

THE IJLT FEED

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with perspectives from India*



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Digital Privacy

General Petraeus' Resignation and Government Snooping

The resignation of General David Petraeus, Director of the Central Intelligence Agency, after his extramarital affair with his biographer Paula Broadwell was revealed, unwittingly raises a series of issues related to digital privacy and data retention practices of technology companies. It was found that law enforcement agencies used sensitive information including geo-location and other metadata to identify the source of e-mails that came from Ms. Broadwell. As explained by Chris Soghoian (Senior Policy Analyst at the ACLU), Ms. Broadwell sent a series of mails from different e-mail accounts (in an effort to conceal her identity), but used the same computer during her stay at different hotels in the country, without concealing her IP address. As a Wall Street Journal article on the subject notes, officials were able to establish her identity by finding out where the messages were sent from—which cities, which Wi-Fi locations in hotels. That gave them names, which they then checked against guest lists from other cities and hotels, looking for common names, which eventually led them to Ms. Broadwell.

From an Indian perspective, such developments are crucial to formulating a comprehensive privacy legislation that balances the rights of user's and their ability to maintain anonymity when desired, with the security concerns of the government and law enforcement agencies. Research has indicated that Indian police officers are not averse to the use of IP addresses to establish the identity of suspects, have done so in the past and is fast become a dependable way for law enforcement agencies in India to track down cyber criminals (source: Prashant Iyengar, *IP Addresses and Expeditious Disclosure of Identity in India*, 2011). This is an outcome of a host of factors including ambiguous and contradictory rules and regulations, the judiciary's condonation of the use of such methods and the reluctance of intermediaries in India to demand a change in the law. All of these issues make the recently released Report of the "Group of Experts on Privacy" constituted by the Planning Commission of India extremely significant in evolving principles for emerging privacy rights issues, in the offline and online world, especially in light of the Draft Privacy Bill, 2011 currently being circulated.

Access to Knowledge

Executive Decree Saves Costa Rican Students Money while Delhi University Students Suffer

One of the key challenges for developing countries in the recent past has been ensuring access to knowledge in an increasingly maximalist copyright regime. This has been noticed most recently in developing countries where the educational safeguards in copyright law have been pitted against the demands of publishers. Enforcement practices differ from country to country - for example, in Costa Rica, after thousands of students protested outside the legislature to oppose a law that could make it illegal to photocopy extracts from textbooks, the President of Costa Rica decided to clear the air with a Presidential Decree clarifying the copyright exception extended to photocopying academic material, even if the photocopy shop makes a profit.

However in India, the Delhi High Court passed an order in November prohibiting Delhi University and its licensee, Rameshwari Photocopy Services, from making and distributing course packs to students despite wide educational exceptions in the Indian Copyright Act. While S.52(1)(a) allows fair dealing for research and private use, S.52(1)(i) permits reproduction in the course of instruction. These are only a few of the educational safeguards in Indian copyright law, which have been inserted to promote education and access to knowledge. However, a restrictive interpretation of these provisions (or complete ignorance of them as was noticed in the Delhi High Court order) is certain to have widespread repercussions for both academics and students alike, who are now struggling to access essential academic material, which they rely on for instruction and study.

A recent report republican study committee chaired by US Congressman Jim Jordan titled "Three Myths about Copyright Law and Where to Start to Fix it" focuses in great detail how the purpose of copyright law is *not* to compensate the creator of the content, but to promote the progress of science and useful arts. With publishers demanding payment for limited reproductions of academic works, despite statutory exceptions in the form of fair use provisions, it is perhaps this report which requires a careful reading to balance the interests of students and recognize the true purpose of copyright law.

Online Free Speech and Expression

Google Transparency Report, 2012 and the Problem of S.66A

The bi-annual Google Transparency Report has always been a good indicator of government censorship and surveillance efforts across the world. The Report for January-June, 2012 suggests that the Indian government has upped the ante, rising to the third position in requesting users' data since July 2009, when Google first started indexing such requests. To give credit where it is due, there is noticeable and corresponding *decrease* in the number of such requests actually granted by Google (from 79% in 2010 to 64% in the latest report).

The Indian government has been careful to dismiss the Report as 'sketchy and inconclusive' but an analysis of the nature of requests however paints a different picture with a majority of the requests being on grounds of 'defamation' (more than 40%) with more than 35% of these requests coming from executive and police orders. Particularly relevant was the recent arrest of an industrialist for a tweet suggesting that Union finance minister P Chidambaram's son Karti Chidambaram had "amassed more wealth than Robert Vadra". While most would consider this to be an exercise of free speech by an Indian citizen in his personal capacity, this was not the position adopted by public authorities.

More worrisome however is the recent incident where a 21-year old college student was arrested in late November for posting a Facebook message that questioned the logic of shutting down all of Mumbai for an entire day (a 'bandh' was declared) for the death of a person from natural causes. A friend who 'Liked' the comment was also arrested under Section 66A of the Information Technology Act, 2000. While the general populace has been up in arms about the unconstitutionality of the provisions and misuse of the provision to stifle free speech, the government has come out in support of it in Parliament and has refused to repeal the provision.

Internet Governance

ITU Possibly Set to Regulate the Internet as India Attempts to Combat Unilateralism

The World Conference on Internet Telecommunications scheduled to be held in Dubai from December 3-14 is the latest in the battle to regulate the internet with discussions revolving around whether the International Telecommunications Regulations treaty would be revised to cover the Internet. This would grant the International Telecommunications Union, which has traditionally been entrusted with the task of setting standards in the field of telecommunications, greater control over internet governance functions. As the ITU is a United Nations body, this would mean greater control over the internet by governments of member states, some of whom may have ambitions for a restricted internet such as those already existing in China and several Arab States.

From an Indian perspective, it is useful to examine where the government stands on global internet governance by examining its proposal in late 2011 for the establishment of a new institutional mechanism by way of the United Nations Committee on Internet Related Policy (UN-CIRP). There is no ambiguity as to the extent of its powers, with the proposal including such things as developing and establishing international public policies relating to global issues of Internet; coordinating and overseeing bodies responsible for the technical and operational functioning of the internet; facilitating negotiation of treaties, conventions and agreements on Internet related public policy and undertaking arbitrations and dispute resolution where necessary. The justification advanced by the Indian delegation for such a position was that UN CIRP was intended to negate attempts at unilateral policy formulation, where the United States appears to be dictating Internet-related policy almost unilaterally, given the concentration of power in the Internet infrastructure as well as the giant internet related corporations such as Google,

Amazon and Facebook within its territory. However, the real test of the future of internet governance will be the resolution at the WCIT in mid-December and it will be interesting to study the Indian delegation's position in Dubai.

Parallel Imports

First Sale Doctrine to be Tested in the U.S. as Parallel Imports Clause Rejected in India

In another important legal development relating to intellectual property, access to knowledge and academic publishing, the US Supreme Court has started hearing arguments in the case of *Kirtsaeng d/b/a Bluechristine99 v. John Wiley & Sons Inc.* This is set to be a landmark case on the ambit of the *first sale* doctrine – the ability to resell goods, which have been legally purchased, without the copyright owner's permission. The defendant in this case, a young Thai-born student entrepreneur, tired of the high textbook prices in the U.S., stumbled on an idea to benefit the student community by legally purchasing low-priced editions of the same textbooks in his home country and then selling it to his friends in the U.S. at a price much lower than prevailing market prices. Although the doctrine of first sale is a legally recognized exception to copyright law and one of its most important limitations, academic publishers are unhappy with this practice that effectively eliminates their ability to price discriminate from country to country. Whether this is a legal right that copyright law *does* and *should* allow is the question the Supreme Court will have to contend with.

In India, the issue of 'parallel imports' has received due attention, given the prohibitive cost of textbooks and unavailability of low-priced editions of several foreign publications. In fact, the draft Copyright (Amendment) Bill had a provision that authorized such imports, but this clause was later rejected after much lobbying from the publishing industry, despite the Parliamentary Standing Committee supporting the amendment on the grounds that it will increase student access to books. As for judicial pronouncements on the doctrine of first sale, two recent decisions of the Delhi High Court - *John Wiley & Sons v. Prabhat Chander Kumar Jain* and *John Wiley & Sons v. International Book Stores* – indicates a trend towards limiting the applicability of the doctrine by prohibiting Indian businesses from selling low priced Indian editions of books to customers in the U.S.A, despite S.14 of the Indian Copyright Act explicitly recognizing the first sale doctrine with respect to literary works. While the above two cases dealt with exports and not imports, thereby making the issue of exhaustion or parallel imports irrelevant to the discussion, an amendment authorizing parallel imports would go a long way towards furthering access to knowledge in India. However, there is still hope for change as Minister for Human Resources Development, Kapil Sibal, has promised to restore the amendment if the National Council of Applied Economic Research, to which the matter has been referred, should recommend its inclusion.

Intermediary Liability

Rosetta Stone Settles with Google while Bharat Matrimony Dispute Trudges Along

There have been several AdWords related disputes filed across jurisdictions, each challenging the legality of Google's practice of displaying search results containing competitors' websites when a certain search query is keyed in by a user. One of the most notable among these is the case of *Rosetta Stone*, the popular creator of language learning software. While Rosetta Stone claimed Google was misleading customers, especially when they specifically searched for Rosetta Stone products, Google argued that showing a variety of advertisements to searchers for particular brands was pro-competition and pro-consumer. Despite a long and protracted legal battle, it has now emerged that both parties have agreed to settle the matter, although the financial terms were undisclosed.

In a related suit, Bharat Matrimony, the popular matrimonial website operating in India has been arguing along similar lines, claiming that search results displaying links to Shaadi.com and other competitor websites constitute trademark infringement and capitalised on its reputation and goodwill. Google, on the other hand, relied on the defence that the words 'Bharat' and 'matrimony' were too generic and were undeserving of independent trademark protection. However, the Supreme Court took a different view and passed an order restraining the competitors from displaying their websites in AdWords and asked them to file their response to the special leave petition filed by Bharat Matrimony.

Copyright

New Exceptions to DMCA Anti-circumvention laws even as India

introduces anti-circumvention laws

Despite all the criticism levelled against the Digital Millennium Copyright Act, one of the unique and commendable features of the American Copyright law regime is the periodical review of the exemptions to circumvention of Technological Protection Measures (TPM's) by the Librarian of Congress. What this means is that every few years, a new set of actions that would ordinarily be termed as 'circumvention of technological protection measures' and therefore a violation of copyright law, would be exempt from liability. In 2012, certain new classes of exemptions were introduced. Firstly, circumvention of technologies that prevented the enabling of read-aloud and screen reader functionality, by disabled users was exempted from liability. This is an important exemption for the visually impaired particularly since the Librarian extended its application even to works that are available in other open formats. 'Jailbreaking' is another act that often receives attention under copyright law as it would allow you to install other unauthorised software such as an alternate operating system on your device. Interestingly however, the exemption was granted for 'telephone handsets', but not 'tablets' on the reasoning that there was no clear definition of a 'tablet'. Further, ripping of DVD's to use short portions for the purpose of criticism or comment where it is non-commercial, a documentary film, e-books for film analysis and for educational purposes in film studies or related courses, is also exempted. However, the Librarian also

made it clear that space-shifting, i.e. ripping to make it compatible on another device such as an iPad, is not exempted as it is not fair use.

From an Indian perspective, this is important as the Copyright (Amendment) Act, 2012 introduces an anti-circumvention law vide Section 65-A and thereby gives statutory recognition to the concept of Technological Protection Measures (TPM's) or Digital Rights Management (DRM's), which are essentially digital locks that control the manner in which copyrighted content can be used and shared by users. The main concerns from a user perspective relate primarily to the restrictions on fair use –for example, being able to circumvent such TPM's to make a local copy for private use on another device. S.65-A assuages this concern by stating that TPM's must only be for the “purpose of protecting’ rights conferred by the Act. Thus the provision makes it quite clear that TPMs can be protected by legal sanction only when they are meant to safeguard rights conferred by the Copyright Act and there is no violation if a TPM is circumvented by a user to exercise a fair dealing or fair use right. However, the residual issues arise from privacy and security concerns as well as the lack of a legal imperative on the government to introduce such a provision in the first place, when India is not a party to the WIPO Internet Treaties. Moreover, when there is no clarity on whether certain actions are permissible fair dealings in India (such as jail breaking of phones/tablets) and the absence of a periodical review of anti-circumvention exemptions like in the U.S., this provision is certain to introduce several impediments and transaction costs.

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