

Legal Issues in 'Search Engines'

Issue: Whether Search Engines as Autonomous Databases can be held liable for IP Infringement?

Concepts & Definitions

❖ Search Engine –

- The Oxford Dictionary defines a search engine as *a computer program that searches the internet for information, especially by looking for documents containing a particular word or group of words.*

❖ Database -

- A database is protected as a literary work under the Copyright Act, 1957. However, the provision fails to give clarity on what a “database” is.
- The Oxford Dictionary defines a ‘database’ as *an organized set of data that is stored in a computer and can be looked at and used in various ways.*

❖ Autonomous Database –




- In simple terms, it is *a cloud database that uses machine learning to automate database tuning, security, backups, updates, and other routine management tasks.*

Concepts & Definitions (Contd.)

❖ Outlook in Foreign Jurisdictions -

- The European Council Directive provides the definition of a database as: “A *database is a collection of independent components, such as pieces of information, data, or works, arranged in a systematic or methodical way and which are individually accessible by electronic or other means.*”.

❖ Functional Aspect of a Database–

- The advancement in technology saw the launch of the first web search engine Aliweb – which follows the process of web-crawling, indexing, and searching the whole world wide web (WWW) to retrieve relevant results to the user’s query.
- Web Crawling  Indexing  Searching  Search Results. |

Relevant Provisions

❖ Section 13, The Copyright Act, 1957 –

- “Works in which copyright subsists— (1) Subject to the provisions of this section and the other provisions of this Act, **copyright shall subsist throughout India in the following classes of works, ...—** (a) **original literary, dramatic, musical and artistic works.**” [Emphasis supplied]

❖ Section 2(o), The Copyright Act, 1957 –

- “Literary Work” includes computer programmes, tables and compilations including **computer databases**”. [Emphasis supplied]

❖ Section 14, The Copyright Act, 1957 –

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- “Meaning of Copyright.— For the purposes of this Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:— (a) in the case of a **literary, dramatic or musical work, not being a computer programme,**— ... (iii) to **perform the work in public, or communicate it to the public; ...**”. [Emphasis supplied]

Relevant Provisions (Contd.)

❖ Section 51(a)(ii), The Copyright Act, 1957 –

- *“When copyright infringed.— Copyright in a work shall be deemed to be infringed— (a) when any person.....(ii) permits for profit **any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright;...**” [Emphasis supplied]*

❖ Explanation to Section 2(ff), The Copyright Act, 1957 –

- *““communication to the public” means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion ... whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.*
- *Explanation.— ...communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;”* [Emphasis supplied]

Legal Issues Arising from the Statute

❖ **Issues:**

- a. Whether a search engine can be considered a ‘database’ under the Copyright Act, 1957, by virtue of its nature and function?
 - b. Whether a search engine as an autonomous database can be held liable for IP Infringement?
- ❖ Search engines are intermediaries under the Information Technology Act, 2000, which statute provides for the liability and penal provisions for any contravention of the law by such intermediaries.
- ❖ There lacks substantive judicial precedence on the issue of whether a search engine as an autonomous database and the interpretation of consequent liability in cases of infringement.

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Relevant Judicial Decisions

❖ *Burlington Home Shopping Pvt Ltd v Rajnish Chibber*, [1995 IVAD Delhi 732]

- “*Compilation [of list of clients/customers] developed by a person by devoting time, money, labour and skill amounts to a literary work wherein the author has a copyright*” [Emphasis supplied]

❖ *Eastern Book Company and Ors. v. D.B. Modak and Anr.*, [AIR 2008 SC 809]

- “...to claim copyright in a derivative work, the author must produce the material with **exercise of his skill and judgment with a flavour of creativity** which may not be creativity in the sense that it is novel or non obvious, but at the same time it is not a product of merely labour and capital.”
- The Doctrine of ‘Sweat of the Brow’ specifies that for any work to satisfy the standards of originality, **a minimum amount of skill and labour must be employed**; whereas the Doctrine of ‘Modicum of Creativity’ embraced the **essence of minimum requirement of creativity**. [Emphasis supplied]

Relevant Judicial Decisions (Contd.)

- ❖ *Super Cassettes Industries Ltd. v. Yahoo Inc. & Anr.*, [CS (OS) No. 1124 of 2008 (Delhi HC)]
 - It was observed that the Plaintiff (T-Series) maintained a repertoire of cinematographic films and sound recordings to the tune of over 20,000 Hindi film and non-film songs and around 50,000 songs in regional languages to its credit.
 - Thereby, The Defendants were restrained from exploiting the work (viz. the cinematograph films, sound recordings and/or the underlying literary or musical works of the Plaintiff) in any manner on their website, 'www.video.yahoo.com', in which the Plaintiff claims copyright, without obtaining an appropriate license from the Plaintiff.
 - Similar observation was made by the Court in the suit instituted by the same Plaintiff in *Super Cassettes Industries Limited v. YouTube.com & Google*, [CS (OS) No. 2192 of 2007 Delhi HC].

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The United States Outlook

❖ *Perfect 10 v. Google Inc.*, [508 F.3d 1146 (9th Cir. 2007)]

- *“The principle legal issues for the search engines arise out of the increasingly recurring conflict between intellectual property rights on the one hand and the dazzling capacity of Internet Technology to assemble, organize, store, access and display intellectual property ‘content’ on one hand.”*
- *“HTML instructions do not themselves cause infringing images to appear on the user’s computer screen. The HTML merely gives the address [of the image] to the user’s browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear of the user’s computer screen....”*

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Conclusion

- ❖ (Open) Search engines would qualify for protection as a database, keeping in mind the larger public interest its functionality serves. It would be entitled to copyright protection by virtue of the back-end processing and their style in presenting results, not just effectively but also efficiently.
- ❖ The liability of IP infringement of a search engine under the Copyright Act, 1957 should rather be limited, and *read with* the applicable provision(s) under the IT Act, 2000.

- ❖ **Recommendations**

- To include a provision to the Copyright Act, 1957– to clearly define what constitutes a computer database within the purview of the Copyright Act, 1957.
- To amend Section 51(a)(ii) of the Copyright Act, 1957 – to bring clarity on the applicability of the provision to search engines and to link the same to the provisions under the IT Act, 2000 with respect to the liability that arises with respect to IP infringement.

THANK YOU!

Questions?

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