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COPYRIGHT INFRINGEMENT IN ECOMMERCE AND LICENSING ISSUES

AUTHORED BY - AKANKSHA YADAV

Licensing is an important part of regulation of the copyright and striking a balance between the rights of copyright holders as well as ensuring that the wider public is able to utilize an invention or new technology. It is also very vital for protection of a copyright. That is why it becomes important to study the licensing concerns that are present in protection of copyrights in digital space. There is also a need to study how the infringement of such licenses is dealt with by the judiciary. Moreover, there are different types of licenses and different protection is given to each. With an increase in the number of ecommerce platforms and the increase in the technology, there is a need to look into the liability of ecommerce websites in case there is a copyright infringement on their platform. This liability is treated differently by different jurisdictions and often protected by the safe harbour provisions. This paper will look at the international scenario of dealing with such infringements.

Keywords: Licenses, Copyright Infringement, Ecommerce, Intermediary Liability

Introduction

Ecommerce platforms are widely used today owing to the development of technology and thereby, there are quite some issues attached to their functioning. The rise of ecommerce has reshaped the retail landscape, offering unparalleled convenience and accessibility to consumers worldwide. Accelerated by technological advancements, shifting consumer preferences, and the proliferation of mobile devices, ecommerce has surged dramatically. It provides businesses with a global reach, allowing them to transcend geographical boundaries and tap into diverse markets. The convenience of online shopping, coupled with secure payment systems and personalized shopping experiences, has fueled its exponential growth. Moreover, the COVID-19 pandemic further accelerated the adoption of ecommerce as consumers turned to online shopping for safety and convenience, solidifying its position as a dominant force in retail.

Licensing serves as a crucial mechanism for regulating the authorized use and distribution of

intellectual property, software, and other proprietary assets. It provides legal frameworks that define the terms and conditions under which such assets can be accessed, used, or redistributed. Licensing ensures creators and owners maintain control over their work while enabling broader dissemination and commercial exploitation. Additionally, it facilitates fair compensation for creators, fosters innovation through collaboration, and mitigates risks associated with unauthorized use or infringement. Ultimately, licensing underpins the integrity of intellectual property rights and promotes a sustainable ecosystem for creativity, innovation, and commerce. With an increase in the activity in the ecommerce sector, there are a wide number of issues present in the field of copyright and software licensing. This paper will explore the different types of licenses in software, the concerns related to the same and the different cases that have been propounded on these issues to understand the current position of law.

A. Case laws relating to violation of copyrights in ecommerce

There are various international judicial pronouncements which have answered the numerous issues that come up whenever there is an infringement of copyright on an ecommerce platform. In A&M Records, Inc. v. Napster, Inc.¹, the users could share music files through the peer-to-peer file sharing service Napster. A&M Records was one of the music labels who sued Napster for copyright violations. The court determined that Napster was responsible for contributing to the infringement of copyright since it knew about its users' unauthorised sharing of music and actively encouraged it.

While in Perfect 10, Inc. v. Amazon.com, Inc.², asserting that the online retailer let third-party merchants to distribute Perfect 10's copyrighted photographs without authorization, Perfect 10 filed a lawsuit against Amazon for copyright infringement. The court determined that although Amazon was not directly at fault for copyright infringement, it might still be held accountable if it knew about the illegal activities or should have known about it³.

In 2010, in Tiffany (NJ) Inc. v. eBay Inc.⁴, Tiffany filed a trademark infringement lawsuit against eBay in this case, claiming that the online retailer made it easier for fake Tiffany products to be sold. The court determined that eBay was not responsible for trademark infringement, but it was ordered to take action to stop the selling of fake items on its

¹ 239 F.3d 1004 (9th. Cir., 2001)

² 508 F.3d 1146 (9th Cir., 2007)

³ T. Prashant Reddy, *Back to the Drawing Board: What Should Be the New Direction of the Intermediary Liability Law*, 1 NLUD J. LEGAL Stud. 38 (2019).

⁴ 600 F.3d 93 (2nd Cir. 2010)

marketplace.

The 2013 decision in Capitol Records, LLC v. ReDigi Inc.⁵ was that ReDigi was a website where people could sell their used digital music files. ReDigi was sued by Capitol Records for copyright infringement on the grounds that the company had sold digital music files in violation of the law. The first sale doctrine was held by the court to not apply to ReDigi's service since digital files cannot be transferred without creating unauthorised duplicates. In addition, the Indian government has developed a draft National E-commerce Policy to govern the country's e-commerce platforms. The measures outlined include the option for IP owners to register with the e-commerce platform in order to receive notifications from the platform when a product with their IPR is uploaded for sale, and the platform will not list the goods without their prior consent. If the seller is unable to provide proof that the product is authentic, the platform will also remove counterfeit products in response to a complaint from a customer.

Therefore, copyright infringement on ecommerce platforms has been regulated to ensure that the rights of copyright holders are protected.

B. Licensing

1. Introduction to licensing

There is a need for strict copyright protection in today's era when the technology has advanced and there is a wide amount of activity in the digital space. Because of the growing digitization, the owners of the copyrights seek copyright protection to stop any unauthorized distribution or copying of their works that are displayed online. Although licensing imposes restrictions on use, it enables an author to sell non-exclusive rights to use their work to anyone without first obtaining their express consent.

The Berne Convention's Articles 11bis and 13 provide for Compulsory Licensing. Additionally, there are particular guidelines for developing nations that cover licenses under Articles 2 and 3.

2. US Provisions on Licenses

The provisions for licensing are provided under the Copyright Act of 1976 under S. 111 for Cable Systems, S. 112 to 115 for Music and S. 119 to 122 for Satellites. The

⁵ 934 F. Supp. 2d 640 (S.D.N.Y. 2013)

S. 1003 provides for audio licensing.

3. Indian Provisions on Licenses

The copyright owner of a work has the right to assign his copyright to any other person, according to Section 18 of The Copyright Act, 1957, which governs copyright assignments. By this method, assignee gains access to all rights pertaining to the assigned work's copyright.

Section 30 states that the owner of a work's copyright can grant interest of a work to any person by way of a written license that must be signed by both the owner and any legally authorized representative.

Compulsory License: India has adopted the mandatory license clause in its legislation which allows for the mandatory issuance of licenses for Indian work that serves the public good.

Statutory Licensing for Broadcasting of Literary and Musical Work is provided under Section 31-D while license to Produce and Publish Translation of Literary or Dramatic Work is under (Section 32)

4. Types of licenses

- Exclusive licence: In accordance with the terms of the exclusive licence, only the licensee and the copyright owner may use the protected work.
- Limited use licence: When a copyright holder grants a restricted use licence, a work may only be used in the way that is stated in the license.
- Creative Commons licence: By granting a Creative Commons licence, some authors permit people to access and utilise their works for free.
- Collecting societies: Since it can be tough and expensive for some copyright owners to licence individual users, there are collecting societies and licencing bodies which are groups of such individuals.
- All Rights Reserved: The owner of the copyright has total control over how their work is used under this licence.
- Open Source: This software licence permits anyone to inspect the source code and make changes as long as they follow specific terms and conditions.
- Copyleft: They allow for the distribution, modification and use of a work by others as long as their changes adhere to specific terms.

4.1. **The Creative Commons License Options:** Creative Commons licenses revolutionize how creators share their work, offering a spectrum of permissions while retaining essential rights. These licenses provide a clear framework for users to understand what they can and can't do with the content. By leveraging these licenses, creators can encourage collaboration, reuse, and adaptation within the boundaries they set. This fosters a culture of sharing and creativity while ensuring proper attribution and respect for intellectual property rights. The different types of these licenses are:

- **CC BY-SA:** As long as credit is given to the original author, this licence permits users to build upon the content. Commercial use is allowed under the licence.
- **CC BY:** This licence permits users to build upon the work as long as credit is provided to the original author.
- **CC BY-ND:** This licence permits users to reproduce and distribute as long as the original author is acknowledged for commercial use as well.
- **CC BY-NC-SA:** This licence permits users to build upon the material for non-commercial uses only, as long as credit is given to the original author.
- **CC BY-NC-ND:** This licence permits re users to reproduce the content solely for non-commercial purposes along with credits.
- **CC BY-NC:** This licence permits users to build upon the material for non-commercial uses only, as long as credit is given to the original author.

The CC Zero is a method which enables creators to renounce their copyright protection and place their works in the public.

5. Concerns related to licensing

There are certain concerns with licensing as well due to the dynamic nature of licenses and they are:

- **Uncertainty around fair use:** A limited amount of copyrighted works may be used without permission for purposes like criticism, commentary, news reporting, teaching, scholarship, or research under the fair use doctrine⁶. However, the definition of fair use in the context of e-commerce can be ambiguous, and its application can be arbitrary.

⁶ Tabrez Ahmad & Partha Misra, *E-Commerce & Its Copyright Issues*, SSRN ELECTRONIC JOURNAL (2011)

- Unauthorized use of copyrighted works: E-commerce platforms could unintentionally or knowingly permit users to distribute or sell copyrighted materials without the necessary authorizations or licences which can lead to legal disputes and claims.
- Complexity of copyright licensing: Copyright licencing agreements can be complicated and challenging to comprehend, especially for smaller companies and individuals and this can lead to accidentally violating copyright of others.
- Ambiguity: Some copyright licensing agreements are drafted in a way that allows for multiple interpretations by various parties. Conflicts over the license's parameters, each party's rights and responsibilities, and other difficulties may result from this.
- Difficulties in enforcing copyright law: It can be challenging to enforce copyright laws across multiple jurisdictions given the international nature of e-commerce. This can make it difficult for copyright holders to safeguard their creations and stop unauthorised use.
- Costs: It may be expensive to access and utilize copyrighted content for individuals or small enterprises due to licensing fees and other charges.

6. Case laws on Software Copyright Licensing

These concerns were raised in some cases and the courts have addressed them in different manners. In this case of Atari Games Corp. v. Nintendo of America Inc.⁷, Atari filed a lawsuit against Nintendo in this case alleging copyright infringement in connection with the lockout chip technology that was used by Nintendo to restrict the playing of unauthorised games on the Nintendo Entertainment technology. The lockout chip mechanism did not violate Atari's copyrights, the court found in favour of Nintendo.

In Autodesk, Inc. v. Vernor⁸, the legality of selling pre-owned Autodesk software on eBay was under question. The court determined that since consumers only had a limited licence to use the programme, Autodesk's software licences were not sales, and Vernor's resale of the software violated this.

While in Microsoft Corporation v. Yogesh Papat & Anr⁹, Microsoft accused the

⁷ 975 F.2d 832 (Fed. Cir. 1992)

⁸ 621 F.3d 1102 (9th Cir. 2010)

⁹ 2005 SCC OnLine Del 216

defendants in this case of selling its software products without authorization. The plaintiff was given damages after the court found that the defendants had violated Microsoft's copyright by offering for sale illegal copies of the company's software.

Also, in Ultra Home Construction Pvt. Ltd. v. Purushottam Kumar Chaubey & Anr¹⁰, the plaintiff had paid the defendant for software to be used by its business. By supplying a pirated copy of the software, the defendant violated the licence agreement, according to the court, which granted the plaintiff damages.

In the latest case in 2021, Oracle America, Inc. v. Google, Inc.¹¹, regarding the use of Java APIs in the Android operating system, Oracle filed a lawsuit against Google for copyright infringement. The Supreme Court disregarded the issue of the Java APIs' copyrightability and found that Google's usage of them satisfied the four criteria for fair use. The decision overturned the Federal Circuit's decision and remanded the matter for additional consideration.

Conclusion

In conclusion, effective regulation of copyright infringement on ecommerce platforms is essential for fostering a fair and sustainable digital economy. By enforcing copyright laws, platforms can protect the rights of creators and incentivize innovation while maintaining a level playing field for businesses. Proactive measures such as implementing robust content moderation systems, responding promptly to takedown notices, and promoting awareness of intellectual property rights are crucial. Collaboration between platforms, rights holders, and regulatory authorities is vital to address emerging challenges and ensure compliance with evolving legal frameworks. Ultimately, a balanced approach that respects both rights holders and users is key to fostering trust and growth in ecommerce.

There have been numerous changes to the licensing practices as a result of increase in technology and it has also led to new types of licenses being introduced. This new environment also allows the users as well as copyright holders to enforce their rights in a freer manner. While licensing is well-suited to the analogue environment, the digital setting has changed how copyright content is distributed and consumed by the users. Therefore, it becomes even more important that licensing practices are granted adequate legal protection for protection of copyrights in the digital

¹⁰ 2016 SCC OnLine Del 376

¹¹ 593 U.S. (2021)

space. Moreover, the platforms should also be made liable in case of infringement on their platform.

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