Chapter VII: CONCLUSION AND SUGGESTIONS

The discussion enunciated and the survey conducted in the preceding chapters reveals that the existing legislations governing the rights and obligations of the copyright owners, domain name holders, consumers, netizens and the internet service providers have failed to clarify the regulatory controversies which have come up in the process of convergence of telecommunication, broadcasting and information technology within the classical compartment of traditional intellectual property system. The shortcomings are not only evident in theoretical plane, the courts and legislatures are also finding it difficult to apply the existing intellectual property principles to settle some of the core issues concerning the scope and extent of copyright and trademark protection of converging technologies.

Indecision of policy makers in setting clear parameters for the development of convergent activities is a major stumbling block in many Asian countries. This not only retards the growth of many new beneficial systems and services, but also prolongs the agony of incumbents to adjust to the new environment while even basic services continue to be widely inaccessible.

The slowness of the reaction of regulators often means resorting to largely unsatisfactory stop-gap measures in order to cope with the rapid technological changes. Instead, regulators need to plan ahead with flexible frameworks of dealing with largely unforeseen and unpredictable technological and market changes. Governments cannot shy away from convergence or they will deny themselves necessary advancement while continuing to keep their people at a disadvantage.

Getting the regulatory house in order remains a primary challenge in much of Asia. Encouraging examples of providing for a proper regulatory environment are being developed in Hong Kong and Singapore. Providing for a reasonably autonomous converged regulatory agency apart from vested
operational interests is becoming increasingly important. Promoting reasonable competition and encouraging the private sector to participate is also needed along with the continuing divestment of government interest in traditional communications industry incumbents.

Focusing on providing transparent and fair regulation for the development of technologies and services to meet information needs and desires in the face of inevitable social and political changes from within and outside countries is the challenge to address in India as well as an opportunity not to be missed.

There is no one formula that can be used in all countries. Yet, India will has to approach the issues of ICT and media convergence in a forward looking manner not only for determining new rules for interconnection, universal access and access to scarce resources, but also for building a regulatory framework for increasing the growth potentials in a networked economy.

The very challenge for copyright in the digital environment is to maintain the delicate balance between the right owners' and authors' interests and the public interests that successfully contributed to progress in the analogue era.

Dramatic growth in broadband communications, convergence of technology systems, digitalisation of content and the globalisation of human interactions have changed the context within which copyright operates.

The technological measures to combat piracy are essential coupled with strong legal protections must be adopted and more importantly, vigorously enforced worldwide, if sufficient intellectual property incentives are to be upheld. The copyright laws do not appear to have developed adequately in line with technological advances.

Due to the nature of digital content, a combination of commercial, technological and legal solutions will be utilised to manage and protect copyright material.
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There is a clear need for international consensus on the law relating to the Internet. Due to the 'global nature of the Internet's purely national responses to the copyright problems are inadequate' and 'a convergent approach is required'. It is obvious that due to the nature of the Internet ignoring boundaries, national law and territorial sovereignty are incapable of meeting the demands of this new technology. However, it will be shown that international efforts to date have been, at best, inadequate to meet these demands.

The TRIPs agreement resulted in no consensus in the area of copyright and technology. Thorny issues surrounding copyright protection for electronic commerce were not addressed explicitly in TRIPs, requiring the negotiation in 1996 of the Copyright Treaty and the Performance and Phonograms Treaty under the auspices of WIPO.

Unfortunately the twin WIPO treaties failed to directly legislate on issues relating to the Internet. This comes as no surprise though; regional agreements involving countries with more common ground have fared little better. The EU Copyright Directive in its full title aims to harmonise 'certain aspects of copyright and related rights in the information society'.

To reach the goal of international regulation of the Internet we must be realistic and look at specific problems that can be remedied in the short term. Some legal scholars even have asserted that cyberspace should have its own law and legal institutions, and have questioned whether state-based governments should have jurisdiction over online activity'. This may well be true and is a bold objective for the long-term. However it is currently more of a moot point; nations are, at present, unlikely to relinquish sovereignty to an international 'Internet police force Therefore, pragmatic reform options are proposed.

In brief, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.
The manner in which legal and regulatory reform is carried out will determine the manner in which convergence impacts our daily lives.

In short we can submit as follows: Technology changes quickly, regulation changes slowly; Legacy regulation not relevant in convergence era; Prioritisation of Regulatory Challenges for optimum utilisation of regulatory resources; Drawing the Road Map for implementation of convergence; Need for efficient and timely dispute Resolution mechanism for converged licensing regime; Capacity and expertise building in the regulatory bodies to meet the challenges of convergence.

There is no doubt that cyber-squatting is the most contentious issue in the Cyber Law area throughout the world. Since the Internet is a global phenomenon, steps are already afoot to tackle the menace of domain name disputes, especially cyber-squatting, on an international level.

The application of trademark law to websites increases opportunities to carry out commercial activity in countries where the person carrying out the activity has no physical presence. This could be an attractive aspect of carrying out e-business as it may make it difficult for owners of foreign intellectual property rights to enforce those rights effectively. On the other hand, another feature of the Internet is that someone operating a website could be too easily accused of infringing a foreign intellectual property right. Clearly a balance has to be struck that results in reasonable certainty for persons operating websites and the effective enforcement of foreign intellectual property rights.

Bringing cyber-squatting within the framework of the Trade Marks Act, 1999, would result in granting trademark holders more extensive protection than what the legislature originally intended. The development may not be healthy because, although the intention of the Court may be to discourage cyber-squatting and curb a social evil, it may result in dangerous precedents, where even genuine registrants of domain names may be adversely affected.
It is pertinent to mention that as the decisions of the WIPO panel do not have any precedent value and are further subject to the decision of a Court of a competent jurisdiction, the subject of domain name disputes is certainly going to be a contentious issue in bringing actions done over the net under the framework of the existing law.

In catena of cases Indian courts have decided that the domain names are trademarks and can be registered as trademarks. The Law of passing off action is fully applied to domain names.

It is evident that domain names and their misuse by private as well as public portals and firms have become rampant in the absence of a strong jurisdictional jurisprudence. The Internet is a global collection of computer networks and requires global solutions and regulation in a new millennium for a world committed to the digital technology and welfare of the netizens through it. In the light of above discussion is submitted as follows:

The first Come first served basis for registration of Domain name was responsible for the spurt in the growth of cybersquatting or the process of registering a domain name which legally belongs to anothers. The existing TLDs or Top Level Domains have been a big target of cyber squatting. It is possible that with the introduction of the new TLDs, cyber squatting will increase. The Existing 'UDNDRP' is a very limited policy and allows only for limited grounds to get back domain names.

In the existing proposals for new top level domain, there are no mechanisms to prevent cybersquatting. It is yet to be seen how ICANN proposes to prevent the recurrence of cybersquatting practices in the TLDs. Therefore, it is clear that the situation is at present not very clear and it is yet to be seen how ICANN proposes to meet the challenges of cybersquatting in the times to come.

Possibilities for reform will now be outlined in relation to liability of intermediaries generally; the unique problem of file-sharing; and how social
norms of pirates might be changed. It should be noted that technological measures against infringement will not be considered, especially in its relation to the notion of fair use.

Countries should come to an understanding on the liability that should be placed on Internet Intermediaries, particularly ISPs. A degree of copyright enforcement can be achieved by holding ISPs liable for the actions of their users. ISPs are better targets for lawsuits, as they will typically have deeper pockets than individual users. A pragmatic approach would be to only hold intermediaries responsible for infringing content where they were made aware of the content, were able to control the content, and failed to act promptly. Evidence of this approach can already be found in the American DMCA and the European E-Commerce Directive. The issue of an appropriate definition for ISPs needs to be considered because a wide definition may not reflect the true services provided by the multitude of providers in existence.

In addition, when considering ISP responsibility, the level that they should monitor their users should be discussed. This monitoring function was left in flux after the ambiguous ruling in Napster.

If ISPs are given the responsibility to act as judge and jury over contents then the likelihood is that they will err on the side of caution and remove all material that might be infringing. This would lead to many fair uses of copyrighted material being denied. ISPs should not be made to actively monitor their users or content their users upload. Instead a more pragmatic approach should be adopted. The international community should follow the lead of Europe with the E-Commerce Directive where ISPs do not have a general obligation to monitor. They should only act when they have notice of clearly infringing content. Also, an element of good faith on the part of the ISP should be included so that they can contact copyright holders if they accidentally discover possibly infringing content.
It is particularly important to obtain wide support for an ISP-related agreement, as countries that did not sign up would become data havens for ISPs allowing infringing content. Wide support might be achieved by the agreement encouraging ISPs to take initiative and regulate themselves.

It is submitted that by including ISPs in deciding their level of responsibility and engaging them in the issue of copyright infringement, they will more receptive to their duties on the Internet and have a better understanding of the appropriate law.

Peer-to-Peer file sharing programs represent a unique problem to regulators. Currently, dozens of such programs exist where anonymous users swap millions of files per day, often infringing copyright. However, it would be unwise to have a blanket prohibition against them as some file-sharing programs have substantial non-infringing uses, as shown in the Kazaa judgement. A blanket prohibition would also be unenforceable. Evidence for this can be found by considering the situation after a preliminary injunction had been taken against Kazaa and the program had been removed from the official website. Even though official distribution had ceased the network continued to function unaffected. This was due to the completely decentralised nature of pure peer-to-peer file sharing: a central server is not required for operation of the network. Any computer on the network is capable of acting as a super node and this process is automatic. The decentralised nature also makes it extremely difficult for any P2P creator to effectively monitor or control the content or actions of its users.

In America lawsuits against P2P operators have only resulted in many more appearing. For example, when Napster was sued replacements appeared that were potentially even more of a threat to copyright than the original had been. However, the situation is not without hope. Two possible regulatory options are proposed.

The first option is the idea of levies. These are already common on the continent. The theory is that if infringement cannot be controlled, government
can take money from the infringers before they infringe by taxing blank digital media, particularly CDs and hard drives. The Canadian Private Copying Collective has recently submitted such a proposal to the Copyright Board of Canada of placing a tariff of $21/gigabyte on the purchase of hard drives. If levies were used they would have to be equal throughout the contracting states to avoid market inequality. One drawback with levies is that they could impede the development and uptake of new technology by making them financially prohibitive. Other issues include creating a body to act as a collecting agency, how it should apportion revenue and, most importantly, to whom. Money could be distributed dependant on popularity of music artist for example.

A second option proposed is that of compulsory licensing. 'What is needed most are practical solutions to make copyright on the Internet effective without making it threatening or needlessly interfering; such as campus licences which allow certain user groups to access entire databases instead of making users pay per document they actually consult'.

The idea of compulsory licenses could be used to make users pay subscription fees to access music libraries in the same way that online databases (such as WestLaw) are currently accessed, on a flat fee system. The Music Industry is already trying to introduce similar subscription systems, based on proprietary music file formats that significantly restrict user access. Instead what is suggested is that P2P operators have a compulsory licence whereby users pay a small monthly fee for access to the service, with the revenue going to the artists whose work is being exploited. 'govt. should pass low fixed compulsory license fees for distribution of [music and entertainment] content on the Web. These fees should not be tied to reporting every usage on the Web. They should be determined the same way they are now for radio; according to a sampling that gives some idea of what music is being played'. In fact, Napster asked the U.S. government to allow for compulsory licensing before being taken to court, but was refused.
To introduce compulsory licensing would require a major reform of international copyright law, as the Berne Convention in its current state seems to exclude such an option. Such reform would have to begin by determining whether file-sharing amounted to distribution or broadcasting. It is hoped that a special exception could be added to the Berne convention to allow for compulsory licensing for digital media so that states could choose which cases warranted licensing. However, this proposal would also create further disparity and less harmony between national copyright regimes and therefore could only be a temporary measure until states could agree on a fundamental, unifying Internet treaty that would regulate the use of copyrighted materials online. It is hoped that this possibility will be considered, as it is more pragmatic than ISP monitoring and less intrusive on the technology market than levies.

**SUGGESTIONS**

On the basis of the survey in the existing material the researcher has suggested as follows to meet the new challenges:

> For the purpose of achieving regulatory flexibility, it is suggested that the following words should be added to section 20 of the CCB 2001 i.e. “The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under this section in relation to a communication service, class of services or a class of service providers, where the Commission finds as a question of fact that to refrain would be consistent with the provisions of section 19 and that there exists or will exist competition sufficient to protect the interests of users of that particular service.” Further It is believed that the repetition of a jurisdiction exclusion provision in the Bill similar to the above-mentioned section 14 (2) of the current TRAI Act will not be proper in an increasingly converging environment due to a possible inability to distinguish clearly the precise nature of a particular communications activity,
especially when it is being undertaken along with other similar activity like print media.

- A legal framework that seeks to promote and regulate convergence should move towards conceptually de-linking the infrastructure provider, telecom service provider(s) and the content provider, recognising that these may be distinct and separate entities, requiring different types of regulation, a legal framework that seeks to promote and regulate convergence should recognise that the person establishing the telecommunications infrastructure that enables provision of multiple services through the same network, would not have control over the content of each of the services. The network service provider and the telecommunications service provider/s could be different entities.

- In order to provide a mechanism for checking abuse of the provisions of CCB 2001, an additional “Citizen’s Programme Code Committee” should be formed which can hear appeals from the aggrieved persons and provide its views.

- If the decision of the committee is not acceptable, the aggrieved parties can resort to the legal remedy available through the Appellate tribunal. This will provide for a Citizen’s group to sit in judgment of subjective issues such as “Indian Culture”, “Allowable degree of Violence”, “Decency in portrayal of Women” etc for which legal remedies are not always the right answer.

- An applicant before the Tribunal can appear himself or authorize one or more Chartered Accountant, Company Secretary, Cost Accountant or a Legal Practitioner and proceeds to present his or its case before the tribunal. This restriction of representation to certain categories of professionals only is unnecessary and discriminatory. It is suggested that the appellant can authorize one or more persons of his choice to represent him without the need for such a person to be a Chartered Accountant etc. In such a case a Telecom Consultant can also represent the appellant.
Even though the objectives of the Bill provide that the Commission is duty bound to take care of consumer interest also, there is no evidence of how this can be achieved. It must also be accepted that "Consumer Interest", "Business Interest" and "National Interest" will be conflicting in many areas and the Commission will be subjected to pressures from different sides. The national interest will be taken care by the Government and the Business interests will be taken care by the "Public Relation Managers". The Consumer will have to however organize himself through voluntary organizations. The Bill can at least take note of the need for such organizations and if possible provide some support.

Provisions of Section 66 and Section 70 overlap with corresponding provisions in Information technology Act 2000 and provide for different penalties/punishments. This will create unnecessary confusion. Our submission is that there must be similar penalties/punishments in both the provisions.

Whoever attempts to commit or abets commission of an offence will be deemed to have committed the offence”. This is a dangerous provision and can be misused by the Police to harass innocent individuals. This totally removes the concept of “Need for a Guilty Mind” for any offence and will bring all erroneous and unintentional violations under punishable offences. One simple example could be a “Wrong tuning of a Radio equipment to a frequency other than the intended frequency”. It is submitted that the Sec.71 of CCB should be deleted. Alternatively, it may be replaced if necessary by a provision which may state “Whoever willfully attempts to commit or abets the Commission of any offence, under the provision shall be punishable with such punishment as may be deemed reasonable under the circumstances of the case and any such punishment shall not exceed half of the maximum punishment that could have been levied if the offence had been committed willfully".
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- A license would be required for any "Wireless equipment". In order to avoid confusion, the consumer equipments such as Mobile phones, Cordless telephones, Radio sets, and Television sets, and infrared remote operating devices etc should be specifically exempted so there is emergent need to suppress the license Raj in this area.

- The discovery reveals that the proposed Communication convergence bill 2001 is not sufficient to meet the new challenges in the convergence environment. Our submission is that, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.

- The software copyright holders should adopt a corporate license system for using particular software in the place of 'one software-one PC' system. They may consider bringing out low-priced editions of their softwares for developing countries like India, in their own interest.

- While it is likely that browsing and allied acts would be covered under fair dealing or implied license, it is recommended that the government should explicitly exclude browsing and allied activities from the purview of infringement and include printing and downloading, albeit only for personal use under section 52 of the Copyright Act.

- For instance, the person establishing a cable television network would, ordinarily, have no control over the content being distributed over the network, since that would be the domain of the broadcaster. Such distinctions require to be taken into account, especially with regard to control and regulation of content.

- Another aspect to be noted is that the law should not seek to over-regulate. The draft CCB 2001 envisage licensing for all kinds of network facilities, including fixed links and cables, towers, poles, ducts, and pits. Such a broad
provision could lead to a situation of unreasonable control, and would therefore require reconsideration.

- There is an urgent need to strike a balance whereby online copyright infringement is prevented without interfering the legitimate uses of software and computer programmes or limiting the opportunities offered by digital technology and the Internet. Combating software piracy in order to foster the growth of electronic commerce requires a multi-faceted strategy.

- Therefore, the imperative need of the hour is that the legislature catches up with the technical developments and passes a separate law prohibiting cyber-squatting or any other malafide registration of a domain name.

- It is suggested that Indian government should amend the present copyright act and IT Act 2000 on the line of U.S. No Electronic Theft (NET) Act 1997 and the DMC Act 1998.

- The software piracy and music piracy is a threat to the Indian economy our present copyright law is not sufficient to tackle the piracy. It is suggested that the govt., should draft a separate law to tackle the piracy related crimes.

- However, a clear statement of responsibilities and duties is crucial, not just for traditional ISPs, but also for employers, educational institutions, and cyber cafe owners among others.

- The ISP providing content service capable of controlling, supervising, adding and deleting and compiling the transferring contents should bear liability as a joint tort-feasor for a user's transfer of contents infringing other's copyrights, when it fails to take any measures to halt the transfer of infringing contents after being informed thereof by the copyright owner.

- The ISP shall be exempted from liability if the Internet user asserts a claim against the ISP for breach of contract on the grounds of the ISP removing the content per request by the copyright owner; any loss accruing to the user
caused by the ISP's removal shall be apportioned as between the user and the copyright owner applying for removal.

- Globally, ISPs should only be liable for the actions of their users where they have been made aware of the infringing material and were able to control the material but failed to take action. This would follow the U.S. and European initiatives. Further, ISPs should not have a general duty to monitor conduct because this would likely be detrimental to normal users. Support for intermediary regulation may be gained by aiding ISPs in establishing their own Codes of Practice, as occurs in parts of Europe. On the issue of file-sharing operators, it has been shown that lawsuits have proven ineffective at deterring infringement. Therefore, either a well-considered system of levies or compulsory licensing is proposed. It is hoped that in this way a compromise between Copyright Industries and Internet users might be reached. If an international levy system were to be supported, there would need to be an exemption for developing countries, especially for the purchase of hard drives, which are essential to the operation of modern computers.

- A dedicated institute under the ministry of information technology may be established as a nodal agency to deal with matters of Convergence of Information and communication technologies, its impact on IPR and e-commerce particularly relating to copyright and trademarks. The institution say the Indian Institute of Convergence Technology (IICT) should offer regular courses on Convergence and organise relevant training programmes for all concerned with the IPR like the producers, and sellers of Intellectual property products, E-commerce industries, industry associations, the police and the public at large. Besides, the institution should work in close liaison with the government and Intellectual property, e-commerce industry associations and provide guidance in policy matters.

- Intellectual property industry associations/convergence societies should launch an extensive campaign through print and electronic media highlighting the adversities associated with the convergence. Lectures, seminars, workshops
etc. could be organised in schools, colleges, universities and other places to create a consciousness among people against the evils of piracy. The message should be conveyed in clear terms that in the long run piracy is against the interest of all in the society excepting the pirates.

➢ A fund could be set up to research more successful technological protection schemes.

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