ABSTRACT

An important drawback of natural law is said to be the failure of its ‘divine’ ‘moral’ perception to control, regulate and develop the human secular activities. ‘Law’ with its divine sources and ‘reason’ being its natural base, could not help an individual who travelled across the geo-political borders for the purpose of trade and livelihood. The growing civilization recognized the importance of such protection at the micro and macro level. Travels of Columbus and Vasco De Gama made the world keenly aware that man-made posited law in the form of the ‘command of the sovereign’ alone could save the situation. The beginning of renaissance is marked with the mercantilism on one hand and the era of positive law on the other. It may not be wrong to say that the seeds of globalization were actually sown during this period. As the geo-politically defined communities emerged as sovereign, conflict of laws between two sovereign States became sharply focused that impacted upon trade and commerce. The quest to resolve this conflicting issue brought the world at the doorstep of globalization on one hand and the border less virtual world on the other. Today, all brand names and the retailing houses reside in the palm of our hands in smart phones and iphones. The conflicts and confusions over law and policy were never felt so strongly in history; the demand for solution to the problems is stronger still. In this context jurisdiction of the dispute resolution fora is of utmost significance.

The Focus of this thesis is to analyse the existing substantial and procedural provisions regarding jurisdictional issues in trademark violation and to make an endeavour to look for an appropriate solution in the situation of conflicts of jurisdictions. Jurisdiction is the gateway for any grievance to enter the portals of the dispute settlement fora and be transformed into litigation. The term jurisdiction is described as well as understood in various ways. However, the common understanding in absence of any precise definition prescribes jurisdiction to be power, authority or competence of any court to entertain the matter placed before it. Each country specifically provides for rule of jurisdiction under its legal framework which plays a pivotal role in effective and efficient litigation management. In almost all countries the rules of jurisdiction are prescribed in substantive or procedural law. The delineation of the power of such boundaries is very essential in situations where human activities surpass well defined geo-political borders. The advent of internet and globalization has accelerated the growth of trade and commerce where the conventional form of physical property tied to territorial boundaries has taken a back seat. The new form of intangible property viz. Intellectual Property is playing a significant role in revenue generation. The competitiveness among states not only for revenue generation but also for recognition of intellectual wealth has sharply emerged. In this situation, intellectual property being an imperative tool for the economic and industrial growth of any nation and the laws protecting them has assumed great importance. With the rising multiplicity of stakeholders in the international commercial field, infringement of intellectual property is frequently connected to more than one state. Trademark being a type of intellectual property is no exception to this. The jurisdictional conflicts in trademark are reaching beyond municipal law which requires specific guidelines on rules of jurisdiction operable within national laws and beyond. Complex legal issues like jurisdictional issues that call
for appropriate solutions require right approach of academicians, judiciary and legislator for suggesting the potential range of solutions. The solutions should not prove to be counterproductive opening path for further conflicts and confusions. To arrive at such framework of solutions one has to go beyond the formal legal reasoning that requires inductive and deductive reasoning by relying on precedents, legal principles and statutes.

Cyberspace and e-commerce are inherently international. Consequently the issues of jurisdiction here are more sever by nature. Thus, any successful governance regime involves significant and substantial international cooperation. The trademark disputes over the internet not only involve conflicting jurisdictions but also involve questions of jurisdictional overlap and ambiguity. Considering this, enforcement of law regulation based on territorial jurisdiction may not provide the solution especially in the virtual world. It is important to mention that the virtual world is not a lawless frontier. So the issue is not the absence of law but rather enforcement through jurisdictional rules which are governed by the doctrine of territoriality.

In case of any dispute involving a worldwide market, there are more than two hundred potential laws applicable for the assessment of the principle on territoriality. This complex issue is not address by any of the international instruments on intellectual property rights particularly on trademarks. At present there is no comprehensive treaty on intellectual property and the rules of private international law. There may be some scattered and episodic provisions in form of substantive rules of public international law. The issue of jurisdiction assumes complex proportion in case of multiple plaintiff and multiple defendants on the other side with dispute involving different places of operations. Therefore, the court has to act cautiously and consciously to assume jurisdiction or to abandon the same. In absence of any specific legal framework applicable to physical world as well as cyberspace, traditional principles of domestic and international jurisdiction are developed and adopted. Considering the non-availability of specific legislation and prescribed procedural norms, much reliance is placed on the judicial pronouncements. In India the case law on these questions is in its infancy and there is no consensus or established rule in this regard. However, with the latest decision the Delhi High Court in the Banyan tree case has released the air of speculation and paved way for further development of law on jurisdictional issues in the virtual world in India.

From the Indian perspective, it is concluded that our current territorially based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today. Restriction of territorial jurisdiction being placed by codified laws, further expansion of personal jurisdiction beyond those lines require appropriate amendments in Section 19 and 20 of the Code of Civil Procedure to incorporate the Objective territoriality principle, i.e. the Effects test. This is so because judicial precedents of lower courts and foreign courts do not have binding authority on the Indian Courts and considering the growing involvement of non-residents in cases of trademark infringement, passing off and domain names owing to the ever-increasing horizon of globalization of businesses and internet connectivity, we need definitive law in this matter.