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AN ANALYTICAL STUDY TRENDS IN CYBERCRIMES IN INDIA AND JUDICIAL RESPONSE

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Abstract:

The internet is the essence of life in the 21st century. With the development in technology, the internet has become more intertwined with our lives than we can think of. Cyber Security plays an important role in the field of information technology. Securing the information has become one of the biggest challenges in the present day. Nowadays when people think about cyber security, the next thing that comes to their mind is cybercrimes, which has increased massively day to day. Cybercrime is a serious threat nowadays. Cyber Attacks are more pervasive and threats to critical infrastructure and lack of security and underreporting makes Industrial systems and products more vulnerable. Internationally, the most affecting problems are mass-ransomware attacks and valuable data theft much like the last few years. There is a need to have one regulatory body to administer these convergent technologies it can be done through appropriate ICT policy and regulatory mechanisms, unified licensing as parts of a broader strategy to promote growth and better position in India and global information environments.

Keywords: Cybercrime, Cybersecurity, Internet Governance, Cyber Regulation, Technology Convergence, Cyber Crimes, Digital World, Technology, Criminal Activities

Introduction:

With the advent of computer networks and the internet, online culture has become an integral part of modern existence because most of our activities such as commerce, industry, banking, money exchange, communication information, government and non-governmental affairs, academia, etc. run through the internet. The situation today is that a person can get what he wants to know or see on the internet but despite this brilliant aspect of computer technology, there are some downsides that are a major cause of concern not only just for the legislature but for the judiciary too. Internet culture has created a lot of online controversy, differences, controversy, etc. due to the misuse of the computer network for online activities. Although such disputes are not new to human society, they appear to have existed since the beginning of human civilization but the cause of concern is that the disputes over online transactions are completely different in their nature, scope and treatment and therefore the resolution of these cyber disputes is a serious challenge for the judiciary.

On Electronic Evidence:

The case of **P.R. Transport Agency v. Union of India and others**¹ involved the question of jurisdiction of court where the contract between the parties residing in different places has been made on e-mail. In this case, Bharat Cooking Coal Ltd (BCCL) held an e-auction for coal in different lots in which plaintiff's bid for 40,000 metric tons of coal from Duburi colliery was accepted. The BCCL communicated the acceptance of bid by e-mail on July 19, 2005. In response, the plaintiff deposited the amount of 81.12 lakhs through a cheque in favour of BCCL which accepted the cheque and en-cashed it but did not deliver the coal to the plaintiff. Instead, the defendant informed the plaintiff through e-mail communication that the said e-auction stands cancelled due to some technical and unavoidable reasons. The plaintiff found that the e-auction of sale of coal was cancelled by BCCL as there was some other person whose bid for the same was higher, which had not been considered earlier due to some flaw in the computer or its program or feeding of data. The plaintiff challenged the validity of cancellation of its contract by the defendant in the Allahabad High Court. The defendant objected the territorial jurisdiction of the Court on the ground that the High Court of Allahabad had no jurisdiction in the case as the cause of action, had not arisen in the state of Uttar Pradesh. The plaintiffs, on their part, argued that the case fell within the jurisdiction of the Court because the communication of acceptance of the tender was received by them through e-mail in Chandauli in U.P. Having heard both the parties, the High

¹ AIR 2006 All 23

Court held that in case of e-mail acceptance, the data transmitted from anywhere by the account-holder goes to the memory of server, which may be located anywhere and can be retrieved by the addressee account-holder from anywhere in the world. Therefore, there is no fixed point either for transmission or for receipt of e-mail. As per Section 13(3) of the Information Technology Act, 2000, “an electronic document is deemed to be received at the place where the addressee has his place of business”. The acceptance of the tender will be deemed to be received by the plaintiff at the place where it has place of business i.e. Varanasi and Chandauli, both in the state of Uttar Pradesh, hence the Allahabad High Court had the jurisdiction to decide the case. On the basis of decision in this case, it may be concluded that the judicial trend with regard to exercise of jurisdiction by courts in cybercrimes must conform to the norms of fair play and justice, which invariably depend on following considerations: -

- a) the extent of purposeful intrusion or illegal activities affecting State's affairs;
- b) the extent of conflict with sovereignty of the State;
- c) the forum of State's interest in adjudication of the dispute;
- d) State's responsibility for protecting the interests of parties providing them relief;
- e) Existence of an alternative forum.

In order to support State's jurisdiction in cyberspace, the law requires that it not only provides accessibility to website but also in some way interacts with the victim.

The Indian judiciary is playing the important role of dealing with such type of crimes by exercising their technological temperament which is showing in the case of *Grid Corporation of Orissa Ltd. v. AES Corporation*², the Apex Court held that “when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties.”³

With the advancement of new technology the Apex Court also allowed the facility of video conferencing as held in the case *State of Maharashtra v. Dr. Praful B. Desai*⁴ by saying that it is an advancement in science and technology which permits one to hear, to see and to talk with someone who is far away as like that someone is in front of you. Similar decision was also given

² (2002) 7 SCC 736

³ Grid Corporation of Orissa Ltd. v. AES Corporation, (2002) 7 SCC 736

⁴ AIR 2003 SC 2053

in *Amitabh Bagchi v. Ena Bagchi*⁵ case and in *Bodala Murali Krishan v. Smt. Bodala Prathima*⁶ case. The Supreme Court also approved the *principle of updating construction* with the purpose to move towards the fast changing technology based society and held in *Ponds India Ltd. v. Commissioner of Trade Tax, Lucknow*⁷, that although Wikipedia is not an authentic source but may be looked at for the purpose of gathering information. In *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*⁸, the court appreciated the electronic evidence while delivering the judgment. The court appreciated it whether in the form of CCTV footage, memory cards, mobile devices, data storage devices, intercepted communications over, IP Addresses, etc.

On Cyber Pornography: As regards the reported Indian cases on cyber pornography, they are far and few as most of them are disposed of in the lower Court at the magisterial level. However, the case of *State of Tamil Nadu v. Suhas Katti*⁹, observes a special mention in this context since it was disposed, of within a record period of seven months from the date of filing of the FIR. The credit for expeditious investigation of the case goes to the Chennai Cyber Crime Cell which produced 18 witnesses and 34 documents-in support of the prosecution case. In this case the accused Suhas Katti was sending obscene, defamatory and annoying messages about the complainant, a divorcee woman on e-mails and in the Yahoo Message group. He had opened a false e-mail account in the name of the victim. The e-mails carried a message that the victim lady was soliciting and therefore, she was receiving annoying phone calls from callers to have sex. She filed FIR against the unknown accused in the Cyber Crime Cell, Chennai. The police investigation revealed that the accused was a known family friend of the victim who was residing in Mumbai and was interested in marrying her. She, however, married another person whom she divorced after sometime, so the accused again started contacting her for marriage with him, to which she declined. Thereupon, he started harassing her by sending obscene and defamatory e-mails.

The accused was charged under Section 67 of the I.T. Act, 2000 read with Sections 469 and 509 of the Indian Penal Code. He pleaded that the offensive e-mails might have been sent to the complainant either by her ex-husband whom she had divorced or she might have herself managed to do so in order to implicate the accused because he had turned down her request to marry her. It was also argued on behalf of the accused that documentary evidence against him was not sustainable under Section 65(b) of the Indian Evidence Act. The Court, however, relied upon the

⁵ AIR 2005 Cal 11

⁶ AIR 2007 AP 43

⁷ (2008) 8 SCC 369

⁸ 2012 AIR SCW 4942

⁹ C No. 4680 of 2004

expert witnesses and other evidence before it including the witnesses of cyber cafe owner and convicted the accused for the offence under Sections 469/509, IPC and Section 67 of the I.T. Act. The accused was sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs. 4500/- for the offence under Section 469, and imprisonment for one year with a fine of Rs. 500/- for the offence under Section 509 of IPC, and a sentence to undergo simple imprisonment of 2 years and a fine of Rs. 4000/- for an offence under Section 67 of the Information Technology Act. All the sentences were to run concurrently.

In the case of *Avnish Bajaj v. State (NCT Delhi)*¹⁰, Baazee.com was an online auction website and Avnish Bajaj was its Chief Executive Officer. He was arrested in December, 2004 for distributing cyber pornographic material. The charges against him arose from the fact that someone had sold copies of pornographic CD through Baazee.com website. The CD was also being sold in the Delhi market. It was as a result of joint action of Delhi and Mumbai police that the accused was arrested. However, he was later released on bail by the Delhi High Court as there was no prima facie evidence that Mr. Bajaj directly or indirectly published the said pornography and the actual obscene recording of chip could not be viewed on Baazee.com. The investigation in this case" revealed that Bajaj was of an Indian .origin and had family ties in India. His company's web-site i.e. Baazee.com was a customer web-site which was dealing with online sale of property on commission basis. An obscene MMS clipping A DPS girl having fun' was listed for sale on Baazee.com on November 27, 2004 and some copies of this clipping were sold by the company.

The question for decision before the Court in this case was to draw a distinction between internet service provider and content provider. The Court ruled that the burden rests on the accused to prove that he was only the service provider and not the content provider. The Court held that the accused deserved to be released on bail as the evidence showed that the obscene material may have been unwittingly offered for sale on his company's web-site and there was probability of the alleged crime having been actually committed by some other person. The accused was, however, ordered to furnish two sureties of one lakh rupees each and surrender his passport and not to leave India without the permission of the Court. He was finally enlarged on bail subject to the condition that he shall participate and assist in the investigation.

¹⁰ (2005) 3 Comp. Lj 364

In *Air Force Bal Bharti School*¹¹, popularly known as Delhi case, a student of this school was teased by all his classmates for having a pockmarked face. Fed up with the cruel jokes, he decided to get back at his tormentors. He set up a web-side with pornographic material and scanned photographs of his classmates and teachers and morphed them with nude photographs and put them on the websites that he uploaded on to a free web hosting service. The father of one of the class girls who happened to see the website objected to this and lodged a complaint with the Delhi Police. The School issued a show cause notice asking the boy as to why he should not be rusticated from the school for his pornographic offence. The case was taken up by the Juvenile Welfare Board which heard both the parties i.e. the counsel for the school and the counsel representing the girl's, father and tried to compromise the matter but the father of the accused boy did not agree to withdraw the boy from the school until the school gave a written guarantee that his son will get admission in some other school, which the school and the Directorate of Education were unable to give. The father of the girl (complainant) insisted that the matter would not be compromised so long as the accused boy is continuing in the same school as the parent of 12 children whose names and photographs were scanned in the web-site, did not want their children to study with the boy (accused) who could indulge in such a heinous crime. The defense allegation that even before the boy had set up the website other students had been sending objectionable e-mails about the teachers of the school through the school's internet connection, was not acceptable as the school produced sufficient evidence that it had no internet connection before April 4, 2001 i.e. the day accused was indicted for the offence of cyber pornography. However, the case was later dropped since it was compromised between the parties i.e. the School and the complainant.

In another case, a *Swiss couple*¹² in Mumbai would gather slum children and then force them to appear for nude and obscene pornography. They would then upload these photographs to websites specially designed for pedophiles. The Mumbai Police arrested the couple for pornography and charged them for the offence of cyber pornography under Section 67 of the I.T. Act read with Sections 292 and 509, IPC. But they were later let off for want of sufficient evidence against them.

Regarding Intellectual Property: In the case of *Kirloskar Diesel Reconstruction (P) Ltd. V. Kirloskar Proprietary Ltd*¹³, the Bombay High Court, held that the definition of trademark includes within it the word 'mark', which means name and therefore, the term 'trademark' in Section 105(c) of the Trademarks Act must be considered to be a comprehensive term including

¹¹ Mumbai 2003

¹² Swiss couple cyber pornography case

¹³ AIR 1996 Born. 149

within it the 'trade name', or the 'business name' and the name by which the article or goods are sold. Obviously, there should be a reasonable nexus between the mark used in relation to the goods and the person claiming right to the use of that mark. In this case, the Court restrained the defendant from using the trade name 'Kirloskar' for their proprietary companies as there was likelihood of confusion or deception of the public resulting in damage to the plaintiff. In other words, a passing off action would lie in cases of trademark or trade name violation. The defendant was therefore, restrained from using the name 'kirloskar' in their online advertisements and internet communications.

Analyzing the principles underlying the law relating to passing off, Mr. Justice A.P. Shah of the Bombay High Court (as he then was) referred to Lord Diplock's observation in *Erven Warinick v. Townend*¹⁴ wherein it was held that the essential characteristics which must be present for a valid passing off action are:

- a) misrepresentation,
- b) made by a person in the course of trade or business,
- c) to the prospective customers of goods or services supplied by him,
- d) which is calculated to injure the goodwill of another trader as a foreseeable consequence;
and
- e) which causes actual damage to the business or goodwill of the trader by whom action is brought against the defendant

The High Court of Bombay came to the conclusion that when both the domain names are considered, it is clearly seen that they are almost similar in nature and there is every possibility of internet users being confused and deceived in believing both the domain name belong to same person although in fact the two belong to different persons. Rejecting the defendant's plea that the word RADIFF was derived from the four words, namely 'radical' information', 'future' and 'free', the Court held that this assertion appears to be completely false and an afterthought devised to answer the plaintiff's claim. The Court concluded in unequivocal terms that the prima facie object of the defendant in adopting RADIFF as a domain name was to trade upon the reputation and goodwill of the plaintiff's domain name and the argument that the field of activity of the two was different is without any substance because both activities are similar as also overlapping. The defendant was therefore, restrained from using the domain name RADIFF forthwith.

¹⁴ (1979) 2 All ER. 927

In the case of *TATA & Sons v. A.K. Chaudhary*¹⁵, the petitioners used TATA logo in its website for its products. They sued the defendant for openly selling his steel and cutlery and similar items using deceptively similar trademark on the website, and prayed the Court for an injunction directing the respondent to refrain from selling their products using brand name similar to that of the petitioners. Allowing the petition, the High Court of Delhi ruled that petitioner's trademark had acquired unique goodwill and reputation and it had become a distinctive trademark within the meaning of Section 9 of the Trademarks Act due to its long continuity. Therefore, the Court prohibited the defendant from using the trademark under Section 29 (4) of the Act although it was not being used by the respondent for commercial purposes.

In yet another case, namely *Mr. Diljeet Titus, Advocate vs Mr. Alfred A. Adebare And others*¹⁶ decided by the Delhi High Court, the plaintiffs were running a law firm which consisted of advocates specialized in different legal fields. The defendants were working with the plaintiff's firm and were paid remuneration while they retained control over the professional organization. They claimed copyright ownership over the work which they had done while working in the plaintiff's legal firm. The plaintiff's, on the other hand, contended that since the defendant's were a part and parcel of the plaintiff's firm, they could not claim exclusive right in respect of database of the list of clients and the expert opinions and advice rendered to them as they were under an obligation to maintain confidentiality. The plaintiff also claimed to have spent substantial amount of money, time, skill, computer network, law library, office infra-structure etc.

Consequent to this dispute which arose regarding the copyright ownership between the plaintiffs and the defendants, the plaintiffs filed a complaint before the Court that one of the defendants came to their office after the office hours and downloaded 7.2 GB of database of their crucial data, write-up through plaintiffs local area network and allegedly have stolen the hard copies compressed over ten proprietary drafts of the plaintiffs and therefore, they prayed for protection of their exclusive data under the Indian Copyright Act, 1957.

After hearing both the parties, the Court came a conclusion that plaintiff had prima facie copyright in the database which the defendants had taken away from the plaintiff's office. The Court noted that the defendants were free to carry on their legal profession, utilize the skill and information they had mentally acquired by experience gained from working with the plaintiff's legal firm but

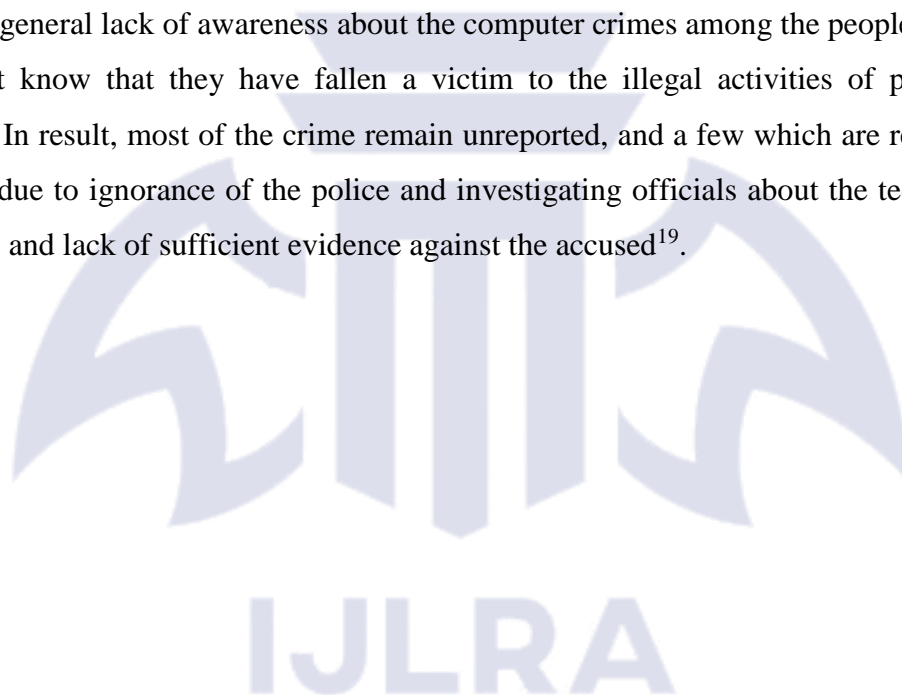
¹⁵ 2009 (40) PTC 54 (Del.)

¹⁶ 2006 (32) PTC 609 (Del)

restrained them from copying material of the plaintiff in which the plaintiffs alone had the exclusive copyright. The principle of law laid down in the case clearly envisages the need for a careful drafting of different clauses of the contracts before entering into any kind of relationship, particularly the clauses dealing with database and in case of a legal firm, whenever an employee of a solicitor firm drafts a document, the employer is the first owner of the copyright document¹⁷.

Conclusion:

The statistical data of cybercrime in India indicates that the incidents of these crime is constantly on an increase as compared to the rate of conviction which is significantly low¹⁸ the reason being that there is general lack of awareness about the computer crimes among the people who at times even do not know that they have fallen a victim to the illegal activities of perpetrators of cybercrime. In result, most of the crime remain unreported, and a few which are reported, result in acquittal due to ignorance of the police and investigating officials about the technicalities of these crimes and lack of sufficient evidence against the accused¹⁹.



¹⁷ Narayana on Copyright and Industrial Design (3rd ed.) paras 6 & 28

¹⁸ According to the National Crime Records Bureau (NCRB), the conviction rate for cybercrimes is only 10%.

¹⁹ Rohas Nagpal: Seven Years of Indian Cyber Law, paper presented in Clubhack in December, 2007.