CHAPTER: 1

INTRODUCTION
"If you have an apple and I have an apple and we exchange apples, then you and I will still each have one apple. But if you have an idea and I have one idea and we exchange these ideas, then each of us will have two ideas."

.........George Bernard Shaw¹

The scientific and technological development has brought all the nations very close to each other and world have become very small one. The territorial boundaries no more remain the barriers for the expansion and dissemination of any concept. The concept of Intellectual Property Rights is not an exception. Hindu philosophy has a Vedic origin. Form the Vedic era the concept of 'Vasudhaib Kutumbkam' i.e., the whole world is a big family also preaches us the tenets of co-existence, brotherhood and devotion for the universal peace, unity and integrity. In consonance with the Vedic spirit at present it seems that emergence of international organizations, international conventions and international treaties are in progress. The basic objects of the United Nations, 1945 are in conformity with the Vedic principles. The prime object of the pivotal and global organization is to maintain world peace and security with the additional functions of developing friendly relations among the nations, of achieving international co-operation in economic, social cultural and humanitarian matters, of developing respect for human rights and fundamental freedom². The acceptance of the concept of Intellectual Property Rights is

¹ Mackay L. Mackay, A Dictionary of Scientific Quotations, (Paperback, Jan., 1991) p.113
effectual to one of the objects of the United Nations i.e., to achieve international co-operation in economic matters.

Intellectual Property Right (IPR) is the bunch of rights which are enjoyed by the person who have earned their intellectual property by application of their intellect. In the modern age the term intellectual property is indispensable one because no one can survive without intellectual property. The term 'Intellectual Property' has been justified at the conceptual level by many great philosopher like George Hegel, John Locke etc. The theories of George Hegel and John Locke regarding the manner in which property is created raise a fundamental question: Can information be considered property in the same sense that a house or a car is considered property? The fundamental character of information is that it is non-rival goods, which means that the assumptions of depletion, scarcities etc, that are used while analysing classical theories of property do not quite fit. Many explanations for the propertisation of intellectual creations are based on the Lockean theory of the creation of property. Locke's theory relies on three basic principles: firstly, that every person has property in himself/herself; secondly, everything that is in a state of nature i.e., not as yet propertised and still held in the commons was given by God to be propertised; and thirdly, that labour converts things in a state of nature into a state of property and adds value to things so laboured upon.

Locke was, therefore, of the opinion that if A mixes his/her labour into a thing that is in a state of nature, that thing becomes the property of A.\(^3\) In terms of copyright, authors can be said to take ideas that are 'out there' in the commons, add their labour to it, and thereby create the 'work'. The question that Locke fails to answer is why, if authors add labour to ideas, the result becomes the

property of the author? His theory simply rests on the assumption that property is the reward for labour.⁴

The next question that may come in this context is whether and how a person actually has property in himself or herself. This property in oneself cannot be a product of one's labour and, therefore, it must be premised upon something else. The core of Locke's theory lays the notion of personal freedom, with state power severely constrained and limited to the protection of liberty. It is in this context that he, again, presumes the ownership of oneself. Unlike Locke, however, Hegel does not see humans as naturally free and as having natural ownership rights in themselves. According to him, it is solely through the historical process of objectification and hence self-confrontation that one comes to be free:

"It is only through the development of his own body and mind, essentially through his self-consciousness and apprehension of itself as free, that he takes possession of himself and becomes his own property and no one else's."⁵

In both theories, ownership of ours enables the ownership of natural objects as they become assimilated to our bodies. Such a proposition meets several objections. Philosopher Robert Nozick poses an interesting question: if I were to pour a bowl of radioactive soup (so that it could be traced), of which I was the owner, into the ocean, and this radioactive soup mixed throughout all the oceans and seas, could it be said that I am now the owner of all this?⁶

Locke locates the desire for propertisation of the commons in the need for the preservation of resources. According to him, if resources are left in the commons their utility will gradually diminish because of over-use or neglect.

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⁵ Supra F.N. 3, p.73.
Land, for example, may be overgrazed or may by neglect become unmanable, and in both cases the utility that this land provides is diminished. Locke assumes that once a resource is taken from the commons and transformed into private property the owner of that property will use it in a manner that preserves its value in use.

Bernard Shaw’s quotation concerning the ‘sharing of ideas’ is a simple, yet effective, demonstration of the nature of ideas and information goods. Information just does not possess the same characteristics as classical ‘real property’. The dissemination of ideas, for instance, does not reduce their use value. Information is considered a ‘non-rival’ good, in the sense that usage of a particular piece of information cannot impair the utility of that information to another user. It has also been characterised as ‘non-excludable’ in the sense that use of a certain piece of information does not exclude other users from utilising the same information. The best example of this is software. The only way a person can prevent the copying of software is by preventing third persons from accessing it. Once access is granted, it can be copied for almost no cost. This copying, moreover, does not affect the utility of the software itself, nor does it prevent the usage of that software by the original owner. The sharing of information goods, especially in the digital context, does not diminish in any manner the quality of the good that is shared. There is clearly a movement away from the idea of property as we have always understood it. However, the concept of copyright represents a stubborn drive towards taming this new monster of accessibility created by developments in information technology.

On the same traction it shall not be just that one person endowing his intellect to develop an idea, spending money to develop a concept, giving labour to

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develop useful skills, giving thought to create any information, providing consideration to construct any plan or investing brain to develop any goods etc. and another will use the same without any hindrance and penny. If this will happen then the value less market shall be created which shall be against the human progress. Thus, to encourage the development in every fields of creation creative act had been welcomed by way of legal recognition and protection resulting in the monopoly of 'know-how'. Today's market is the product based market and when anyone using his skill to make his creation marketable than that should be encouraged by governmental policy so that more and more creative works shall be possible. Until and unless the legal recognition and protection to the intellectual property is provided the encouragement is not possible. The realization of this prolonged problem has already been made and global initiatives have already been taken to boom the creative culture. India has also attempted a lot to protect the intellectual properties through various legislations but the available laws providing the security to the Intellectual property by some non-technological manner and protection is available to the established modes of violation or infringement only. The technological advancement throughout the world made the infringement an ordinary and common practice because of non established/traditional or electronic or online mode of infringement. Indian law is still suffering from policy sickness in this area because different amendments of Copyright Act, 1957 are also unable to meet the challenge of the electronic advancement.

1.1 INTELLECTUAL PROPERTY RIGHTS:

To begin with the term Intellectual Property Right (IPR), it can be said that the term IPR is a heterogeneous term having mixture of many ideas. The term is not related to any one basic norm but rather it is a dynamic idea depending upon the application and market of the place. The term IPR can be analysed in the following way:
IPR is a bundle of exclusive rights given to persons over creations of the mind, both artistic and commercial. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time. The former is covered by copyright laws, which protect creative works, such as books, movies, music, paintings, photographs, and software, and gives the copyright holder exclusive right to control reproduction or adaptation of such works for a certain period of time.

In this era of globalization, especially after the establishment of WTO, intellectual property law has assumed much importance, quite disproportionate to what they actually deserve. The reason might be the feeling that advanced industrial societies are undergoing a fundamental transformation from capital and labour based economies into knowledge economies and aftermath of the recent information technology revolution. Two interesting features of a knowledge-based economy are the astonishing speed and intensity of innovation and emergence of new technologies enabling dissemination of knowledge/information in an unprecedented manner. These technological development paved way for upsurge in the demand for the strengthening of protection of IPR. The proponents of expanded IPR protection try to justify their demand arguing that social progress in the technological age is inextricably connected with the creation and protection of intellectual property.

The proponents of the arguments that stronger IPR is inevitable for industrial and economic development of a nation rely upon the commonly accepted belief that adequate protection of IPR is essential for promoting confidence among investors in research and development. Their claim is that IPR acts as

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10 Ibid.
incentive to innovate to disclose the technology so as to facilitate further growth in science and technology. The progress of science and technology in the developed countries and the emergence of multinational corporation relating to the economic and industrial development are cited as example in this regard. They also try to propagate the view that the developing countries could reap the benefits of increased IPR as it attract more foreign direct investment and accelerates transfer of technology between countries, ensuring that all countries enjoy the benefit.\footnote{William M. Landes and Richard A. Posner, The Political Economy of Intellectual Property Law, AEI Press, Washington, 2004 at http://www.aei.org/docLib/20040608_Landes.pdf.}

There are many economists and jurists who share the feeling that knowledge is not like any other kind of goods as it is ‘non-rival in use’ and a proliferation of IPR inhibits access to information in areas of basic research, creating artificial scarcities in fields where abundance naturally prevails. Economists like Paul A. David\footnote{Edward Elgar, New Frontiers is the Economies of Innovation and New Technology: Essays in Honour of Paul A. David, Cristiano Antonelli, Dominique Forany, Bronwyn H. Hall, W. Edward Stainmuller, eds., Cheltenham, UK 2006, p. 379.} are of the opinion that the present system of intellectual property rights are economically imperfect in that the monopolistic nature of such rights may lead to waste of resources referred to by economic welfare. This is because of the tendency of the monopolists to raise the price of every product much above the cost of production thereby excluding many potential users form enjoying it.

However, internationally the current trend supports the former view. The TRIPS Agreement is the culmination of the efforts of the proponents of expanded IPR protection to set international standards base on their view.

Unlike the TRIPs Agreement, the initial International Conventions like Berne (1886) and Paris (1883) created only minimum principles of substantive law with adequate flexibilities so as to enable the member states to adopt the international norms without affecting their domestic requirements. This in fact enabled many countries to take advantage of the system to promote economic
and technological development. TRIPS, on the other hand, attempted standardization of substantive law by listing out the scope, subject matter, duration etc., of different forms of IPR with very limited flexibilities in its implementation.

1.2 IDEA OF COPYRIGHT:

It is important to remember the purpose of copyright which is public welfare, Enlightenment ‘the encouragement of learning’\(^1\). Justice Hugh Laddie observed, ‘The whole human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done, not necessarily as parasites but simply as the next generation. It is at the heart of what simply we know as progress.’\(^2\) The provisions for infringement and piracy may concentrate the copyright materials with the powerful corporation, particularly the Hollywood studios and this may not only lock way various copyrighted materials from public domain whose access would be unaffordable for the population of a country whose 70% still live in rural areas but may also seriously erode the common cultural products through a systematic homogenization thereby also affecting the most prolific, colourful and culturally diverse industry, Bollywood.\(^3\)

The issue of copyrights has until recently been in the foray for both its use and abuse since the dawn of the renaissance period, a time in history when the world marveled at the birth of new inventions, philosophies in science, arts and industry; inventions that redefined the limits of our capabilities at achieving hitherto what had been considered unachievable. The most remarkable feature worthy of appreciation would be the analysis of the development and evolution

\(^{13}\) Layman, Ray Patterson, Copyright in Historical Perspective, 1968, p. 147

\(^{14}\) Laddie Hugh, Copyright: Over-strength, Over-regulated, Over-rated? 5 E.I.P.R., 253, 1996, p.18

\(^{15}\) India, Economic Survey, 2006
of copyright law in parlance with the development of legal theory. A systematic compilation of thought aimed at bringing about reforms, regulations, restrictions and punishments to certain identified behaviour considered detestable by a collective group of people called society. Although there are competing claims in defining the eternal question, what is law? Yet it is undeniable that Natural law theory affords a qualified understanding to copyright law, inherently an aspiration to secure individuality in realization of our right to liberty and property. Legal concepts of 'property' and 'right' in their extended applications brought a concrete materialization of determining the basis of Intellectual Property.

1.3 INFRINGEMENT OF COPYRIGHT:

Copyright law confers upon the owner of the copyrighted work a bundle of exclusive rights in respect of the reproduction of the work and other acts. The owner of the copyright alone has a sole right in relation to such work without his permission\(^\text{16}\). If anybody else does any of the acts without the authority of the owner of the copyright, the owner of the copyright can maintain an action for infringement of his copyright against the wrongdoer.

The Copyright in a work could be said to be infringed when someone without the permission of the owner of copyright does anything, the exclusive right being conferred upon the owner by the Copyright Act. In order to prove infringement, it has to be proved that the work alleged to be infringed has copyright and the infringing work is a copy of it. For proving the latter part, one has to have a clear understanding as to what amount to copying. How much of the original work need to be copied for constitution of infringement? Copying of the un-copyrightable material from the original work is not infringement. In order to constitute infringement not only that copyrighted

\(^{16}\) H.M. Jhawala, Intellectually Property and Competition Law in India, C. Jamnadas & Co, Mum., 1997, p.139.
material is copied but also such protected material is ‘substantial’. In other words, there should be substantial copying between the original work and the work alleged to be an infringing copy. However, the determination of the extent of copying that constitutes a substantial copying is one of the most difficult questions in the copyright law. Substantial copying does not necessarily mean copying of substantial portion of the work. Even if the similar material is quantitatively small, it is enough to constitute substantial copying if it is qualitatively small important.\(^\text{17}\) Copying need not be literal or verbatim. It is enough if the fundamental essence or structure of one work is duplicated. The mere fact that the defendant paraphrased rather than literally copied will not preclude a finding of substantial copying. Otherwise, a plagiarist would escape by immaterial variations.\(^\text{18}\) However, both in literal and non-literal copying one of the most important considerations while deciding an infringement has the adverse effect on the market caused by the infringing work.

The question of infringement of copyright comes into picture when the people intend to take advantage and cause economic loss to the people who by virtue of their intellect, expense and hard labour have earned those rights. What is apparent is that the technological change has made reproduction of copyright material easy and cheap, and also at the same time it has made piracy of copyright work simple and difficult to control. They have made copyright infringement international in character. When a work is transmitted from one point to another or made available for the public to access, numerous parties are involved in the transmission. These include entities that provide internet access or online services. When such service providers participate in transmitting or making available material provided by another, which infringe


\(^18\) Nichols Vs Universal Pictures Co., 45 F 2d 119 (2d Cr 1930), at p.121.
copyright or alter rights, they are liable.\textsuperscript{19} Such liability could arise in one of the ways, if the service provider itself is found to have engaged in unauthorised acts of reproduction or communication to the public or if it is held responsible or contributing to a making possible the act of infringement by another. It is the potential liability of the online service and access providers for infringement taking place through their services. The important question that is raised is: are service providers exercising the exclusive rights of copyright owners themselves, as they engage in acts that cause the material to be copied and transmitted?

Regardless, where the services make the transmission possible, the service providers are legally responsible for the unauthorised exercise of those rights. There is one reference to this issue in an Agreed Statement if the WCT, which says, ‘It is understood that the mere provision of physical facilities for enabling or making a communication dies not in itself amount to communication within the meaning of this Treaty or the Berne Convention\textsuperscript{20}. Statement clarifies that simply providing the wires used to communicate, for example, does not constitute an act of communication. But the statement is limited in its application. It does not cover a number of activities that service providers may engage in, and it does not deal with concepts of liability for contributing to the infringement of another. The US Digital Millennium, Copyright Act, 1998 shields qualifying Internet Service Providers form much of the potential liability. It insulates service providers form vicarious liability (but not direct) for copyright infringement, both for acting as a conduit for infringing material (conduct activity) as well as infringing activities of their users and the content of those user’s web pages (user activity) on the Internet Service Providers\textsuperscript{21}. The information Technology Act 2000 provides that a network

\textsuperscript{19} Rodeny D. Ryder, Intellectual Property and the Internet, 1st edn., LexisNexis, 2002, p.66.
\textsuperscript{20} Agreed statement concerning Article 8 of WCT, 1966.
\textsuperscript{21} Section 512(a) and (c) of US Digital Millenium Copyright Act, 1998.
service provider is not subject to criminal or civil liability for third party material for which or to which the provider merely provides access.

Home taping by video audio recording has posed further challenges to the rights of copyright owner of cinematographic films and sound recordings. By using audio and video recording devices any number of copies of the films or sound recording can be made available at a very low cost which may result into a substantial loss to the copyright owners. Further home taping reproduction of a broadcast may also be made by recording of the air from the satellite broadcast, thereby infringing the rights of broadcasting organisations and performers.

Perhaps the most difficult task for intellectual property owners is detecting infringements and identifying the infringers. The worldwide reach of Internet, the millions of websites on the World Wide Web, the ease of access to the source of information/creation and copying others intellectual property and the framed anonymity of this new medium detection become cumbersome. The sufferings of a creator can best be seen by looking at R.G. Anand Vs Delux Films, where the Courts clearly held that if the mediums are different, proving violation becomes all the more difficult.

The next difficulty involved in answering the question of infringement is the idea/expression dichotomy in copyright. Since ideas are not protected under the copyright, similarly in ideas the question of infringement does not arise. It is not easy to identify when an imitator has gone beyond the idea and has borrowed its expression. According to Professor Zechariah Chafee, the

22 Section 78 of Information Technology Act, 2000.
24 AIR 1978 SC 1613.
protection covers the ‘pattern’ of the work; the sequence of the events and the development of the interplay of characters.  

1.4 HYPOTHESIS OF THE RESEARCH:

Due to rapid technological growth the copyright law becomes the weakest piece of legislation in terms of protection because the technological and other development makes this area most accessible and people can easily take the advantage of technology in the process of violation of the copyright resulting in twofold economic crisis. Firstly, the crisis is available to the author or copyright owner and secondly the loss to the government’s revenue. There are many other ways by which now a days the copyright can be violated. The most common use of statistics in the copyright tale concerns the losses caused by piracy. Thus, for instance, in case of computer software one would encounter the following narrative:

- The extent of software piracy and losses due to piracy cannot be given in exact quantitative terms though it is believed that piracy in this sector is widespread. In India software piracy is costing the IT industry quite clear. According to a survey conducted jointly by Business Software Alliance (BSA) and NASSCOM in May 2006, total losses due to software piracy in India stood at a staggering figure of about Rs 500 crores (US $ 151.3 million) showing about 60 per cent piracy rate in India. In Europe alone the software industries lose an estimated $ 6 billion a year. In fact, Europe holds the dubious distinction of accounting for about 50 per cent of worldwide losses from software piracy, more than any other region including the number two, Asia. According to a study, losses due to piracy of personal computer business application software nearly equalled revenues earned by the global software industry. In 2006, piracy cost the software industry US $

26 MHRD Report on Copyright Piracy-2006
11.2 billion, a 16 percent decrease over the estimated losses of US $13.3 billion in 2005\textsuperscript{27}.

- In India a study by the Business Software Alliance (BSA), the international association of the world's commercial software industry found that, 73% of the software installed on PCs in India in 2004 was pirated representing a loss of Rs 23,355 crore. It has been estimated that a 10% reduction in the infringement of copyright i.e. piracy in the next four years in India, would enable the IT sector to boom from Rs 33,300 crore to Rs 87,750 crore\textsuperscript{28}.

- The failure to enforce Copyrights (IPR) laws has taken a heavy toll on government revenues and reduced employment opportunities, with the government forgoing tax revenue of over Rs 10,000 crore annually due to the proliferation of counterfeit consumer products alone.\textsuperscript{29}

- The 2007 report of the International Intellectual Property Alliance (IIPA) on the Indian documented that India suffered trade losses worth 496.3 million US dollars due to copyright infringement.\textsuperscript{30}

It is often lamented that there is a difference between enacting a law and ensuring that it is properly enforced. The copyright laws in India offer a very good illustration of this enigma. Despite the protection provided by the India Copyright Act, 1957, India has acquired notoriety by being on the priority watch list year after year mainly because of abominable high piracy rates and dearth of appropriate measures of encouragement.\textsuperscript{31} It is critical to adjust the

\textsuperscript{27} Study Conducted by Software Publishers Association, a US-based body, published in 2006.
\textsuperscript{28} The Times of India, Jan 10, 2006
\textsuperscript{29} Chief Justice of the Delhi High Court, S B Sinha, in the inauguration of a seminar on new IPR laws organised by the Associated Chambers of Commerce and Industry of India (ASSOCHAM), The Hindu, September 22, 2002.
\textsuperscript{31} Rachna Desai, Copyright infringement in Indian film industry, Vanderbilt Journal of Entertainment, Law & Practice, Spring 2005, p.259-278.
legal system to respond rapidly to the new technological environment in an effective and appropriate way, because technologies and markets evolve increasingly and rapidly. This will ensure the continuous furtherance of the fundamental guiding principles of copyright and related rights, which remain constant whatever may be the technology of the day. It would involve giving incentives to creators to produce and disseminate new creative materials; recognising the importance of their contributions providing appropriate balance for the public interest, particularly education, research and access to information and thereby ultimately benefiting society by promoting the development of culture, science and the economy.\textsuperscript{32}

Apart from the above mentioned facts the present research work is undertaken to cope with the following supplementary objects:

The excerpts from news reports quoted above provide just a glimpse of the discourse that has become a regular staple of the media’s coverage of copyright-related issues. Yet there is a stubborn logic that refuses to accede so easily to the threats, blackmail and pleas of copyright protectionists. The spectral figure of copyright looms large over, but fails to entirely haunt our imagination. As with any other conflict, the ‘battle for souls’ is perhaps as important as the transformations taking place in the material world of practices. And it is within these spaces of the human imagination that we insert our current intervention. The promoters of copyright have a rather straight forward justification for it. We shall begin with what may be considered a rather typical account of the necessity of copyright law. In recent years copyright law has been amended to include protection for performers’ rights. The key assumption that sustains copyright law is that authors have a natural right over their works of intellectual labour, and copyright protection is required to provide an

\textsuperscript{32} Minister of State for Coal, Mines, Law and Justice, Ravi Shankar Prasad, in his keynote address in the inauguration of a seminar on new IPR laws organised by the Associated Chambers of Commerce and Industry of India (ASSOCHAM), The Hindu, September 22, 2002.
incentive to create intellectual works. Copyright, therefore, grants an exclusive right to the author over his or her works; this includes a basket of related rights such as the right to authorise reproduction, adaptation, performance, and distribution etc, of the work. In the absence of a system like copyright, it is argued, there would be no incentive for authors to produce and hence there would be a general decline in the world of creativity and the arts. However, copyright inherently includes a balance between the protection of authors, on the one hand, and the interests of the public, on the other. Since it is recognized that excessive protection may result in curbing the ability of the public to use works, copyright protects only unique expressions and not ideas per se. Some balance is also sought to be achieved by providing a limited term of protection (i.e., the lifetime of the author plus 60 years). Within these limits, any person who uses the works of another person’s intellectual labour without permission is, according to copyright law, guilty of indulging in an act of stealing the other person’s ideas. The rationale is that such theft will result in unacceptable losses of the author for the work. As with any other totalising story, the tale of copyright appears to have some intrinsic appeal, relying as it does on a progress account (copyright promotes creativity) and the despotic world that it prevents (there will be no creativity without copyright). There are a number of contradictions in the attempt to equate information goods with classical property which are becoming ever more glaring. Some of these are internal contradictions within the larger machinery of production and consumption. Thus, on the one hand, we have hardware manufacturers creating better CD writers at a cheaper price and advertising their products with the magical words, BURN, RIP, COPY, DUPLICATE, STORE, etc. On the other hand, we have the content industry screaming itself hoarse at these new technologies that are making it easier for people to steal information unethically. Copyright has acquired all-pervasive status in recent years, entering the realms of the

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everyday in various forms. It appears in the public sphere most commonly as a newspaper story about the losses caused by piracy or the latest 'threatno-innovative' attempt to fight piracy. Post September 11, 2001, the war against terrorism and the war against piracy have become close allies. Sometimes the battle acquires a certain glamorous appeal when one celebrity sues another for copyright infringement, as in the recent case of *Bappi Lahiri against Dr Dre*\(^3^4\) for using his song, *Kaliyon Ka Chaman*, or *Rajnikant*, Famous Hindi and Tamil film actor, claiming rights over a sign that he uses in his film, *Baba*\(^3^5\). The recognition of the legal tender shall certainly helpful in achieving the target of prevention of copyright infringement in India.

Copyright infringement (or copyright violation) is the unauthorized use of material that is covered by copyright law, in a manner that violates one of the copyright owner's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works. It is the authorized use of copyrighted material in a manner that violates one of the copyright owner's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works that build upon it. There are different ways through which copyright owners may find their copyright has been infringed. For example in this world of technology apart from illegal copying, Bootlegging Piracy, Counterfeiting, Plagiarism etc which may be related to writing, software, film and music industry etc. are other forms of infringement. Anyone who violates the exclusive rights of the owner of copyrighted work by using or copying it for its commercial exploitation or its communication to the public, without the author's consent or authority, is infringing the copyright. Under the Indian Copyright Act for electronic and audio-visual media, unauthorized reproduction and distribution is occasionally referred to as

\(^3^4\) *The Telegraph, Calcutta, India, Friday, November 01, 2002.*

\(^3^5\) *The Hindu, Saturday, Sep. 28, 2002.*
piracy.\textsuperscript{36} The legal basis for this usage dates from the same era, and has been consistently applied until the present time. Critics of the use of the term ‘piracy’ to describe such practices contend that it is pejorative, unfairly equates copyright infringement with more sinister activity,\textsuperscript{37} though courts often hold that under law the two terms are interchangeable.\textsuperscript{38}

We are constantly delighted with stories of how copyright as a system acts as the basic protection for poor, struggling authors who would otherwise have no means of protecting themselves against pirates who reproduce their goods or others who steal their ideas. Let us, at the very outset, clarify that we certainly not enemies of creative workers and we would, of course, like to see all creative labour recognised and rewarded. But the question that begs an answer is: does copyright really achieve that and, if not, why does this image of the poor, struggling author keep coming to mind? What the metaphor of the poor, struggling author does is render invisible the critical difference between the authorship of a work of intellectual labour and the ownership of the same.

Copyright scholar Peter Jaszi states that:

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“while there is a tendency in copyright law to invoke liberal individualism to justify economic structures that frustrate the aspirations of real-life individuals, it is somewhat surprising to encounter the individualistic romantic conception of ‘authorship’ deployed to support a regime that disassociates creative workers from a legal interest in their creations: the ‘work-for-hire’ doctrine of American copyright law, where this doctrine applies, the firm or individual who paid to have a
\end{quote}


work created, rather than the person who created it, is regarded as the ‘author’ for purposes of copyright ownership.”

When a work is deemed to have been made ‘for hire’, the alienation of labour is formally and legally complete: the ‘author’ of the ‘work’ is the person on whose behalf the ‘work’ was made, not the individual who created it. In this legal configuration, the employer's rights do not derive from the employee by an implied grant or assignment. Rather, those rights are the direct result of the employer's status. Ironically, the employers' claims are rationalised in terms of the Romantic conception of ‘authorship’ with its concomitant values of ‘originality’ and ‘inspiration’. Recently, J K Rowling, author of the Harry Potter series, has been in the news for enforcing her copyright against cheap pirated copies. In more ways than one she stands as a role model for copyright enforcers, and her status as a struggling single mother is often used as the analogy for the way copyright protects the rights of poor authors. While we are all happy for Ms Rowling, what is not convincing is how the example applies even after the publication of the fifth or sixth Harry Potter book, by which time the writer had become one of the highest paid authors in the world, with many millions of pounds in excess. Clearly pirates respond only to a market demand, and not every book is pirated. There is a particular popularity or price limit that has to be achieved before it enters into the piracy circuit. Presumably, if a book has achieved a certain status that leads to it being pirated, its author is no longer poor and struggling. Encouraging creation of authors by protecting their interest shall undoubtedly be helpful to minimise the rampant practice of infringement of copyright through different modes.

The unauthorized downloading of copyrighted material and sharing of recorded music over the internet in the form of MP3 files and other audio files is more

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prominent now than since before the advent of the internet or the invention of MP3, even after the demise of Napster and a series of infringement suits brought by the American recording industry. Promotional screener DVDs distributed by movie studios (often for consideration for awards) are a common source of unauthorized copying when movies are still in theatrical release, and the MPAA has attempted to restrict their use. Movies are also still copied by someone sneaking a camcorder into a movie theater and secretly taping the projection (also known as 'camming'), although such copies are often of lesser quality than copied versions of the officially released film. Some copyright owners have responded to infringement by displaying warning notices on commercially sold DVDs; these warnings do not always give a fair picture of the purchaser's legal rights, which in the US generally include the rights to sell, exchange, rent or lend a purchased DVD. Sharing copied music is legal in many countries, such as Canada, and parts of Europe, provided that the songs are not sold but under Indian copyright law it is gross infringement since it is not permitted. A blanket ban on reproduction of a work of science, literature and arts, either in full or part may, in certain circumstances, become inimical to the public purpose that a copyright is intended to serve. For example, such a total ban may, instead of promoting and stimulating study and research in science, humanities and arts, lead to thwart it and become counter-productive. Promotion of music and cinematographic industry not only protect the copyrights of the creator or investor but also encourage the scope of employment in this industry.

To understand how to protect and promote the markets in creativity, it is important to first define creativity. Creativity is the production of something novel that offers value in a particular situation. What is valuable differs according to the situation. The value may stem from the usefulness, merit, importance, uniqueness, or desirability of that product, service, process, or idea. The copyright industries savour their role as critical intermediaries in the
copyright supply chain. To this end they are continually seeking to strengthen their legal entitlements by arguing that stronger copyright incentives fuel future creative action. But the reality of creativity is different from the linear economic reward/action relationship that these industries promote. This reality has been brought into sharp focus by the seemingly limitless creativity that the internet has unleashed. Much of this creativity occurs without reference to the incentive structure provided by copyright law and demonstrates the potential redundancy of several existing industry functions. The result has been a seemingly intractable tension between established industries and emergent modes of production and dissemination. The clearest examples of this tension are the current debates over the utility of peer-to-peer technology and the competition between proprietary and open source software development models. This tension, and the realities of creativity that underpin it, are the challenges for the researcher. Many of us think of the arts and sciences as being the sole domains of creative expression, but creativity is manifested in many different ways and in many different fields. The people and organizations produce novelty and value by way of Expressions, Potential, Experiences and Capabilities. The last category of creativity that emerges from individual and organizational capabilities is what is at stake in the question about the future of copyright.

Historically software has been considered to be a subject matter that may be protected by copyright. It is obvious that any item protected by copyrights automatically comes under the ambit of the Berne Convention, and all statutory provisions under the copyright law become applicable to the software protected by copyright. One has to be very clear about the concepts of authorship and ownership of computer programs. The programmer or programmers are to be considered as joint authors of a work. If the work is created in the course of

one’s employment, then the first ownership goes to the employer in the absence of any contrary contractual agreement. If someone is specifically hired to develop the program then it is implied that the ownership is assigned to the one who commissioned the work. However one has to exercise considerable care as issues of prior knowledge, proprietary object codes from one’s library may be used for the development of the program & the associated applications and hence the issue of authorship and ownership can get fairly murky under such circumstances. Different data of the days shows that the software industry shall have the potential to contribute to the state fund remarkably if nurtured properly. The protection of the software industry from the curse of infringement and promotion of this industry to its proper shape and size are amongst the duties of the researcher.

Apart from the statutory provisions as laid down under Indian Copyright Act the infringement of copyright cases can also be dealt with by High courts and Supreme Court of India under different lawful provisions of constitution of India. Even though certain important fundamental rights including right to carry on any trade or business are guaranteed only to citizens, all persons including non-citizens can claim equality before the law and equal protection of the laws under the constitution. Therefore any arbitrary discrimination against a person, who is a non-citizen qua his claim to be treated equally as others before the law, can be challenged before the Courts. Recourse to Court by law is a well recognized concept world over and firmly entrenched in the Constitutional and other laws of India. Therefore, any person can claim a statutorily or customarily recognized right to property. In case of infringement of a legally recognized right recourse to law cannot be denied and the rule of law enshrined under the Constitution will enable any person including a non citizen to move to the appropriate forum of the country for redressal of his grievances. In India the Code of Civil Procedure allows alien friends also to sue in any Court otherwise competent to try the suit, as if they were citizens of
India. Ordinarily, violation of Copyrights has a private dimension in as much as it affects the proprietary rights of individuals and may cause financial loss and loss of credit to the owner. Therefore, the questions of national or public interest would rarely arise when redressal is sought by a non-citizen for violation of such proprietary rights by the infringer. The judiciary is bound to implement the laws and redress grievances of all persons including aliens to uphold their common law or statutorily recognized rights. The Indian Judiciary has many things to achieve in present time to establish a society with minimum of infringement of copyright or any Intellectual Property. Some cases may be summarized to mobilize the concept of judicial response in real sense. Infringement of Copyright is century old problem but the infringement of copyright in ancient age was not as harmful as in today's situation. In ancient time the creator were not so worried because the dimension of this right did not receive the present economic values. In present time copyright has not only the creative values but rather it has becomes economic right of the owner. At the same time the challenge to protect copyright is also very difficult which was not to centuries back. Today, due to the development of technology, electronic and digital mechanism the scope of infringement is higher and value of copyright is also increasing day by day. Results from past studies indicated that apart from protecting their economic, cultural, moral etc. rights rather contributing to the state exchequer that now a day copyright is not only benefiting the owner/creator of the copyright by contributing in state exchequer, in some of these nations (e.g. USA, Germany, Sweden, Australia, and U.K.) the contribution from copyright based industries to their respective Gross Domestic Product (GDP) is significantly high. Unfortunately in the Indian context no systematic effort is undertaken to arrive at fair indicators of the sector's contribution to GDP whereas India is one of the largest creator of the copyrighted works whose benefit cannot enjoyed due to rampant infringement of copyright and related rights.
The copyright is one of the highly demanded mode of intellectual property which has immense role to play so far as the advancement of the country and the contribution to the revenue of the govt. is concerned but due to the excessive available modes of infringement of copyright it has remained only a dream for a country like India which is one of the largest market of copyright related IP. Whereas in developed countries having lesser market in comparison to Indian market, the copyright based industries comprise mainly the print & publishing industry, audio cassettes/CDs industry, film and video industry and computer software etc. which contribute handsomely to the state exchequers. Worldwide it is recognized that copyright piracy is a serious crime which not only adversely affects the creative potential of the society by denying the creators their legitimate dues, it also causes economic losses, to all who had invested their money in bringing out copyrighted materials in various forms for use by end-users. Globalization forced the copyright issues to the forefront because a large number of copyrighted products area are traded internationally. Protection of copyright, therefore, is a priority matter in the national agenda of many countries especially in the developing world. Surely, it has also emerged as an important factor governing international relations. India is losing its revenues to the tune of crores every minute due to infringement activities but due to unknown modes or cases of the infringement it is not able to protect the same. Moreover, sometime due to unavailable legal measures, known infringement activities area is also not prevented resulting is loss to the owner/author of the creation. Another problem for which the work has been taken is that maximum population in India even, today do not know what copyright infringement is and how it is caused at all? The protective acts could not be expected from a person who has no basic idea about the Copyright and its infringement. This is caused because of lack of awareness and consciousness about consequences of infringements. The present available laws in India are insufficient and are not able to protect every aspect of the copyright
infringement in India. Another object is to analyse the current position of law and to find out the proper measure for the protection of the copyright and related rights. Judiciary always plays an important role in the development of any civilised countries. Basically in federal countries the judicial pronouncements are playing the role of path finder both for the legislature as well as other branches of judiciary. In India Article 141 of the Constitution made Supreme Court as the highest Court having supremacy in judicial decision with binding effect on the subordinate judiciary and after administrative and quasi-judicial bodies of the country. The proposed work shall analyse the different judicial decision and try to find out the areas of infringement, mode of infringement and the available modes of protection of the copyright from infringement.

Thus, the abovementioned data and situations clearly speak regarding the emergence of the present research in the field of copyright and its protection from infringement. The research propose to find out the modes by which the copyrights have been infringing and on the same track the ways by which reasonable protection can be given to copyright based creation as well as industries so that less loses to the creator/ owner or investor shall be caused and at the same time more revenues shall be contributed to the Govt. revenues. The research work seeks to identify and interrogate some of the assumptions that underlie most media stories about copyright. The greatest success of the concept of copyright has been its successful elevation to the status of myth through the constant rendering of certain familiar figures (the poor struggling author), arguments (people deserve to own the fruit of their labour) and rhetorical data (billions of dollars lost due to piracy). By specifically labelling these assumptions myths, the researcher seek to question their truth premise. This is, however, a task that has just begun and more collective works are required to strive towards making arguments that go beyond merely providing counter-facts if we are to effectively counter the totalising rhetoric of
Copyright. The importance of the work can easily be measured from the facts and informations discussed in the foregoing paragraphs. It also shows that the Copyright protection in India is still not strong and effective enough to take care of the copyright of individual and copyright based industry and business so far as the protection of copyrighted works are concerned. Though sometimes it is claimed that our law is enough for the protection of copyright works but it is a utopian thought because Indian laws on copyright is capable to protect the copyright from the established or manual methods of infringement only not otherwise. The technological and technical advancement is adding to the process of the infringement of copyright throughout the globe nowadays. The protection extends only to the Copyright as understood in the traditional sense but not in its modern aspect. Thus, on-line copyright issues are also not adequately protected. Neither the country has developed a sound strong legal base for the protection of copyrights nor is the judiciary playing a proactive role in the protection of these rights. Hence, the situation is very alarming as it is growing and the existing legal system cannot effectively take care of all problems associated with copyright infringement. In this thesis the researcher has tried to find out the non-obvious or electronic/ digital/ technological modes of infringement of copyright and possible methods of its protection so that the monopoly of the know-how based property exists and more and more endeavour is made in the process of creativity and development which consequently contributes more and more to the government revenues from the Intellectual Property market particularly from the Copyright based market.

RESEARCH METHODOLOGY:

The research work may be helpful in formulating the legislative policy in future on the present subject to fulfill the aspirations of the general people investing their labour, money and intellect in the thought creating process and to add the WTO's principles at par to reach the destination of making the law a dynamic one to ensure the economic justice in India.
In this work an attempt has been made to study the laws relating to the IPR. The Laws relating to copyright and its infringement in context of the modern trends of technological, digital and electronic advancement after the globalization and subsequent amendments in India have been deeply examined. The work is a purely analytical, descriptive and doctrinaire study as this is not based on any empirical data and field survey. The study is primarily based on the relevant laws and secondary (sources) various developments and progress made in this field since its emergence. Different Indian and foreign journals, periodicals and publications on the subjects have been seriously studied. Landmark judicial pronouncements have been collected, systematically discussed and analysed. The data disclosed through newspapers and informations have also been surveyed in the present work.

Thus, in order to explore the possibilities of better use of copyright without its infringement the author has classified the entire research project into six heads:

The First Part introduces introduction, The Second Chapter highlights on the historical retrospect of copyright. The Third Portion of the work discusses the International position of copyright. The Fourth Chapter explains the Indian position of copyright especially during post constitutional period. The Fifth Chapter of the thesis studies on cases and its analysis in the context of copyrights. The Sixth Part finally concludes the whole research project with necessary suggestions.