in good faith of the goods and services and the trademarked term is not used as a mark.¹⁶ In a social media platform, if an undertaking uses a trademark without authorisation of the trademark holder, uses the word in a mere descriptive meaning, it can invoke the classic fair use defence. This descriptive fair use defence can be used by social media providers to limit their liability with respect to infringement by bringing in the concept of mere descriptive use as defence.¹⁷

15 USC Section 1115 (b) (4) can also be used to explain the nominative fair use principle. Descriptive fair use permits use of another's trademark to describe the user's products or services, rather than as a trademark to indicate the source of the products or services whereas nominative fair use permits use of another's trademark to refer to the trademark owner's actual goods and services associated with the mark. Nominative fair use generally is permissible as long as¹⁸ (1) the product or service in question is not readily identifiable without use of the trademark - Subsidiary Principle (2) only so much of the mark as is reasonably necessary to identify the product or service is used - proportionality principles and (3) use of the mark does not suggest sponsorship or endorsement by the trademark owner-passivity principle.

From the above paragraphs it can be observed that the concept of use in commerce is applicable to a trademark being used a social media platform and liberal approach can be seen with the incorporation of defenses in the provisions. This clears the ambiguity with respect to the use of a trademark in a new technological platform. Since the use

¹⁵ *Id.*

¹⁶ 15 USC Section 1115 (b) (4)- Incontestability; defenses; That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin.

¹⁷ Danny Friedmann, *supra* note 4 at 123

¹⁸ *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992).

amounts to use in commerce, it is necessary to understand the common trademark infringements that can occur and the related exceptions to those infringements.

6.2.2. Trademark Dilution

The US legislations; Federal Trademark Dilution Act of 1995 and Trademark Dilution Revision Act of 2006 provides for 2 types of trademark dilution; dilution by blurring, dilution by tarnishment.

6.2.2.1. Dilution by blurring

Under Section 1125 (c) (2) (B) of the title 15, Chapter 22, Subchapter III of the United States Code, ‘dilution by blurring’ occurs from the similarity between a mark or trade name and a famous mark that harms the uniqueness of the famous mark. The relevant factors considered by Court in determining dilution by blurring are (i) the degree of similarity between the mark or trade name and the famous mark and the (ii) similarity with respect to the inherent or acquired distinctiveness of the famous mark. Further the factors considered are (iii) the degree to which the owner of the famous mark is engaging in substantially exclusive use of the mark thereby increasing (iv) the recognition of the famous mark. The Court will also analyse whether the user of the mark or trade name (v) intended to create (vi) an actual association with the famous mark. It is important to analyse and understand the applicability of these six factors under the new technological platform. The factors (i) and (v) are related to the actions of the infringer. (ii) and (iii) are related to the trademark holder and (iv) and (vi) relates to the external information from the relevant public.

6.2.2.2. Dilution by tarnishment

Dilution by tarnishment was never explicitly defined in the US Code, later in 2006 Trademark Dilution Revision Act was passed¹⁹ that amended the US Code and included within ‘false designation of origin, false description, dilution by blurring and dilution by tarnishment.’ “Dilution by tarnishment” occurs from the similarity between a mark or trade name and a famous mark that damages the reputation of the famous

¹⁹ Section 2. Trademark Dilution Revision Act: DILUTION BY BLURRING; DILUTION BY TARNISHMENT. *See also* LAURA SCAIFE, HANDBOOK OF SOCIAL MEDIA AND THE LAW 355 (2015)

mark.²⁰ In contrast to the trademark dilution by blurring, trademark dilution by tarnishment does not have any tests which Courts can apply.

The US Act statutorily recognises dilution by blurring and dilution by tarnishment. The US Courts also recognises free-riding as a third form of non – confusing use by third parties. To these defences the aspect of exceptions are also included so that there will be a balance with respect to owner’s rights and legitimate interest of the public. Fair use defence codified under the Lanham Act, gives the exclusions from what is actionable under dilution by blurring and dilution by tarnishment. Section 1125 (c) (3) (A - C) deals with the exclusion provisions which mentions that certain acts are not actionable as dilution by blurring or dilution by tarnishment, they are; fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with advertising or promotion that permits consumers to compare goods or services or identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner. All forms of news reporting and news commentary and any non-commercial use of a mark.²¹

6.2.3. Intermediary liability

Section 1114(2) Lanham Act Protects ‘innocent infringing and violating’ publishers of newspapers, magazines or other similar periodical or in an electronic communication against intermediary liability for trademark infringement, including Online Service Provider’s that host user generated content. Social media providers that publish content written by its users can be defined as electronic communications.²²

²⁰ 15 USC Section 1125 (c) (2) (C).

²¹ 15 USC Section 1125 (c) (3) (A - C): Exclusions. The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with—

(i) advertising or promotion that permits consumers to compare goods or services; or
(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

(B) All forms of news reporting and news commentary.

(C) Any non-commercial use of a mark.

²² 18 U.S. Code Section 2510 – Definitions; “electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system that affects interstate or foreign commerce, but does not include—

Section 1114 (2) (A) states innocent infringer or violator as an infringer or violator who is engaged solely in the business of printing the mark or violating matter for others. In this trademark infringement via social media context they can be regarded as the social media provider who is hosting the infringing user generated content.

Under the Lanham Act, these service providers are exempted from intermediary liability if the infringement or violation complained of is contained in or is part of paid advertising in an electronic communication, and if they don't have the knowledge regarding the violation i.e. if they are innocent infringers or innocent violators of the trademark rights, provided that these service providers shall be limited to an injunction against the presentation of such advertising matter in future transmissions of such electronic communications.²³

Further in Section 1114 (2) (C), which explains that the trademark holder's injunctive relief against future infringement shall not be available if restraining the dissemination of such infringing matter would delay the normal transmission of such electronic communication, in accordance with sound business practice.²⁴

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

²³ (B) Where the infringement or violation complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical or in an electronic communication as defined in section 2510(12) of title 18, United States Code, the remedies of the owner of the right infringed or person bringing the action under section 43(a) [15 USC Section 1125(a)] as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The limitations of this subparagraph shall apply only to innocent infringers and innocent violators.

²⁴ (C) Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 43(a) [15 USC Section 1125(a)] with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter where restraining the dissemination of such infringing matter or violating matter in any particular issue of such periodical or in an electronic communication would delay the delivery of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice, and not due to any method or device adopted to evade this section or to prevent or

Unlike the liability limitation under the DMCA, the Trademark law does not provide for a detailed liability limitation provision. The provisions laid down also has lacunas and its applicability in a technological platform is limited. These aspects will be analysed in the coming paragraphs where a comparison of provisions under various jurisdictions will be made.

6.3 EUROPEAN UNION (EU)

In European Union, the major regulations that regulate trademarks in social media are Directive (EU) 2015/2436, Regulation (EU) 2017/1001, Directive on Electronic Commerce 2000 and Intellectual Property Rights Enforcement Directive 2. These regulations will be analysed on the aspects trademark law features that are relevant considering the trademark use in social media.

Table VI.2- Trademark law feature and E.U. legislation

Trademark law feature	European Union
Trademark Use	Use in the Course of Trade: Article 10 of the DIRECTIVE (EU) 2015/2436 Displayed In The Sale Or Advertising: Article 10 (3) (e) and (f) of the DIRECTIVE (EU) 2015/2436 Defences: Fair use: Article 14 (1) (a) and (b) of the DIRECTIVE (EU) 2015/2436 nominative fair use: Article 14 (1) (c) and (2) of the Regulation (EU) 2017/1001
Trademark Dilution	Detrimental to the distinctive character: Article 10 (2) (c) of the Directive (EU) 2015/2436 Detrimental to the reputation of the trade mark: Article 10 (6) of the Directive (EU) 2015/2436 Defences: No explicit provision

delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.

Intermediary liability	Articles 12, 13 and 14 of the E commerce directive 2000, Article 18 (1) of the Directive on electronic commerce 2000, Article 3 of Intellectual Property Rights Enforcement Directive 2
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6.3.1. Use in the Course of Trade

According to Article 10 of the Trademark Directive, rights conferred by a trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered and any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.²⁵

So it can be inferred that the use of trademark ‘in the course of trade’ is the EU equivalent of ‘commercial use’ in the US. So just as in the case of US, non-commercial use of trademark can be used as a defence in the case of trademark infringement in EU. The application of these provisions on social media can be inferred from the ‘using the sign on business papers and in advertising and using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC’,²⁶ which can be made applicable to online advertising too.

The major defence to this particular provisions are laid down under Directive (EU) 2015/2436²⁷ and Regulation (EU) 2017/1001.²⁸ If a

²⁵ Article 10- Rights conferred by a trade mark: Directive (EU) 2015/2436 Of The European Parliament and Of The Council to approximate the laws of the Member States relating to trade marks. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2436>, see also URSULA SMARTT, MEDIA & ENTERTAINMENT LAW 234 (3d. ed. 2017).

²⁶ Article 10 (3) (e) and (f) of the Directive (EU) 2015/2436.

²⁷ Article 14 (1) (a) and (b) of the Directive (EU) 2015/2436- Limitation of the effects of a trade mark.

²⁸ Article 14 (1) (c) and (2) of the Regulation (EU) 2017/1001.

third party uses his name or address, or if indications are used that concern kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services, can be a fair use. This provision is comparable to the classic fair use defence in the U.S. Additionally, a trademark holder cannot prohibit a third party from using a trademark in the course of trade, where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts. The condition is, however that the person uses the trademark in accordance with the honest practises in industrial or commercial matters. These provisions are the parallel, comparable provisions of nominative fair use defence that is enumerated in the US law.²⁹

6.3.2. Detrimental to, the distinctive character or the repute of the trade mark

Directive (EU) 2015/2436 and Regulation (EU) 2017/1001 both deal with preventing third parties, from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, without consent, where the latter has a reputation in the member state and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.³⁰ The aspects covered under Article 10 (2) (c) of the Directive (EU) 2015/2436 are (1) detriment to distinctiveness, (2) detriment to repute, (3) unfair advantage of the distinctive character and (4) unfair advantage of repute; use without due cause. The aspect ‘detriment to distinctiveness’ is the EU alternative to dilution by blurring. ‘Detriment to repute’ is the EU equivalent of dilution by tarnishment as

²⁹ DANNY FRIEDMANN, *supra* note 4 at 154.

³⁰ Article 10 (2) (c) of the Directive (EU) 2015/2436: Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade the sign is identical with, or similar to, the trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to, or not similar to, those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. *see* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2436>.

Article 9 (1) (c) of the Regulation (EU) 2017/1001: he sign is identical with, or similar to, the EU trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the EU trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.

by such activity the capability of the trademark to appeal will be reduced. Even in EU there is no test for dilution by tarnishment. Factor (3) and (4), ‘unfair advantage of distinctive character and of repute’ are related to the infringer he misappropriates the attractive power and advertising value of the original mark and use unfair advantage of the renown of the original mark.

Article 10 (6) of the Directive (EU) 2015/2436; Paragraphs 1, 2, 3 and 5 shall not affect provisions in any member state relating to the protection against the use of a sign other than for the purposes of distinguishing goods or services, where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.³¹ Article 10(6) of the Directive does not use the term ‘use in the course of trade’ which is explicitly mentioned in other above mentioned articles in the directive.³²

Directive (EU) 2015/2436 and Regulation (EU) 2017/1001 both lack explicit provision with respect to fair use against detrimental to the distinctive character or the repute of the trade mark. The ‘without due cause’ provision enumerated in these Articles gives Court the possibility to interpret the invocation of fundamental guarantee of freedom of expression and information as due cause enumerated in that of Article 11 EU Charter³³ and Article 10 ECHR³⁴ after weighing them against the right to protection of intellectual property or more broadly property.

6.3.3. Intermediary liability

Recital 46 of the E commerce directive 2000 states; in order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect member state’s possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

³¹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2436>.

³² DANNY FRIEDMANN, *supra* note 4 at 155.

³³ Article 11 corresponds to Article 10 of the European Convention on Human Rights.

³⁴ ARTICLE 10 European Convention on Human Rights: Freedom of expression.

In general, the E Commerce Directive requires its member state to establish procedures to remove or disable access to alleged infringing information after notification.³⁵

The Article supportive of this recital can be seen in its provision relating to safe harbour provisions particularly Articles 12,³⁶ 13³⁷ and 14³⁸ that deal with acting as a “mere conduit”, caching and hosting respectively. The interesting feature with the “mere conduit” exception, is the additional presence of Article 12(3). This provision clarifies that the “mere conduit” exception shall not stand in the way of a Court or

³⁵ Recital 51 of the Directive reads; Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-Court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders. *See also* 14 (3): This Article shall not affect the possibility for a Court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

³⁶ Article 12- "Mere conduit": 1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.

³⁷ Article 13- "Caching": 1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a Court or an administrative authority has ordered such removal or disablement.

³⁸ Article 14- Hosting: 1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

administrative authority requiring the service provider to terminate or prevent an infringement.³⁹ Article 18 of this Directive⁴⁰ also casts an obligation upon Member States to ensure that Court actions available under national law permit the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.⁴¹

In the proposal for criminal measures aimed at ensuring the enforcement of intellectual property rights a directive called Intellectual Property Rights Enforcement Directive 2 (IPRED2) was proposed.⁴² Article 3 of the directive obliges member states to consider all intentional infringements of an intellectual property right on a commercial scale as a criminal offence. It also covers attempting, aiding or abetting and inciting such offences. This Article is an application of Article 61 of TRIPs provision which obliges members to “provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Text of this provision also adds that this directive does not affect specific liability systems such as the system laid down for internet service providers in Articles 12 to 15 of Directive 2000/31/EC on electronic commerce.⁴³ The idea was to make

³⁹ Article 12 (3) of the Directive on electronic commerce 2000 : This Article shall not affect the possibility for a Court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

⁴⁰ Article 18 (1) of the Directive on electronic commerce 2000-Court actions: Member States shall ensure that Court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

⁴¹ Ananth Padmanabhan, *Give Me My Space and Take down His* 13, 1-16 (2013) <http://www.ijlt.in/archive/volume9/Ananth%20Padmanabhan.pdf>. See also Chapter V footnote 92

⁴² Danny Friedmann, *supra* note 4 at 244.

⁴³ Article 3 of Intellectual Property Rights Enforcement Directive 2: This Article obliges Member States to consider all intentional infringements of an intellectual property right on a commercial scale as a criminal offence. It also covers attempting, aiding or abetting and inciting such offences. The “commercial scale” criterion is borrowed from Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), concluded on 15 April 1994 and signed by all the members of the World Trade Organization. Article 61 obliges Members to “provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be

this form of inducement independent from other forms of secondary liability for internet intermediaries as laid down in E commerce directive.

6.4. INDIA

In India, the major regulations that regulate trademarks in social media are Trademarks Act, 1999 and Information Technology Act, 2000. These legislations will be analysed on the aspects trademark law features that are relevant considering the trademark use in social media.

Table VI.3- Trademark law feature and Indian legislation

Trademark law feature	India
Trademark Use	Use in the Course of Trade: Section 29 of the Trade Marks Act 1999 Displayed In The Sale Or Advertising: Section 29 (6) (d) of the Trade Marks Act 1999 Defences: Fair use: Section 30 of Trademarks Act, 1999 nominative fair use: Section 30 (1) (a) of Trademarks Act, 1999
Trademark Dilution	Detrimental to the distinctive character: Section 29 (4) (c) of Trademarks Act, 1999 Detrimental to the repute of the trade mark: Section 29 (4) (c) of Trademarks Act, 1999 Defences: No explicit provision
Intermediary liability	Section 79 of the Information Technology Act, 2000

applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.” The infringement must be intentional, that is to say that the act must be deliberate, whether it is an actual infringement, an attempt at infringement, or aiding and abetting or inciting such an offence. This does not affect specific liability systems such as the system laid down for Internet service providers in Articles 12 to 15 of Directive 2000/31/EC on electronic commerce.

6.4.1. Use in the Course of Trade

According to Section 29 of the Trade Marks Act 1999 under infringement of registered trademarks, a person who, not being a registered proprietor or a person infringes a registered trademark by using in the course of trade, a mark which is identical or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.⁴⁴

So, like the position in US and EU it can be inferred that the use of trademark 'in the course of trade' is the Indian equivalent of 'commercial use' and 'use in the course of trade' in the US and EU respectively. So just as in the case of US and EU, non-commercial use of trademark can be used as a defence in the case of trademark infringement in India. The application of these provisions on social media can be inferred from the 'uses the registered trademark on business papers or in advertising' which can be made applicable to online advertising too.⁴⁵

The major defence to this provision are laid down under Section 30 of Trademarks Act, 1999. If any person uses a trademark in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services will not amount to infringement.⁴⁶ This provision is comparable to the classic fair use defence in the US and EU. Additionally, a trademark holder cannot prohibit any person from using a trademark in the course of trade, where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts. The condition is, however that the person uses the trademark in accordance with the honest practises in industrial or commercial matters.⁴⁷ These provisions are the parallel comparable provisions of Nominative fair use defence that is enumerated in the US and EU law.

⁴⁴ Section 29 (1) of the Trade Marks Act, 1999. See <https://indiankanoon.org/doc/84096/>.

⁴⁵ Section 29 (6) (d) of the Trade Marks Act 1999 a person uses a registered mark if in particular, he uses the registered trade mark on business papers on in advertising.

⁴⁶ Section 30 (2) (a) of the Trade Marks Act 1999.

⁴⁷ Section 30 (1) (a) of the Trade Marks Act 1999.

6.4.2. Detrimental to, the distinctive character or the repute of the trade mark

According to Section 29 (4) (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.⁴⁸ From the reading it can be analyzed that the aspect covered under the provision are (1) detriment to distinctiveness, (2) detriment to repute, (3) unfair advantage of the distinctive character and (4) unfair advantage of repute. The aspect detriment to distinctiveness is the Indian law alternative to dilution by blurring. Detriment to repute is the Indian equivalent of dilution by tarnishment as by such activity the capability of the trademark to appeal will be reduced. Factor (3) and (4), unfair advantage of distinctive character and of repute are related to the infringer that he misappropriates the attractive power and advertising value of the original mark and use unfair advantage of the renown of the original mark.

The Indian law lack explicit provision with respect to fair use against detrimental to the distinctive character or the repute of the trade mark provision. The absence of the explicit provision with respect to fair use does not balance the concepts like public interest and private rights. Also another significant aspect which is a drawback in the Indian legislation is Section 29 (8) which states that an advertising of a registered trademark amounts to an infringement if such advertising takes unfair advantage of and is contrary to honest practices in industrial or commercial matters or is detrimental to its distinctive character or is against the reputation of the trade mark. In effect, these provisions prevent comparative advertising and fair use of all registered trademark. When compared with the US law, which clearly excludes any fair use including use in connection with advertising or promotion that permits consumers to compare goods or services; or identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner; all forms of news reporting and any noncommercial use of the mark, from the purview of dilution by tarnishment or blurring, this provision confers absolute property right on the owner of every trademark- not even a reputed mark. This will lead to absurd results and it

⁴⁸ Section 29 (4) (c) of the Trade Marks Act 1999. See <https://indiankanoon.org/doc/84096/>.

is apprehended that Section 29 (8) (b) and (c) might be used to curb freedom of expression in the future.⁴⁹

6.4.3. Intermediary liability

Section 79 of the Information Technology Act, 2000 deals with the exemption from liability of intermediary in certain cases. According to the Act an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted. The act further enumerates liability limitation if the intermediary does not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission.⁵⁰

One of the important aspect of the act is that the intermediary must observe due diligence while discharging his duties under this Act. Thus, it is mandatory for the Intermediaries to follow such due diligence to seek exemption under the IT ACT, 2000. The exemption provided under Section 79 read with the Information Technology (Intermediaries guidelines) Rules, 2011 can be said to be the generic version of DMCA

⁴⁹ T.G. Agitha, *Trademark Dilution: Indian Approach* 50 (3), JOURNAL OF INDIAN LAW INSTITUTE 351, 352, 339-366 (2008)

⁵⁰ Section 79 of the Information Technology Act, 2000: Exemption from liability of intermediary in certain cases.— (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-section (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if— (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (b) the intermediary does not— (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf. (3) The provisions of sub-section (1) shall not apply if— (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purpose of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary. *See also* Chapter V footnote 121.

safe harbour provision. Rule 3 (3) of the Guidelines states that the intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission. Following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information if temporary or transient or intermediate storage of information is an intrinsic automatic feature and immediate response is made by intermediary upon actual knowledge of the infringing activity.⁵¹

Rule 4, when read along with Rule 2(d) of the Information Technology (Intermediaries guidelines) Rules, 2011, casts an obligation on an intermediary on whose computer system infringing content has been stored, hosted or published, to disable such information within thirty-six hours of it being brought to its actual knowledge by any affected person.

6.5. JURISDICTIONAL LEGISLATIVE COMPARISON AND ANALYSIS OF THE TRADEMARK LAW FEATURES AND ITS APPLICABILITY IN SOCIAL MEDIA

6.5.1. Trademark Use: Trademark name, Trademark logo use in social media dilemma

Since it can be determined from ‘Displayed in the Sale or Advertising’ that social media exploits advertisements and so trademark on social media will be used in a commercial way. The problem won’t arise if there is a clear understanding and balance among the commercial use provisions and non-commercial use defences. In all the three

⁵¹ Rule 3 (3) of the Information Technology (Intermediaries guidelines) Rules, 2011: The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2): provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule: (2) — (a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource; (b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorized by the intermediary pursuant to any order or direction as per the provisions of the Act. *See also* Chapter V footnote 122.

jurisdictions descriptive fair use defence and nominative fair use defence can be made out from the legislations and can be made applicable to ‘trademark names’ as it alone can be used for merely describing or comparing the products in fair and good faith or in honest and concurrent manner.

Table VI.4- Trademark use provision and applicability in social media- Jurisdictional comparison

Trademark Use			
Trademark Law Provision	Applicability in Social media		
	United States of America	European Union	India
Commercial use, Use in the Course of Trade,	Applicable to trademark names and trademark logo use in social media	Applicable to trademark names and trademark logo use in social media	Applicable to trademark names and trademark logo use in social media
Displayed In The Sale Or Advertising	Applicable to trademark names and trademark logo use in social media	Applicable to trademark names and trademark logo use in social media	Applicable to trademark names and trademark logo use in social media
Defences.	Applicable to trademark names in social media but not to trademark logo use in social media	Applicable to trademark names in social media but not to trademark logo use in social media	Applicable to trademark names in social media but not to trademark logo use in social media

But the aspect differs when a trademark logo includes in itself ‘sponsorship’ ‘endorsement’ and ‘affiliation’ qualities, in such a situation

the fair use defence clause in the legislations will not be wide enough to balance the fair use of a trademark logo along with the commercial use as one cannot minimally use a trademark logo to pass the subsidiary principle, proportionality principle and passivity principle that supports non-commercial defences. So, the laws under various jurisdictions is wide to understand the fair use of trademark names in social media but not complicate enough to fairly use trademark logo use in social media.

6.5.2. Trademark Dilution

Considering the trademark dilution definitions and the use of trademark in social media. The law must be advanced and unambiguous enough to apply ‘automatically’,⁵² to a social media platform and the defence provision must be explicit and must balance the public interest and private rights.

Table VI.5- Trademark dilution provision and applicability in social media- Jurisdictional comparison

Trademark Dilution			
Trademark Law Provision	Applicability in Social media		
	United States of America	European Union	India
Trademark Dilution	Weak Provisions	Weak Provisions	Weak Provisions

⁵² See generally DANNY FRIEDMANN, *supra* note 4 at 92-110, 329, 330. The particular usage has been made in “Chapter 4- Analysis Of The Legal Conflict”, wherein the author distinguish eight elements of legal conflict between trademark holders, social media providers and internet users. They are 1) a perception by internet users, social media providers and image search engines that the trademark logo is without protection, 2) the ample access to unauthorized use of trademark logo, 3) the proliferation, scale and speed of unauthorized use of trademark logo, 4) the permanence of the uploaded unauthorized trademark logo on the internet, 5) the uncertain boundaries of trademark logo, 6) stakeholders that are either overwhelmed or ignorant to the infringement, 7) a loss of control for trademark holders and 8) emergence of new technology such as cloud computing. The author proposes a legal notion wherein the law must apply automatically, which means the provisions of law must have in itself objective intent rather than subjective intent when considering the use of trademark logo on social media owing to the above mentioned elements. The non-scalability of litigation and arbitration necessitates the prerequisite of automation for any solution. The provisions in the law must apply automatically and objectively and must be well suitable for automation.

Defences.	Explicit provision	No explicit provision	No explicit provision and does not balance with public interest and private rights.
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From the analysis of the trademark dilution provisions in United States of America one can observe the textual breakup of the provision relating to protection against trademark dilution cannot be applied automatically to a social media platform.⁵³ The reasons are; factor (i) deals with the degree of similarity between the mark or trade name and the famous mark which can be determined in an objective and automatic way and can be applied in cases relating to unauthorised use of logo in a social media. Factor (v), the action that related to an infringer as to whether the user of the mark or trade name intended to create an association with the famous mark, is rather subjective intent and hence cannot be applied automatically to a social media platform. Considering factor (ii) and (iii), the analysis of the degree of inherent or acquired distinctiveness of the famous mark and the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark is completely superfluous and irrelevant in determining dilution for blurring as it is completely to the discretion of the trademark holder whether he wants to engage in exclusive use of its trademark, or whether he wants to license his trademark. Factors (iv) and (vi) use external information from the relevant public; the degree of recognition of the famous mark and the actual association between the mark or trade name and the famous mark seems to be costly and difficult to automate for a trademark logo in social media.⁵⁴ So it can be understood that only factor (i) is appropriate and applicable with respect to determine whether there is a case of trademark dilution by blurring.

Both EU directive and Indian law relating to dilution is formulated descriptively. The major factors are (1) detriment to distinctiveness, (2) detriment to repute, (3) unfair advantage of the distinctive character and (4) unfair advantage of repute and use without due cause (EU). Factor (1) is the EU and Indian version of dilution by blurring, detrimental activities affects distinctiveness when the capacity of the trademark to recognize itself is faded. Since the detriment of the distinctive character can be

⁵³ See page 209.

⁵⁴ Danny Friedmann, *supra* note 4 at 148.

recognised from the comparison so made from the original mark and infringed mark, factor (1) can be applied to social media platforms automatically. Factor (2) is the EU and Indian equivalent of dilution by tarnishment as by such activity the capability of the trademark to appeal will be reduced. In EU and India there is no test for dilution by tarnishment. Protection against detriment to repute against trademark can be applied to the social media platform as detriment can be made out from the comparison so made with the original mark, but the application is partial because the instance may be subjective. Factor (3) and (4), unfair advantage of distinctive character and of repute are related to the infringer where in former aspect the infringer misappropriates the attractive power and advertising value of the original mark. But in latter aspect the infringer use unfair advantage of the renown of the original mark. Even this aspect cannot be directly used in the aspect of social media because it is rather subjective intent.

Considering the defences, the US law contains explicit fair use defence provision, whereas in EU it is implicit from the ‘use without due cause’. India does not contain a fair use defence against trademark dilution and meaning made out from Section 29 (8) (b) and (c) might be used to curb freedom of expression owing to its weak interpretative nature.

6.5.3. Intermediary Liability

Table VI.5- Intermediary liability provision and applicability in social media- Jurisdictional comparison

Intermediary Liability			
Trademark Law Provision	Applicability in Social media		
	United States of America	European Union	India
Intermediary Liability	Safe Harbour provision apply partly to trademark infringement No notice and takedown and counter notification procedure	Safe Harbour provision do apply to all trademark infringement no notice and takedown and counter notification procedure	Moderately Detailed and vague

Under the Lanham Act in US, the service provider is required only to prevent infringing matter from being presented in future, but only if this is not incompatible with a sound business practise. The Lanham act lacks any notice and takedown and counter notification procedure as that is available in case of copyright infringement liability limitation provision included under Digital Millennium Copyright Act. Another important aspect that must be sorted out from the text of the Lanham Act provision is that it is applicable only to those trademark infringements that are a part of paid advertising matter and not all trademark infringements in general. It can be inferred that the liability limitation of a service provider is limited to trademark infringement that is a part of paid advertisement. Other forms of trademark infringements like dilution by blurring, tarnishment and non-commercial use of a logo on the social media might render them liable. The law is even silent on the aspect of trademark infringement in a context with paid advertisement thereby limiting the liability limitation under this scenario too.

Under the EU, safe harbour provision does apply to all trademark infringement as the provisions under the directive clearly explains the various safe harbour provisions with respect to trademark infringement and the idea incorporated in Intellectual Property Rights Enforcement Directive 2 recognises different form of inducement independent from other forms of secondary liability for internet intermediaries as laid down in E commerce directive. In India, the law is moderately effective with respect to intermediary liability and take down procedures.

6.6. CONCLUSION

The tremendous growth of technology has changed the outlook of advertising. The modernisation of the advertising companies from traditional billboards to advanced pop up advertisements in social media has taken brand promotion to another level. The activities in social media platforms are many, the brand owners now rely on collaborative marketing by including customers also in the brand promotion activity and further dissemination of information about brand for higher reach and reputation. These activities have spurred the legal conundrum.

Analysing the trademark features and the legal provisions under US, EU and Indian jurisdiction, it can be analysed that the traditional trademark featuring provisions are inapplicable with respect to the use of trademarks in social media. The law must try to grant automatic protection to use of trademarks in social media rather than giving

ambiguous provisions making it difficult for the judiciary to interpret and apply. The intermediary liability aspects, when compared to the copyright provisions are very weak for the trademark aspects. The safe harbour provisions with respect to trademark infringements provides legal uncertainty to social media, trademark holders and users on internet.

Transparency as to what use of a trademark is authorised can be the first step in increasing legal certainty for social media. The proper balancing of trademark use in social media and public interest has to be made. The law must provide for a proper standard that must be used by the social media for filtering mechanism, and that standard must adequately provide for safe harbour provisions without ambiguities so that social media platforms won't be resistant towards use of filtering mechanisms by themselves.

CONCLUDING REMARKS

Technological systems are fundamentally social systems in two respects, firstly it is itself a self-organizing system because it holds specific individual users and structures. Secondly it is a certain category within the society's higher dimensions as it is man-made. It is obvious from the reading that technology and human beings are interconnected thereby granting a sociality on the web. All the technological advancements relating to internet are structures that objectify human interests, understandings, goals and intentions which in turn affect social behavior. The human elements of cognition, communication and cooperation gives identity to internet thereby giving birth to the concept of social media. These information functions; cognition, communication and cooperation is what determines the structure and function of different social media platforms. The social presence of humans on a platform, the richness of media used in a platform and how information are processed in these platforms describes the purpose for which different types of social media are used by humans. It is because of these functionalities social media are being used by various actors for various purposes.¹

The trailblazing impression of social media has kindled advancements. Besides the numerous gains, the social media carries conundrums of different genre. The Content Communities, Blogs, Social Networking sites used by the individuals and business entities for online content sharing, online branding and advertising constructs teething troubles which turn out as giant legal difficulties. Works of intellectual nature coupled with property rights in the new digital era of social media, restricts persons from the unauthorized use of the same. The concept of copyright and trademark has gained a new outlook after digitization.

The combination of the internet and digital technology presents copyright law with what has been described as a digital dilemma. On one hand, digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the internet individuals may distribute those digital works around the

¹ See Chapter I.

world at the speed of light. On the other hand there is a world where works are duplicated and distributed freely and illegally by people through social media. The illegal peer to peer sharing, the unauthorized sharing via media sharing and storage websites are new trends in digital world creating legal dilemmas.²

The internet being a space with undefined boundaries, the copyright owner's ability to control dissemination of their works without affecting their rights is merely impossible owing to the technological complexities. The technology creates difficulty to both the copyright owners and the service providers. In social media a copyright infringement occurs when there is an unauthorised access made by the infringer, thereby enabling him a control over the copy to duplicate and disseminate. Even though the copyright holder may use the possible measures to control the infringing activity, at times, the infringer will have the better technicality or expertise. So basically, the infringing activity occurs when a person circumvents a technological measure applied by the right holder and thereby access, duplicates and disseminate the file despite the technological measure's competency of access control and copy control. These elements are significant because the infringement nature is that of online. So, while framing a law relating to effective technological measure, the law must be clear and unambiguous with respect to the elements of effective technological protection measures. While the infringing activities are before the court, the law must be able to categorize and represent the provisions against the infringing activity. Leaving a larger interpretation task to the court may affect the judgement due to the contentions based on inefficiency or absence of law supported by technical complexities.

Considering any law with respect to effective technological protection measures, it is imperative that the key concepts and terms such as "technological protection measures," "effective" and "acts of circumvention have to be appropriately defined. From the analysis made in Chapter V, the anti-circumvention laws in USA, UK and India shows that Indian legislators took a misstep in defining principal terms of anti-circumvention. Definitions of these terms are vital for accomplishing a certain amount of legal certainty and limiting the scope of the anti-circumvention acts. The definition of concepts like 'technological protection measure', 'effective' and elements of circumvention are among the fundamentals of any anti-circumvention law.³

² See Chapter III.

³ See Chapter V.

Effective technological measures consist of elements like ‘effectiveness’ and ‘technological measure,’ effectiveness means the ability or degree to which something is successfully functional in producing a desired result. ‘Effectiveness’ with respect to technological protection measure means, it must be functionally successful in producing a desired result and the functional successfulness should be because of its stability, matchlessness and the difficulty in circumventing the said function intentionally.

The ‘technological measure’ aspect with respect to copyright infringement shall include access control and copy control. Like mentioned in the earlier paragraphs, a copyright infringement occurs when there is an unauthorised access made by the infringer, thereby enabling him a control over the copy to duplicate and disseminate. So a technological protection measure definition must distinguish between access controls and copy controls.

Considering the legislative framework in United States of America and EU, the access control and copy control are substantively and analytically distinguished respectively. The effectiveness aspect in United States of America is left entirely for the courts to interpret. The definitional clarity is less in EU, but the concept can be analysed from the types of effective measures mentioned in the legislations. India, on the other hand has no proper definition to understand the concepts.⁴ So it is necessary to have a proper definition in the legislative framework based on the elements so mentioned above.

Another important aspect that must be left unambiguous in a legislative framework is the meaning of circumvention. It is the circumvention activity that effect the infringement process. In any legislative framework the ‘Circumvention’ definition must be unambiguous with respect to the purpose of the breach of copy control mechanism, breach of access control mechanism and import and use of trafficking devices and providing or facilitating circumvention services and that act of circumvention must be unauthorised or restricted by the relevant law. In the United States of America, DMCA have included provisions with respect to circumvention and preparatory activities partially. The three circumvention bans related to access control mechanisms, illegal use and import of trafficking devices and trafficking in tools to facilitate the circumvention of DRM are explained under the first, Second and third ban under the DMCA legislative framework. There

⁴ *Id.*

are no provisions with respect to circumvention of copy control mechanisms and facilitating circumventing services by a third person is not included in the text of the US legislation. In European Union and United Kingdom, provisions relating to obligations as to technological measures and provisions relating to obligations concerning rights-management information deals with circumvention and preparatory activities forms a clear definitional understanding of circumvention. Indian legislative framework lacks clarity even from technological protection measure furthering it to form a lacuna in the definitional clarity of circumvention. The word usage in the legislative framework is in such a way that it creates further interpretation dilemmas. So, a provision must be formulated including all the necessary elements that can be found from these jurisdictional legislative frameworks.⁵

Digital Rights Management and related rights grants an user with new set of rights besides the traditional rights enumerated in copyright, so it is important to have certain exceptions to these rights. Those exceptions thus formulated must be unambiguously incorporated in the legislative framework. Digital Right Management must have a different set of exceptions that are in build with technologically adaptive capability and also there must be exception provisions made available to the manufacturers of computers, electronic products, and telecommunications devices with respect to their product designs to balance with the anti-circumvention prohibitions.⁶ The exceptions so mentioned here are to accommodate certain non-infringing uses relating to technological measures for legitimate purposes by experts and researchers.

An effective legislative framework must have a strong intermediary liability limitations provisions. The liability limitation provisions must be exhaustive enough to encompass aspects like safe harbour provisions and provisions that can be used by service providers to adopt and implement reasonably a policy for removing infringing content from the social media.

The safe harbour provisions are based on various conducts by the service provider that includes transitory communication, system caching, storage of information on systems of networks at the direction of users and information location tools. Intermediaries must come across different conditions to be relieved from liability under the various conducts mentioned before.

⁵ *Id.*

⁶ See Chapter V, No mandate provisions under Section 1201(c)(3) of the DMCA and Recital 48 EUCD.

In India issue of copyright infringement by transitory communication by ISPs is governed by Section 52(1)(b), (c) of Copyright Act read with Rule 75 of Copyright Rules, 2013, which completely absolves them of any liability, while that of enforcement of copyright through the medium of such ISPs is governed by the IT Act.

Rule 75 of the Copyright rules brings the practical application through the language of Section 52(1) (b), (c) of Copyright Act whereby it allows the exemption from liability only available to, intermediaries who facilitate, “transient and incidental storage of work for providing electronic links, access or integration”. Inclusion of only Transient communication makes the legislation quite narrow as intermediaries provides various other conducts as enumerated in US and EU legislations. Indian legislation being silent on other conducts does not define the terms transient or incidental. A lack of such statutory precision can result in the improper and unpredictable application of this provision.

The rules made under are stacked with multiple uncertainties. The absence of counter notification system unlike DMCA, whereby the intermediary on receipt of notice from the owner has no obligation to give a counter notice to the user who uploaded a content. The user therefore is left without an option to be heard by the intermediary and to dispute the notice when it is received by the intermediary. There is no procedure to have the removed information restored by filing a counter notice or by appealing to a higher authority. From this it is obvious that the procedure lacks natural justice principles.

Rule 75(3) requires the Intermediary to take down the allegedly infringing material within 36 hours of receipt of the complaint when it is satisfied that it is an infringing copy. The time-period doesn't sound reasonable but still the content will be taken down by the intermediary to avoid legal consequences.

Like Section 52 of Copyright act related to Intermediary liability limitation, Section 79 of IT act is also meant to exempt intermediaries from certain liabilities. Section 79 of the IT Act read along with the Information Technology (Intermediaries Guidelines) Rules 2011 also faces the same criticism faced by provision under the copyright rules. The lack of counter notification mechanism affects the natural justice principle and there are no safeguards to prevent abuse against the frivolous complaints. The lack of identification of different intermediary types functions and conducts in the legislation may lead to undue over blocking of websites and affects legitimate business practises. The Indian law requires a takedown mechanism considering the natural justice principles,

identification of intermediary conducts and functions and an amendment in the normal time period for counter notification and take down process.

From the above submissions it can be analysed and concluded that the Indian copyright legislative framework is weak and lacks basic definitions which are important considering use of copyrighted contents via social media platforms. The various intermediary conducts and safe harbour provisions related to it are ambiguous and not exhaustive enough to grant protections. It is distinct from the reading that there is a need for a reasonable policy for removing infringing content from the social media under the Indian law. So, it is of paramount requirement to bring in the necessary legislative amendments in the copyright law and the Information Technology Act.

Trademark holders can benefit from social media by setting up their own pages, advertising and buying data for behavioral targeting. Social media platforms are used by trademark holders in different way to promote and advertise their brands. Internet users make unauthorized use of trademark logos without restrictions. Internet users uses trademark logos for a variety of reasons. Some internet users want to share their love or hate for a brand of which the logo is the symbol. While others see the logo to express part of their personality. Some internet users perceive the trademark logo as raw material with which they may freely use to express some marketable, creative or political messages. This unauthorized use of trademark does create legal conundrums and courts find it difficult to apply the offline principles online, thereby entering a loop of uncertainties.⁷

Electronic use of Trademarks conveys that social media exploits advertisements and so trademark on social media will be used in a commercial way. The descriptive fair use defence and nominative fair use defence so made out from the legislations can be used to balance the private interest and public use. The fair use defences so made are fairly applicable to 'trademark names' as it is a mere usage of a 'word' for comparing the products in fair and good faith or in honest and concurrent manner. But when it comes to a trademark logo, it includes in itself 'sponsorship' 'endorsement' and 'affiliation' qualities. In such a situation the fair use defence clause in the legislations will not be wide enough to balance the fair use of a trademark logo along with the commercial use as one cannot minimally use a trademark logo to pass the subsidiary principle, proportionality principle and passivity principle that supports

⁷ See Chapter IV.

non-commercial defences.⁸ Considering the trademark dilution definitions and the use of trademark in social media, the law must be advanced and unambiguous enough to apply automatically to a social media platform and the fair use defence provision must be logical and applicable to use of trademark logo in social media platforms. So, the laws under various jurisdictions needs a re look with respect to the use of trademark logo in social media. Since the purpose of trademark is to represent a product and identify the source of origin of goods and the assurance with respect to its quality, right of the trademark owner must be stronger under the law with respect to these features. The moral rights aspects of disclosure, attribution and integrity can be a mode to grant automatic protection to use of trademark in any manner in social media platforms as it can understand the nature of dilution or tarnishment better and when a use of trademark does not amount to fair use. The legislative framework must include strong rights to protect and enforce moral rights for trademark logos in social media.

Copyright law incorporates within the moral rights, wherein the author can decide when and where his work will be disclosed. Attribution regarding a work is now imprinted in a digital content via copyright management information metadata and any person tampering with that will be liable to copyright infringement owing to circumvention activity. Similarly, these moral rights aspects when incorporated in a trademark legislative framework can enhance the protection of all forms of trademarks in social media.

Under the Lanham Act in US, the service provider is required only to prevent infringing matter from being presented in future, but only if this is not incompatible with a sound business practise. The Lanham act lacks any notice and takedown and counter notification procedure as that is available in case of copyright infringement liability limitation provision included under Digital Millennium Copyright Act. Another important aspect that has to be sorted out from the text of the Lanham Act provision is that it is applicable only to those trademark infringements that are a part of paid advertising matter and not all trademark infringements in general. It can be inferred that the liability limitation of a service provider is limited to trademark infringement that is a part of paid advertisement and other forms of trademark infringements like dilution by blurring, tarnishment and non-commercial use of a logo on the social media might render them liable. The law is even silent on the aspect of trademark infringement in a context with paid advertisement thereby limiting the

⁸ See Chapter VI.

liability limitation under this scenario too. Under the EU, Safe Harbour provision do apply to all trademark infringement as the provisions under the directive clearly explains the various safe harbour provisions with respect to trademark infringement and the idea incorporated in Intellectual Property Rights Enforcement Directive 2 recognises different form of inducement independent from other forms of secondary liability for internet intermediaries as laid down in E commerce directive. In India, the law is moderately effective with respect to intermediary liability and take down procedures.⁹

From the above submissions it can be analysed and concluded that the Indian Trademark legislative framework is weak and not completely applicable to trademark use in social media.

7.1. SUGGESTIONS

1. A proper definition for 'Effective Technological Protection Measure' should be made in the relevant copyright legislative framework.

'Technological Protection Measure' is effective, where the use of protected work or subject matter is controlled by the right holder through a properly functioning application of access control and copy control, which can only be disabled intentionally with considerable difficulty and there exist in other easier means to achieve access or control over the protected work

'Effective' means, where use of protected work or other subject matter is controlled by the right holder through application of an access control or protection process such as encryption, scrambling or other transformation of work or other subject matter or a copy control mechanism which achieves protection objective.

2. Definition of circumvention must be made unambiguous in the copyright legislative framework.

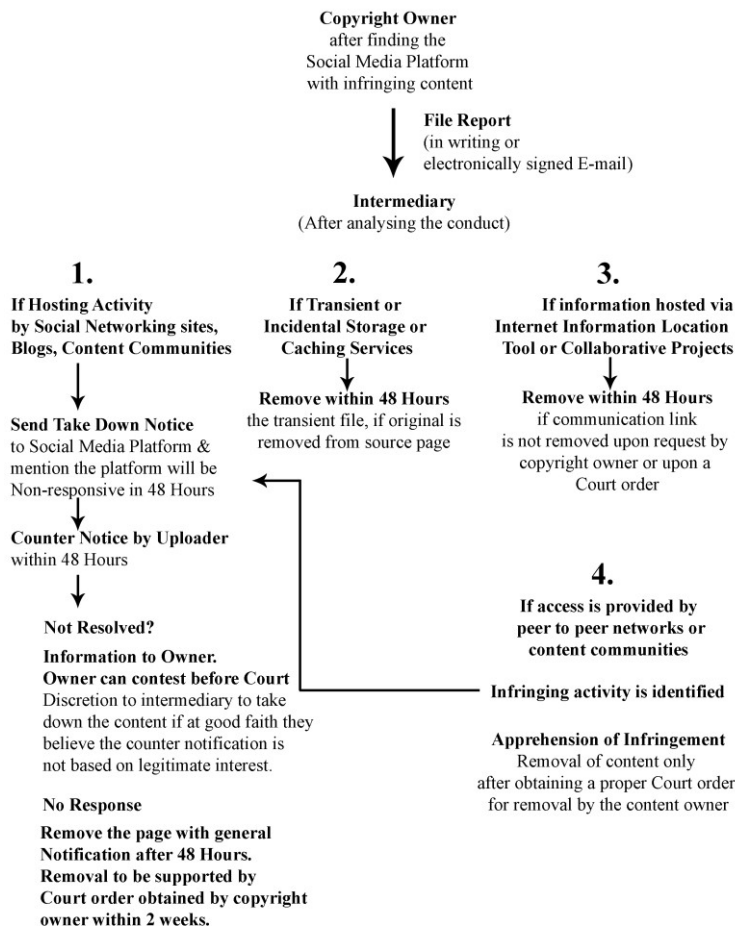
'Circumvention' means any technological device or component that in the normal cause of operation is designed to prevent access to a work or restrict copy of a work in respect of works or other subject matter which are not authorised by holder of any copyright as provided for by the law.

3. Circumvention exception provisions applicable to Technological Protection Measures have to be designed and incorporated in the copyright legislative framework. The exceptions may include

⁹ *Id.*

basic aspects like circumvention for informative and public interest uses, circumvention in the cultural and free speech context, circumvention of uses for national interest, circumvention of detrimental Technological Protection Measure that might affect the work itself, circumvention for making transitory copies, circumvention for reverse engineering purposes etc.

4. Include within the legislative framework safe harbour provisions based on various conducts by the service provider that includes transitory communication, system caching, storage of information on systems of networks at the direction of users and information location tools.
5. Adopt and implement reasonably a policy for removing infringing content from the social media thereby amending the current Takedown Procedure.



6. To include provisions within the trademark legislative framework strong rights to protect and enforce moral rights for trademark logos in social media.
- ‘The Trademark Owner of a Trademark shall have the right to
- (a) To claim to be the identified as the trademark owner of his trademarks except where omission is dictated by manner of licence conditions so made; and
 - (b) To restrain or claim damages in respect of any dilution or tarnishment or any unauthorised use of trademark anywhere in any manner that will be prejudicial to the integrity and reputation of the trademark holder.’
7. Include Safe Harbour provision like that has been adopted in the EU legislative framework within the Indian trademark legislative framework.
 8. Adopt and implement reasonably a policy for removing infringing trademark from the social media thereby amending the current Takedown Procedure as explained in Suggestion 5.
 9. Adopt an Internet Governance Model of international standard considering the settings in India. The governance model must include in itself equal participation and governance by realm of individuals, service providers and government.

7.2 CONCLUDING REMARKS

In this modern age of science and technology the horizon of intellectual property rights are expanding with an alarming speed. Being the latest device for cognition, communication and co-operation of human beings, the intellectual property aspects of social media has great social significance. Both technological and legal measures are essential for preventing intellectual property right infringement of creations and knowledge that are generated organised and transmitted through social media.

To occur an infringement of Intellectual property right in social media, an infringer must have access to the digital content, make copies of the digital content and disseminate without limit and without authorisation, may it be copyrighted content or trademarked content.

Considering a copyright owner, he ought to maintain security measures of digital nature that prevents the infringing activity from occurring. Besides the technological measure, it requires by the law, the protection of one’s rights that is in ordinary case granted by the copyright laws. So it is important that the technological measure as well as the

infringement activities need to be recognised and defined properly in the relevant law. The Indian legislation is weak with respect to that aspect and hence a proper definition to an effective technological measure and identification of circumvention activities in the legislation is imperative.

As the mode of business activities and consumer purchase has attained a new face through the social media, the problems related to it has also increased. The traditional trademark principles can be applied to a variety of infringement instances, but the nature of offence has changed after there has been a widespread use of trademark logo on social media. The complexity with use of trademark logo is that fair use defence are rarely applicable as the logo itself carries full information with respect to sponsorship and affiliation. The sufficient access to unauthorised use of trademark logo has led to huge proliferation, scale and rapidity of unauthorised use of trademark logo along with permanence of uploaded unauthorised mark has created threat to trademark protection in social media. Moral right of integrity protection has to be included in the relevant legislation so that provisions will protect trademarks no matter it is of commercial or non-commercial use.

The safe harbour provisions must be clear and unambiguous with respect to any issue related to copyright or trademark infringement and the provisions must safeguard the rights of right holder and at the same time balance with the business models.

As mentioned in the introduction part of this book, the focus is on analysing India's legislative stand point on these new forms of infringements and propose suggestions if necessary. The suggestions mentioned can be used as a basic layout for dealing with the issues at present and as a foundation for the changes that ought to be made in the law necessitated by the rapid technological advancement in due course of time.

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Copyright & Trademark aspects of Social Media:

An Analysis

walks through the aspects of copyright and trademark in social media. The contents disseminated by everyone and the brand names and advertisements being used by anyone via various social media platforms, contain certain rights and related perils. The book tries to recognise these rights, analyse its usage in social media and understands the associated problems. The book makes a comparative analysis of these concepts over jurisdictions to understand nature and behaviour of intellectual property laws and cyber laws, its inter relation and effectiveness in the virtual world. The work is basically the result of the Author's curiosity on intellectual property law and cyber law, fascination towards technological marvel and dependence on social media for anything and everything.



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