

Managing IPR in Publishing

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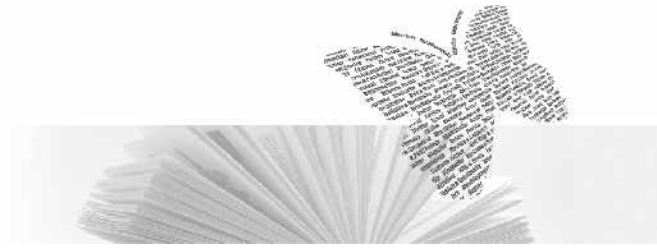
Olivia Goldsmith, a famous American author once said that “Publishing is no longer simply a matter of picking worthy manuscripts and putting them on offer. It is now as important to market books properly, to work with the bookstore chains to get terms, co-op advertising, and the like...”

Any establishment engaged in the creation and use of the work of human mind and intellect, must take all essential measures to protect and enforce their intellectual property portfolio. Proper management of IP asset is deleterious to the success and growth of the business. Book publishers not only hold the rights on behalf of the authors and creators of the original work, but are themselves the custodians and managers of valuable intellectual property rights. Publishers are entrusted with the responsibility of protecting and monetizing these rights to the mutual benefit of the authors and themselves.

Intellectual property (IP) is a term referring to a number of distinct types of creations of the mind for which a set of exclusive rights are recognized. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property rights include copyrights, trademarks, patents, industrial design rights and trade secrets in some jurisdictions.

The asset and value of any publishing firm, be it Penguin Books or Tata McGraw-Hill Publishing Company, is not determined from the number of books stacked in the company or the latest industrial printing presses, but the intangible asset that would generate revenue even when the shelves stacked with the books are emptied. Therefore the publishers must take all essential steps to secure, protect and enforce their IP rights.

The lack of awareness of the IP rights has really been the bane of the publishing industry. The problem arises because of the deep rooted prejudice that IP is very complex and hard to decipher. Nevertheless the publisher should realize that importance of IP since it forms the basis of the knowledge industry of which publishing is a part of. The IP in-fact is a very important link in the legal relationship that connects the readers, authors and the publishers. A well protected and enforced IP is not only responsible for the commercial success of any firm but also determines its future prospects and encourages the further publication of artistic and literary work.



The most important types of IP Rights relevant to a publisher include:

- 1) Copyright
- 2) Trademarks
- 3) Domain Names
- 4) Trade Secrets

Copyright is a legal protection extended to the owner of the work created by him. It subsists in the “original” work created by the author. It is however important to note that such originality pertains to the “form of expression” and not to the underlying idea. Copyright comprises two main sets of rights: economic rights and moral rights. Economic rights include the right of reproduction, broadcasting, public performance, adaptation, translation, public relation, public display, distribution and so on. The moral right includes the author's right to object to any distortion, mutilation or other modification of his work that might be prejudicial to his honor and reputation.

Copyright is the most significant intellectual property right relevant to the book publishing industry. Section 13 of the Copyright Act 1957 states the type of work that qualifies for the protection of a copyright in India. Copyright laws have been enacted to prohibit duplication or reproduction of the work in any form or format that is not justified under the umbrella of “fair dealing” or “fair use”, which allows reasonable use of excerpts or examples. The publisher can also have copyright on the published edition as the typographical arrangement of the publication, the layout and typeface etc. It is pertinent to point out here that the moral rights are never owned by the company but is given only to the original creators or authors. In-fact mutilating or encroaching on the moral rights of the original creators tarnishes the reputation of the publishing firm.

Moral rights above Copyright

In 1962 **Amarnath Sehgal** completed a 140 by 40 feet bronze mural that depicted rural and modern India, spanning the entire wall of the foyer of Vigyan Bhawan. Later in 1979 due to the mural being incompatible with the construction work being carried out at the building, it was torn down without taking permission from the artist. The artist felt cheated and believed that his moral rights were violated.





In 1992 the artist, Amarnath filed a suit for permanent injunction, declaration and damages in the Delhi High Court only to be relieved after a 13 year old long battle that ended in the year 2005.

The court awarded damages worth rupees 5 lakh in favour of the plaintiff and declared that Vigyan Bhawan had no rights and all the rights vested in the plaintiff only.

Books comprises bundle of copyright: in the literary content and in the artistic work of drawings and photographs. The publisher therefore must have the knack to identify these rights and enter into such contracts with the author or first owner of copyright that would enable him to acquire the rights enabling him to publish and reproduce the work, or license permitting him to exploit such rights.

Book publishers may have either opted for an “outright assignment” thereby acquiring copyright from creators (writers, artists, designers, photographers etc.) or may make a license agreement with the right owners. It shall identify the specific works and specify the rights assigned and the duration and territorial extent of such assignment or license. It shall also specify the amount of royalty payable, if any, to the author or his legal heirs during the term of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties. The author will have no rights to publish his work if the copyright for the same has been assigned to the publisher.

In India copyright in case of original literary, dramatic, musical and artistic work lasts for author's lifetime and 60 years from the year following the death of the author. The term of the copyright is an important factor that a publisher needs to know, because different term is applicable in different countries. Thus the publishers should have the knowledge about the local copyright legislation.

European Union extends term of protection in Copyright

EU introduced the directive this month to extend the term of protection for performers and sound recordings to 70 years. The term is 70 years for the authors after their death and therefore the term for performers is now revised to be in sync with that.

The extended term will enable performers to earn money for a longer period of time and in any event throughout their lifetime. According to the European Council "Performers generally start their careers young and the current term of protection of 50 years often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes. They are also often not able to rely on their rights to prevent or restrict objectionable uses of their performances that may occur during their lifetimes".

Therefore, the income from copyright remuneration is important for performers, as they often do not have other regular salaried income. The extended term will also benefit record producers who will

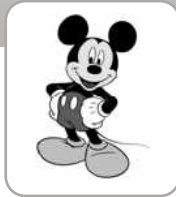


generate additional revenue from the sale of records in shops and on the internet. This should allow producers to adapt to the rapidly changing business environment and help them maintain their investment levels in new talent.

The new legislation, has become known as "Cliff's Law" in the U.K. named after Sir Cliff Richard, a long term campaigner for copyright extension.

Long live Mickey Mouse

Mickey Mouse remained immortal for another 20 years, after its 50 years of copyright expired in 2003 all due to the efforts of Walt Disney. The "Sonny Bono Copyright Term Extension Act", also called the "Mickey Mouse Protection Act" amended the 'Copyright Term Extension Act' under the US legislature to gain protection for an expanded number of years. Also saved by the new act were Pluto, Goofy, Donald Duck which were headed for the same fate in 2009. Under the US law previously copyright would last for the life of the author plus 50 years, or 75 years for a work of corporate authorship. The Act extended these terms to life of the author plus 70 years and for works of corporate authorship to 120 years after creation or 95 years after publication, whichever endpoint is earlier.

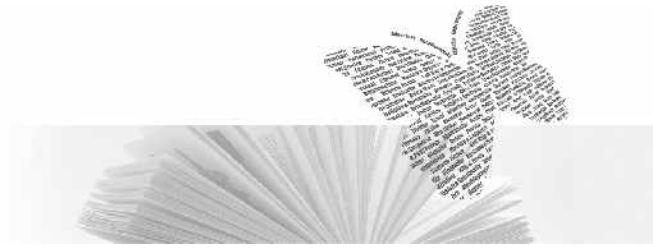


Copyright term Extension

The rights of publication of Rabindranath's work rests with Viswa Bharti which managed to amend the Indian Copyright act by introducing an extension of 10 years on the then existing copyright term of author's life plus 50 years in the year 1990. The copyright was to expire in the year 1991 but due to the consistent efforts of Shantiniketan committee and the Viswa Bharti publishing house the term extended till 2001. Again the publishers tried to seek an extension prior to the second expiration date but lost firstly due to the non- feasibility of frequent amendments, secondly since Viswa Bharti did not seem to be living up to its standards as was expected from it in terms of quality among other reasons.



It is the obligation of the publisher to ensure that the published work complies with the relevant IP laws. The practice of plagiarism should be discouraged and curbed. It is very difficult for a publisher



to identify the plagiarized work, thus it is advisable if some kind of **warranty** or **indemnification** clause is also included in the contract or agreement with the author, to protect the publisher against any kind of plagiarized work of author.

The author and publisher must realize that plagiarism is an offence and against the moral rights of the original creator. Thus if the publisher wishes to incorporate any third-party material, he must seek permission from the owners to reproduce the work.

An interesting Plagiarism case

Plagiarism to the extent of the following story looks more than just the effect of the memory pill. Kaavya Viswanathan, an Indo American girl just after graduating from high school wrote "How Opal Mehta got kissed, got wild and got a life". Its 2006 debut was highly publicized. While attending Bergen County Academies, Viswanathan showed her writing to Katherine Cohen of IvyWise, a private college admissions consultancy which Viswanathan's parents had hired to help with their daughter's application process. Through Cohen, Viswanathan was signed by the William Morris Agency under senior agent and William Morris partner Jennifer Rudolph Walsh and referred to book packaging company 17th Street Productions (now called Alloy Entertainment). On the basis of an outline and four chapters of the novel that would become Opal Mehta, Viswanathan eventually signed a two-book deal with Little, Brown and Company. She began writing the book the summer before college and finished it during her freshman year at Harvard College, while taking a full course load. Opal Mehta was published on April 4, 2006, and Viswanathan was profiled by The New York Times on April 6, 2006.



On April 23, 2006 The Harvard Crimson reported that several portions of Opal Mehta appeared to have been plagiarized from Megan McCafferty's first two "Jessica Darling" novels *Sloppy Firsts* (2001) and *Second Helpings* (2003), noting over a dozen similar passages.

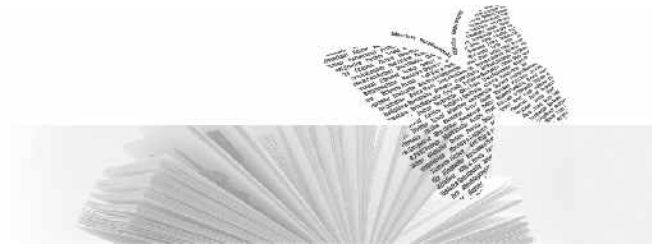
For instance:

McCafferty's *SloppyFirsts* and *Second Helpings*

Viswanathan's *Opal Mehta*

Sloppy Firsts, page 7: "Bridget is my age and lives across the street. For the first twelve years of my life, these qualifications were all I needed in a best friend. But that was before Bridget's braces came off and her boyfriend Burke got on, before Hope and I met in our seventh grade Honors classes."

Page 14: "Priscilla was my age and lived two blocks away. For the first fifteen years of my life, those were the only qualifications I needed in a best friend. We had bonded over our mutual fascination with the abacus in a playgroup for gifted kids. But that was before freshman year, when Priscilla's glasses came off, and the first in a long string of boyfriends got on."



On May 1, 2006, The New York Times ran a story giving national prominence to claims on the Sepia Mutiny blog that Viswanathan may have lifted text from Salman Rushdie's 1990 novel *Haroun and the Sea of Stories*. On May 2, 2006, The New York Times alleged "striking similarities" between passages in Opal Mehta and those in Sophie Kinsella's 2003 "chick-lit" novel *Can You Keep a Secret*. Viswanathan apologized and said any similarities were "completely unintentional and unconscious." All shelf copies of Opal Mehta were ultimately recalled and destroyed by the publisher and Viswanathan's contract for a second book was canceled.

Trademarks

Another aspect of IP of significance to the publishers and publishing firms is the trademark. A trademark is a distinctive sign which identifies certain goods or services as those produced or provided by specific person or enterprise. A trademark may be a combination of words, letters and numerals. It is used by firms to distinguish their goods and services from those of their competitors. Trademark do not protect the ideas behind the goods from imitation or duplication, but prevent firms from deceiving the customers into believing that services provided by them were produced by the trademark holders. The trademark once registered can be renewed as long as the owner wishes to use it. Thus unlike copyright, it can always be protected.

The publisher may trademark any or all of the following: single letters, words, initials, names of characters, titles, phrases, logos, the distinctive size or shape of publication. It is worth noting that protection of names, characters or titles of books varies with the national legislation.

The trademark largely contributes to the brand awareness. However in the publishing industry, barring few big publishing firms like Pearson and Thomson Reuters, the awareness among general public is not much. More often than not, it is the character we talk about and not the publication house. Teenagers around the globe go crazy over "Edward Cullen" from the famous *Twilight* series, however very few would have the inkling that it is published by Little, Brown and Company. Nevertheless the publishing firms should register their trademarks as without its protection it would become difficult to take action against infringers and protect their intellectual property.



Low Price edition sale

The rights of the publishers are highlighted in the following case : (IA No.11331/2008 in CS (OS) No.1960/2008)

John Willey & Sons Inc., Cengage Learning Inc. and Pearson Education Inc. with their exclusive licensees namely Wiley India Pvt. Ltd, Cengage Learning India Pvt. Ltd. and Dorling Kindersley India Pvt. Ltd. respectively, are in their respective fields of publishing academic, scientific and other educational books which are circulated worldwide. Keeping in mind the requirement of the business,

demand of the books and the economic viability of the purchasers they decided to expand their operations in India by introducing low price editions of their books so that the otherwise costly ones are made available to the Indian and other Asian students. The plaintiffs contended that any attempt by anyone to sell, distribute or circulate the books outside the territories prescribed by the owners of the copyright shall cause infringement of the copyright.

The plaintiffs very clearly have the following notice printed on every low price edition:

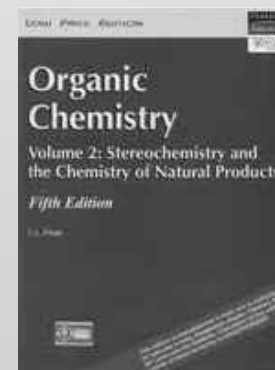
-Wiley Student Edition Restricted for Sale only in Bangladesh, Myanmar, India, Indonesia, Nepal, Pakistan, Philippines, Sri Lanka and Vietnam. Or,

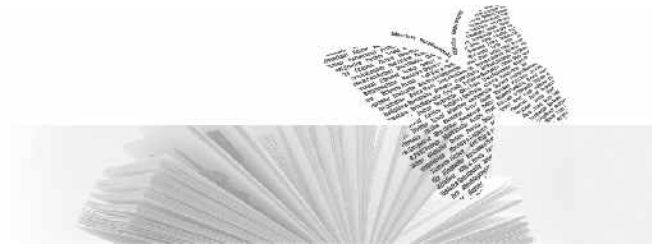
-For sale only in: Bangladesh, Myanmar, India, Indonesia, Nepal, Pakistan, Philippines, Sri Lanka and Vietnam

Additionally each book bears a yellow band at the top of the cover with the phrase 'Low Price Edition' prominently appearing on the front and back covers.

The defendants were Technischer Overseas Pvt. Ltd. a bookseller in Delhi under the website 'www.alibris.com' and its owners, who were offering online sale and delivery worldwide of the Low price editions of the plaintiffs' publications.

Consequently in this prima facie case the defendants, their agents and sister concerns were restrained from advertising, offering for sale/exporting any publications to the countries outside the territories specified on the books published by the plaintiffs.





Ideally the Plaintiff's case should have been dismissed on the grounds that the Defendant's activities were perfectly legitimate under the "First-Sale Doctrine". Under the first-sale doctrine, once a person has bought a lawfully produced copy of a copyrighted work, he is free to further sell or dispose that copy without the permission of the copyright owner.

The temporary injunction was granted against the defendant and the judgment further stated that “the purchaser after purchasing from the exclusive licensee cannot by claiming the principle of exhaustion or extinguishment of rights defeat the rights of the owner. This is the only harmonious interpretation possible by invocation of doctrine of first sales in the present case.”

Domain names used in association with websites and e-commerce can also be registered and protected as trademarks. With the advent and rapid globalization as well as commercialization of the internet, domain names have become the significant business identifiers. A domain name is a publishers own unique identity and always will be as long as he continue to use that name.

Trade Secrets

The Publishers receiving scripts and original works have the legal responsibility of not disclosing the work to any other person. A non-disclosure agreement between the author and publisher is a kind of comprehensive agreement that prevent disclosure of confidential and commercial information and ideas by the proposed publisher.

Business and Legal Consideration

In case of sales or acquisition of a publishing firm by another company, the terms and conditions of the publishing contract between the author and publisher would usually remain unaffected.

The intellectual property, like any other physical property can be bought, sold, bequeathed and inherited. Thus an author may gift his legal rights or obligations to others or his legal rights would be inherited by his legal representative, if he dies during the term of the contract.

The authors and publishers also have moral responsibility for what is published. They should ensure that none of the published content is malicious, obscene or defame others. Some of the contractual arrangement also includes liability clauses for the same.



Digital Media

Print media is gradually giving way to electronic libraries. The digital media is promoting transference of knowledge at a much lower cost system of storage, transfer, reproduction and archiving. E-publishing has particularly been successful in the areas of science and education, news and databases.

Flipkart...a success story

Flipkart is an Indian electronic commerce company headquartered in Bangalore, India. Established in 2007, it is the largest online bookstore in India. Flipkart was established by Sachin Bansal and Binny Bansal. Both are alumni of Indian Institute of Technology Delhi and worked for Amazon.com before quitting and founding their own company.

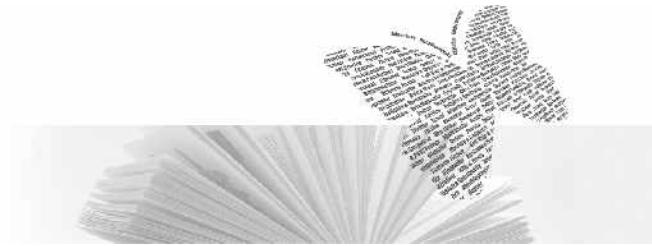
Initially they used word of mouth marketing and social networking websites to popularize their company. A few months later, the company sold its first book on flipkart.com - John Woods' Leaving Microsoft to Change the World. Within two years through word of mouth of their services, Flipkart became one of the top 100 Indian sites and was credited for being India's largest online bookseller with over 7 million titles on offer.

Flipkart broke even in March 2008 and claims to have had at least 100% growth every quarter since its founding. The store started with selling books and in 2010 branched out to selling CDs, DVDs, mobile phones, cameras and other electronic gadgets.

In December 2010, Flipkart acquired WeRead, a social book discovery tool from Lulu, a US-based on-demand publishing firm.



An important factor to consider is the digitization of the copyrighted work. The liability of the internet service factor is to be taken into account. The service providers may either be directly responsible if they are engaged in activities like unauthorized reproduction or communication to the public or may have contributory liability if they augment unauthorized acts of others. The publishers of both the hard and soft copy must take essential measures to prevent unauthorized copying and ensure that the copyright of the owners are protected on the internet.



EMERGING TRENDS IN PUBLISHING

Amazon kindle: Revolutionizing the Digital Media

The Amazon Kindle is an e-book reader developed by Amazon.com. It uses wireless connectivity to enable users to shop for, download, browse, and read



e-books, newspapers, magazines, blogs, and other digital media. Amazon released the Kindle First Generation on November 19, 2007 and was sold out in five and a half hours. Through a service called "Whispersync", customers can synchronize reading progress, bookmarks and other information across Kindle hardware devices and other mobile devices.

In the last three months of 2010, Amazon announced that in the United States, their e-book sales had surpassed sales of paperback books for the first time. The success of the e-book reader clearly goes on to show the changing scenario in the publication industry.

BUSINESS IMPLICATIONS OF EMERGING TRENDS

Industry experts believe that with the emergence of e-books, the traditional publishing industry has received a major setback. Statistics reveal that there has been decline in the paper book printing, distribution and sales. The traditional book publishers must therefore take measures to adapt themselves to the e-books and make them an integral part of their overall strategy.

The world without Borders

Borders Group, Inc., was an international book and music retailer based in Ann Arbor, Michigan. The company employed approximately 19,500 throughout the U.S., primarily in its Borders and Waldenbooks stores. It also formerly operated stores in Australia, New Zealand and Singapore.

On February 16, 2011, Borders applied for Chapter 11 bankruptcy protection and began liquidating 226 of its stores in the United States. Despite an offer from the private-equity firm Najafi Companies, Borders was not able to find a buyer before its July 17 bidding deadline, and therefore began liquidating its remaining 399 retail outlets on July 22, with the last remaining stores expected to shut their doors by the end of September. The last Borders New York store closed on September 14, 2011.





The “Publishing News” reported that the impact of the closing of Borders's stores started to show up in industry numbers. According to preliminary estimates released on September 14, 2011 by the Census Bureau, bookstore sales fell 4.2% in July, the steepest decline in 2011. Sales dropped to \$982 million from \$1.02 billion in July 2010. The July decline followed a 1.9% drop in June and as a result bookstore sales for the first seven months of 2011 were down 0.5%, to \$8.03 billion.

The industry insiders have predicted that the print book sales would continue to decline while e-books sales would increase.

E-books are profitable options for all publishers as they have low production costs, and low shipping and non-existent return costs.

Barnes & Noble Booksellers bookstore may soon go the way of the music retail stores, spurred by price cuts on e-book readers and sales of digital books. Barnes & Noble has dropped prices of its e-ink-reader “Nook by Barnes & Noble” to match the ever increasing competition from Amazon.com Inc.'s Kindle e-book reader.

Kindle e-book reader, sold out -- weeks before it even started shipping.

Amazon is selling more e-books than paper-based books on its websites. Then there are other options of downloading electronic books such as on Apple iPads, computers, and cell phones. But e-book readers are the key for serious readers. Three years ago, an e-book reader cost \$400, offered a limited choice of books, and had a dark gray screen that wasn't so easy on the eyes. Today they're just over \$100, offer almost unlimited choices of books, and the screens are excellent. And, naturally, you can download books over the air.

Let's see what happened in the music industry:

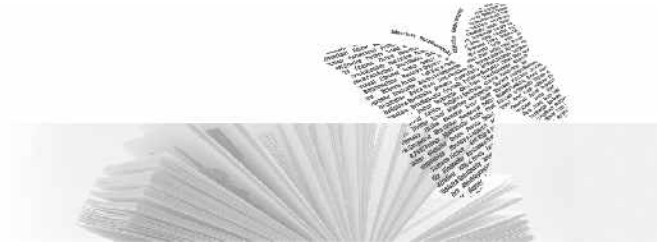
2001 Music Stores Employees Working 80,000

2002 the iPod took off

2010 Music Stores Employees Working 20,000

Employee Strength Down by 75% ↓

The days of print media is definitely not over. Publishers however rethink and reorganize their print business strategy. Worries of piracy have kept many publishers and authors, most notably J.K. Rowling, author of the Harry Potter book series, from embracing the e-book format. Even though Rowling's publisher, Scholastic Books, doesn't currently offer any Harry Potter titles in e-book format, hackers have scanned all of the books and turned them into PDF files that are viewable on any e-reader. Thus with the advent and increasing sales and use of e-books and e-publication the issue of piracy on these mediums and illegal copying and distribution would also need to be tackled.



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Cases studies and image source : Internet; particularly Wikipedia (<http://www.wikipedia.org/>)