LEGAL EYE

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Dear Readers

We wish our readers a very Happy Diwali and a Prosperous and Healthy New Year.

Continuing with our objective of updating our readers in specific focus areas, this issue of the Legal Eye highlights emerging trends in intellectual property and information technology law in India. Internet Service Provider liability for online copyright infringement, protection of databases and trademarks in the digital world are all issues that are gaining attention in the Indian legal field. The articles in this issue of Legal Eye, aim at providing a comparative analysis of how far India has been able to develop its law in these areas and the necessary changes that should be brought about to provide an effective legal system for dealing with intellectual property issues arising as a result of rapid technological development in India.. .

We trust this issue of Legal Eye will be of interest to you. We look forward to receiving your suggestions and comments.

Rajesh N. Begur, Editor-in Chief, Legal Eye

Home

Liability of an ISP for Online Copyright Protection

Online Database Protection

Domain Names and Protection of Trademarks - The Indian Trademarks Act, 1999 and other Dispute Resolution Avenues

Liability of an ISP for Online Copyright Protection

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The term “copyright” is usually used to refer to a bundle of rights enjoyed by an author of an original work with respect to that work. The “original work” in respect of which these rights are enjoyed are usually works, which are literary, artistic, musical, dramatic works and sound recordings. The author of such works, enjoys the right to reproduction, distribution, performance and the right to create translations / adaptations (i.e. derivative works). Any violations of such rights by a third party amount to an infringement of the copyright owners rights.

The advent of the Internet brought with it new problems and issues relating to protection of copyrights. The control of an author over his original works diminished substantially with the Internet facilitating fast copying, rapid distribution and anonymity to infringers. Such anonymity has raised issues relating to what would be online copyright infringement and who could be held liable for such infringement.

It is in this environment that the liability of an Internet Service Provider (ISP) for copyright infringement becomes an issue. An ISP is a company that provides access to the Internet. ISP liability for online copyright infringement arises as a result of various issues such as for transmission, hosting, linking to infringing material over their facilities including creation of copies on its servers to facilitate quick access to sites (which is commonly known as caching). Further since its usually difficult to find, enforce and obtain monetary relief from an individual Internet user, the ISP, being a big company, capable of paying large amounts as damages, is often targeted.

ISPs, on the other hand, claim that they are merely passive carriers just like telecommunication companies and hence their liability should be limited with respect to copyright infringement and that not limiting their liability would lead to a crippling effect on the growth of the Internet.

Recognizing this issue as being an emerging problem in the area of enforcing copyright infringement, the U.S. was one of the first countries to develop

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statutory limitations for the liability of ISPs, followed by many other countries including the European Union ("EU").

This article discusses the major developments in limiting the liability of an ISP in the U.S. and the EU and continues to discuss the liability of an ISP under the Indian Copyright laws and cyber laws.

Developments in the U.S. and the EU

The 1996 landmark case in the United States, which dealt with ISP liability, was Religious Technology v. Netcom. In this case the plaintiffs had copyrights in the unpublished and published works of L. Ron Hubbard, the late founder of the Church of Scientology. Parts of the copyrighted works were reproduced by a third party on a Bulletin Board Service, which was not directly linked to the Internet, but was connected through the facilities of defendant Netcom On-Line Communications, Inc., an ISP in the United States. The court considered the direct liability of Netcom and found that though the copies may be created when any computer connected to the internet transfer, receives or passes on a particular document, the only role of the ISP was to establish a system integrated into the Internet. Hence Netcom was held not to liable for direct infringement. Further since Netcom had not received direct financial benefit from such posting on the Bulletin Board Service, the court held that Netcom was not liable for vicarious infringement.

Pursuant to this case and a volume of judicial precedents in this respect, the US Government passed the Digital Millennium Copyright Act, 1998 (DMCA), with Title II clarifying the issues relating to ISP liability for Copyright Infringement.

Under the DMCA, ISP liability is limited both for caching as well as for transmission, hosting and linking to infringing material. Under the DMCA, the ISP is not liable for caching, provided that it is carried out through an automated

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technical process for the purpose of making the material available to subscribers who subsequently request it and subject to certain other restrictions.

The ISP is also not liable for transmission of infringing material through its servers as long as the servers transmit the information automatically and the ISP does not modify the contents. Further an ISP is also not liable for infringing material on websites hosted on their systems or acts of referring or linking users to a site containing infringing material if, (1) the ISP has no knowledge of the infringing material; (2) if he does have knowledge then he does not receive financial benefit directly attributable to the infringing activity and upon receiving proper notification of the infringement the ISP takes down the material. The DMCA also provides for notice and take down provisions for removing the infringing material stored on its servers.

The EU Directive on Electronic Commerce provides for similar provisions of limiting the liability of an ISP with respect to transmission, caching and hosting of infringing material. However it is important to note, that under the EU Directive limitations to liability of ISPs apply to all forms of liability, not just to copyright liability. The Directive nevertheless allows right holders to obtain injunctions in court or by other action against intermediaries whose services are used by third parties for copyright infringement.

Liability of ISPs in India for Copyright Infringement

There are no provisions in the Copyright Act, 1957 (“the Copyright Act”), which specifically deal with ISP liability. However liability is determined in accordance with the general grounds for infringement stated in Section 51 of the Copyright Act. Section 51 provides that a copyright in a work shall be infringed when any person without the consent of the author does anything, the exclusive right of which to do is conferred on the owner. Thus under the Copyright Act an ISP would be liable for any unauthorized copying, distribution, display or

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performance of a copyrighted work.

As stated above, ISP liability usually arises as a result of the two main types of activities undertaken by the ISP, namely (1) caching and (2) transmission, hosting and linking to infringing material i.e. material, the copy of which by a third party, has been unauthorized.

Copyright Liability for Caching

As explain above, caching involves copying of a web page / site and storage of the same for speeding up subsequent access. Caching also implicates the copyright holder's right of distribution, display and performance as the unauthorized copy of the website is then distributed and displayed to end users.

ISPs in India, like their counter parts in the world, cache web pages / sites on their servers for improving the response time to end-users. Under S 51 of the Copyright Act, caching by an ISP would make the ISP liable to the copyright owner for copyright infringement.

Further, the Information Technology Act, 2000 ("the IT Act") has not provided any relief to ISPs in this respect and does not limit the liability of an ISP for copying by the ISP as a result of caching.

ISP liability as a result of Transmission, Hosting or Storage of Infringing material

Section 79 of the IT Act, limits / restricts ISP liability in this respect. This section unlike the DMCA does not limit liability only with respect to copyright infringement, but like the EU directive it applies to all types of liability.

Section 79 provides that no person providing service as a network service

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provider shall be liable under the IT Act for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

The IT Act however fails to provide any explanations as to the minimum standard of care to be undertaken by the ISP, nor does it provide any guidelines as to exercise of such due diligence.

Conclusion

Though an initial step forward has been taken by the Indian government in limiting ISP liability by including S 79 in the IT Act, ISPs in India are not protected to the extent that ISPs are protected in the US and the EU.

The Copyright Act and the IT Act fail to provide protection to an ISP for its caching activities. The IT Act only provides limited protection to an ISP for infringing material that may be "made available" by an ISP without his knowledge or provided he exercises due diligence. Further the measure of care or extent of due diligence to be undertaken by the ISP for it to be covered by S 79 of the IT Act, is not explained.

It is thus suggested that the Indian Government, take cognizance of the legal developments in defining and restricting ISP liability that have been taken in various countries and follow the lead established by the DMCA and the EU Directive.

Statira H. Ranina

Home

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ELECTRONIC DATABASE PROTECTION

Database products and services are growing in importance in the global knowledge based economy. Increasingly, the compilation of information is being digitized. However, technology makes it possible to easily reproduce and integrate the database with other products. The investment and effort required to create them might lose all value, if they are not adequately protected by a range of measures, such as legislation.

The protection of database poses a special problem. To serve their purpose, they must be designed in such a manner that they can be easily located and accessed. The considerable ingenuity that went into their creation is not always evident in the final result. This poses a problem, given the obligation to comply with the criterion of originality so as to obtain the protection of the Copyright Act. Various countries and international organizations have examined the issue of the legal protection of databases. This Article intends to examine the position of database protection laws in the Europe, United States of America and India.

European Database Directive

In early 1996, the European Union adopted a Directive to provide new legal protections for databases. This Directive provided two levels of protection. First, it provided copyright protection for original selection and arrangement of facts in a database. Second, it provided sui generis ('of its own kind or class') protection for non-original databases, prohibiting the unfair extraction of a substantial part of any database reflecting significant investment.

Under the Directive, a database could simultaneously receive both types of protection: copyright protection for the expression - the selection and arrangement of data; and sui generis protection against the extraction of a

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qualitatively substantial part of the data itself. The sui generis protection lasts 15 years from the first day of the year, following the year in which the database was completed or made available to the public, while the copyright protection lasts for the life of the author plus 70 years.

However, this legislation also has been strongly criticized with respect to the lack of provisions in respect of compulsory licensing, a feature common to almost all intellectual property legislations. Nevertheless, this Directive seems to be a step in the right direction to grant of protection to database makers.

Database Protection Laws in the United States of America

In order to protect database creators, some courts in USA began to move away from the strict interpretation of creativity, to take into account the effort put into the development of work, even where that effort is not necessarily creative. This lead to the development of the 'sweat of the brow' doctrine and the same has been applied in a number of cases.

The 'Sweat of the Brow' doctrine enunciates that the creator of database could claim copyright protection in a compilation, provided that the creator could show that sufficient effort has gone into the acquisition and selection of data to make the compilation original. However, it is important to note that the copyright statute of the United States of America does not specifically list automated database as a copyrightable subject matter.

With the introduction of the European Union Directive, the US felt the significance to maintain its competitive advantage and to protect against piracy. This resulted in a flurry of legislative activity, which led to the introduction of Database Investment and Antipiracy Act, 1996. This draft legislation did not receive much favour and died a natural death at the close of the 104th Congress.

As the Database Investment and Antipiracy Act, 1996 did not receive much

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response, in October 1997, the House of Intellectual Property Subcommittee introduced the Collection of Information Antipiracy Act. This draft legislation was essentially based on the EU Database Directive. This draft legislation prohibits the extract of information, collected, gathered or maintained by another person, which gives the publisher of database inordinate control over the reuse of information contained in the database.

Database Protection Laws in India

India lags behind in the protection of database. The Indian database makers would have to rely upon the protection available under the copyright laws applicable in the country. However, the protection available seems to be of little assistance to the creators of database. It seems that in order that the creators of database have control over their creations, they have to resort to other provisions like the law of contract.

The law of contract may be construed as the most effective protection in respect of database and gives the author of the database, the greatest degree of control and the covenants of which can be easily enforced, provided the contract is not repugnant to the provisions of any other law in existence.

It is clear that the database represents a new evolved form of intellectual property and hence does not easily fit into the parameters established under the existing provisions of intellectual property laws. Given the volatility of the industry, India has to work towards introducing new laws and advancement in jurisprudence for database protection.

Radhika K

Home

DOMAIN NAMES AND PROTECTION OF TRADEMARKS - THE INDIAN TRADEMARKS ACT, 1999 AND OTHER DISPUTE RESOLUTION AVENUES

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Introduction

On the Internet, each computer has its own numeric address called the Internet Protocol (IP) number. However since the IP number is difficult to remember each IP address is assigned a name called a domain name. The domain name is made up of three parts for e.g. www.google.com. The 'www' describes the type of server from which information is retrieved, 'google' is called the second level domain (**SLD**) and the .com is called the Top Level Domain (**TLD**).

There are two types of TLDs, **generic** and **country code**. Generic TLDs (**gTLDs**) are used by the Internet public, while country code TLDs (**ccTLDs**) are used by each individual country, as they deemed necessary. The gTLDs are .COM, .ORG, .NET, .EDU, .GOV, .MIL and the ccTLDs like .IN, .UK, .JP, .US etc are 2-letter country codes maintained by the ISO 3166 Maintenance Agency. Some new TLDs have been recently introduced such as .BIZ, .INFO, .NAME, .AERO, .PRO, .MUSEUM and .COOP.

The National Centre for Software Technology (***NCST***), a scientific R & D institution under the Ministry of Information Technology (***MIT***), Government of India is the ccTLD Manager of the ***.in*** ccTLD. NCST has been registering domain names under the ***.in*** domain name space since 1995. The Internet Management Group (***IMG***), a committee formed by the Govt. of India, oversees the Internet domain name registration related activities for the ***.in*** ccTLD.

Domain Name Disputes

Domain name disputes generally arise where (1) a company registers its own brand name / trademark as a domain name which is similar to the brand name / trademark of another company giving rise to concurrent claims or (2) when an individual or an organization with no other rights to a name registers that name

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as a domain name for several reasons such as extortion, appropriation of goodwill, diversion of web-traffic, defamation etc (i.e. know as cybersquatting).

The United States is the first country to introduce cyberspace-specific trademark legislation with Anti-Cybersquatting Consumer Protection Act, 1999 (ACPA), which now forms part of the U.S. trademark law. In India there are no specific anti-cybersquatting laws, however such offences are termed as infringement or passing off depending on the facts of the case and have been tried under the prevailing trademark laws.

Domain Name Dispute Resolution in India

The Indian Trade Marks Act, 1999, which was enacted last December *(yet to be notified in the gazette)*, does not deal with domain names specifically. However Section 28 and Section 29, of the said Act provide grounds of infringement, which would be applicable for resolution of domain name disputes.

Section 28 permits the registered proprietor of a mark the right to restrain infringement and claim appropriate reliefs. Section 29 explains the circumstances and conditions under which a registered mark is infringed, namely, (a) the identity or deceptive similarity between the plaintiff's and the defendant's mark; (b) the likelihood of confusion in the minds of the public; (c) identity or similarity to the goods or services covered by the registered trade mark etc.

In the past few years India has seen an increasing amount of litigation over domain names. The first and most significant Indian case, *Yahoo! Inc. v. Akash Arora,* established the pattern of analysis which lies in passing off. The plaintiff, Yahoo! Inc. had adopted its mark in I994, registered yahoo.com in early 1995 and had issued or pending trademark registrations in 69 countries, including India. The defendant traded under the business name “NetLink Internet Solutions” but had registered the domain name “yahooindia.com” and began

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offering the same type of informational services as Yahoo! Inc. although specifically targeted to India. The defendant had also copied the plaintiff's web page design for its own site. The court ruled that trademark law does indeed apply to the Internet, and should apply with even greater strictness because the Internet's ease of copying, anonymity, and global distribution all worked to substantially increase the potential for harm. While the word "yahoo" might indeed be a general dictionary word, the court noted that under Indian trademark law, these could acquire distinctiveness with use. The defendant also claimed that Net users were sophisticated enough to know the difference between the US company and the local version, particularly given a disclaimer on the site and the different TLD extension. The court rejected all these arguments and found that the strong visual and nominative similarity between the sites would lead even sophisticated users to assume some affiliation.

Nearly a dozen domain cases have been heard since Yahoo!, all of them favoring the trademark owner, one of the more recent ones being *Rediff Communication Limited v. Cyber Booth and Anr.*. This has been a landmark decision, in which the Bombay High Court went a step further and held that,*" A domain name is more than an Internet Address and is entitled to equal protection as a trade mark."*

Other Dispute Resolution Avenues

Apart from proceeding under the Trademarks Act, an Indian trademark holder may also avail of other dispute resolution avenues for obtaining recourse against infringement of his mark. These avenues provide for resolution of disputes through administrative proceedings, thus providing a trademark holder quick relief, which would not be possible by going to court. Administrative proceedings are conducted in accordance with the dispute resolution policies adopted by various registrars (i.e. companies who register domain names). Thus any person who registers a domain name with any of these registrars can choose to avail of the dispute resolution mechanism provided by these

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registrars. Some of the most commonly availed of dispute resolution mechanisms have been outlined below.

Uniform Dispute Resolution Policy (UDRP)

The Internet Corporation for Assigned Names and Numbers (ICANN) is the centralized authority for managing the domain name system. ICANN adopted the UDRP in October 1999, to provide a quick and cheaper dispute resolution mechanism to settle domain name disputes. The UDRP has proved to be a popular dispute resolution mechanism, with several Indian trademark holders, also availing of the UDRP to protect their trademarks.

All registrars accredited by ICANN have adopted this policy and therefore any person who registers a domain name with any of these registrars is by virtue of their registration subject to the UDRP.

In case of a dispute, the complainant is required to prove all three of the following:

(i)	The domain name is identical to a trademark or service mark in which the Claimant has rights; and
(ii)	The registrant has no rights or legitimate interests in respect of the domain name; and
(iii)	The Registrant has registered the domain name or is using it in bad faith.

There are only two remedies available to the complainant namely (i) cancellation of the domain name (ii) transfer of the domain name registration to the complainant.

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Other Dispute Resolution Policies

An Indian trademark holder could also avail of the dispute resolution mechanisms, which are provided with respect to domain names registered under the new gTLDs. Most of these dispute resolution mechanisms allow the registration of the domain name in the new gTLDs to be contested, if the registration does not meet the registration requirements prescribed for registration under that particular new gTLD.

Further, in case an Indian trademark holder would like to challenge a domain name registered under the .in ccTLD, he could choose to proceed under the dispute resolution procedure adopted by NCST called the 'Indian Domain Name Dispute Resolution Policy.' This policy is almost identical to the UDRP.

Conclusion:

Domain name disputes as such are very much a part of the Indian scenario though no specific attempt has been made to legislate specific laws for the same. The Indian courts have taken the initiative to exercise jurisdiction over domain name disputes and protect the rightful owner, however, lack of specific statutory provision for domain name dispute resolution, is being felt. Thus Indian trademark laws need to be amended to provide for a comprehensive anti-cybersquatting legislation to effectively deal with such disputes in India.

Ashu Thakur and Ketki Shah

Home

Legal Snapshots

Government plans stricter quality control for medical kits

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The Ministry of Health has decided to introduce regulatory standards for manufacture and import of medical devices under the Drugs and Cosmetics Act. The Ministry will lay stricter quality control norms as a mandatory prerequisite for permits and shall notify a large number of devices, biological materials including in-vivo and in-vitro diagnostic kits as “sensitive items”. The Bureau of Indian Standards *(BIS)*, Council of Scientific & Industrial Research *(CSIR)* and National Accreditation Board for Laboratories *(NABL)* will assist the ministry to effectively implement these plans.

Big push for foreign investment

The N K Singh led steering committee on foreign direct investment *(FDI)* has outlined a 10-point agenda, including enactment of a foreign investment promotion law and overhaul of the existing strategy for attracting *FDI*. It recommended that Foreign Investment Promotion Board *(FIPB)* be empowered to give initial Central Government registrations and approvals and empowered to fix the time frame for investment-related approvals both at State and Central Levels. The committee has called for removal of cumbersome policies that block exit based on sale of shares by foreigner to another foreigner, sale from NRI to a resident Indian, share swap and restrictive clauses. It also proposed change in government rules to empower the Foreign Investment Implementation Authority to hasten the processing of policy approvals.

The report suggested increasing the sectoral cap in the following industries:

§ Civil aviation from 40% to 49% and allowing equity participation by foreign airlines

§ Basic and mobile telecommunications services from 49% to 74%

§ Direct-to-home telecast services from 20% to 49%

§ Insurance from 26% to 49% and

§ Plantations from nil to 49%

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It has also recommended removing the existing cap and allowing 100% FDI in private banks and investing companies, petroleum refining public sector undertakings, oil, marketing, real estate, including complexes, individual houses and buildings, advertising, trading, radio paging, airports, bandwidth companies, oil and gas pipelines, gateways, coal washeries and mining and quarrying of diamond and precious stones. The ban on FDI in retail will however continue to remain.

The group of ministers on foreign investment will take up the recommendations of the committee shortly.

Trusts free to make their own investment decisions

The government is proposing to repeal section 20 of the Indian Trusts Act 1882, which deals with the securities in which the funds of a trust can be invested in. According to government sources the reasoning behind this is that since all other financial sector intermediaries are being permitted to make their own investment decisions, the trusts should be permitted to do so too.

Competition Commission of India (CCI) can breakup Dominant Undertakings

The parliamentary panel which examined the provisions of the new Competition

Bill regarding the CCI has left unchanged the requirement of mergers and acquisitions of over Rs 3000 crores and takeovers of Indian companies by foreign companies to be referred to the CCI. Though this provision is not mandatory, since the CCI has the power to reverse mergers no company is likely to take the risk. The CCI to take into account market share when inquiring whether an enterprise enjoys a dominant position.

Under the new bill CCI can recommend a break up of any enterprise to the govt., but it is unclear whether this is a recommendatory power or not.

Creation of tax panels for advanced rulings customs and excise

The finance ministry has finally set up the Authority for Advance Rulings under the Customs and Central Excise Law. This will remove one level of uncertainty for foreign investors with regard to indirect tax liabilities of their planned operations in India. Former Supreme Court Justice K Venkatswami, has been appointed as the chairman of the Authority.

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Ordinance to amend the Securities and Exchange Board of India Act, 1962.

The Union Cabinet has recommended promulgating an ordinance to give Securities and Exchange Board of India (SEBI) the search and seizure power and allowing it to impose enhanced penalties on defaulters upto Rs. 25 crores or three times the amount involved whichever is higher. This penalty will be applicable will be with respect to fraud and insider trading offences. The Department of Company Affairs (DCA) has agreed to the transfer of search and seizure powers to SEBI. The Finance Ministry and the DCA had also agreed to permit SEBI to levy a penalty of 1 lakh per day or maximum fine of 1 crore whichever is lower for default by brokers, failure to furnish returns, etc.

SEBI to review underwriting at sell offs

Earlier this month SEBI had formulated guidelines for merchant bankers to provide underwriting facilities to retail investors i.e. if the market price falls below the issue price during the succeeding two months, an investor may exercise the option of exiting at the issue price. SEBI is reconsidering these guidelines under pressure from merchant bankers. Merchant Banking sources said they were opposed to the idea since it would promote a culture of guaranteed returns among retail investors.

Book building to fix exit price for delisting may go

The Securities and Exchange Board of India is unlikely to allow book building to determine the exit price that any company would have to offer to shareholders for delisting shares. This mechanism is skewed because in depressed market conditions the exit price arrived on this basis does not adequately compensate shareholders.

SEBI advisory committee on derivatives

The Securities and Exchange Board of India (SEBI) advisory committee on derivatives has suggested that Rs 2 lakh minimum contract size in the futures and options market should be abolished since the environment it was introduced in has dramatically changed. The panel noted that globally the contract size is determined by the exchanges without any intervention from the regulators. It was suggested that a new slab for member-wise positions should be introduced. Further that member-wise position limit should be 20% of the market-wide position limit in the stock where the market-wide position limit is less than or equal to Rs. 20 crores. On scrip wise limits, the committee has proposed that within market-wide open interest of Rs.50 crores, the limit applicable be Rs. 5 crores but

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when the open interest crosses Rs. 50 crores, the limit applicable is proposed to be 10% of the market-wide open interest of Rs. 20 crores, which ever is lower.

RBI deed of covenants

Part-time directors on boards of banks have refused to sign the deed of covenants, which is being circulated by the Reserve Bank of India, which will make them liable for the functioning of the bank. The deed is largely general in nature but has recommendations such as directors being responsible for the risk management of the bank, monitoring the bank's investment in subsidiaries, overseeing the setting up of and monitoring of numerous committees such as the shareholder's redressal committee, the risk management committee, and the supervisory committee. They say that investment issues and risk management issues are functions of whole-time directors.

Foreign cos. Allowed to issue IDR's

The Department of Company Affairs (DCA) has drafted a notification, which will allow overseas companies, which are listed on an international stock exchange to issue India Depository Receipts (IDRs). The draft rules stipulate that only profitable companies for 5 yrs and having a dividend record of more then 10% should to be allowed to issues IDR's. This notification is still to be approved by the government.

ECB guidelines further liberalized by the Indian Goverment

External Commercial Borrowings (ECBs) guidelines have been further liberalized by allowing companies to raise foreign loans from any internationally recognized sources such as banks, export credit agencies, etc. The government has withdrawn the ceiling imposed by the RBI on borrowers of $50m under the automatic route. They have also announced a comprehensive ECB policy for Special Economic Zones.

Projects below Rs.100 crore do not require EIA clearance

The Central Government has changed the Environmental Impact Assessment Notification 1994, so that projects investing below Rs 100 crores do not need to obtain any EIA clearance. There is a list of 16 industries for which this has been relaxed by the Ministry of Environment and Forests.

SEBI has issued a regulation about sweat equity shares

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Securities and Exchange Board of India has prescribed a 3 year lock-in period for sweat equity shares of listed companies and allowed their listing on the stock exchanges. They have to be approved by a simple majority of shareholders in a general meeting. The regulation specifies the pricing norms and the accounting treatment for these shares.

Deemed public companies can revert to private status

A company deemed to be a public company can revert back to its private company status. The Companies (Amendment) Act, 2000 has made Section 43A inoperational with only sub-section 43A(2A) in force which makes it mandatory for every company reverting back to inform the Registrar of Companies of it.

Government to offer cell companies a more liberal regime

Under a new policy being prepared by the Government for the cellular industry the advance license fee is being abolished and can be paid after 3 months, and also bank guarantee equivalent to one year's fee is to be reduced to 6 months.

Pre-merger valuation is a must under Department of Company Affairs (DCA) guidelines

DCA guidelines have made it mandatory for companies seeking mergers & amalgamations to seek independent valuations of shares. This means that a regional director will be empowered to reject applications on the basis of unsatisfactory valuations. These guidelines will have to be adhered to before the shareholders consider a merger proposal.

RBI to relax existing Forex regulations relating to residents

The Reserve Bank India has relaxed the rules relating to Forex transaction by residents in India. The minimum period for repayment of loans from close relatives outside India has been reduced to 1 year.

Amendments to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations

The Securities and Exchange Board of India ("SEBI") has vide its notification dated 9th September 2002 made regulations to amend the SEBI (Substantial

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Acquisition of Shares and Takeovers) Regulations 1997 (the "Takeover Code"). The amendment, except to the extent expressly provided otherwise, comes into effect on the date of its publication in the official gazette. The highlights of the major amendments are:

· Acquisition of shares through preferential allotment route would not be entitled to exemption from open offer.

· Exemption from open offer extended to acquisition by; (i) international institutions like IFC, ADB, IBRD, CDC and such other international financial institutions; (b) merchant banker or a promoter of the target company pursuant to a scheme of safety net under SEBI (DIP) guidelines.

· Additional disclosure requirement to the stock exchanges on acquisition of shares in the target company to the extent of: (i) 5%, 10% or 14%; or (ii) in the aggregate 2% or more under the creeping acquisition route.

· Creeping acquisition ceiling brought down to 5% from 10%. The eligible period thereto changed from any period of 12 months to financial year ending on 31st March.

· The formula for computing minimum offer price has been changed to include, the higher of: (i) the average of the weekly high and low of the closing prices during the twenty six weeks; or (ii) the average of the daily high and low of the closing prices during two weeks, prior to public announcement.

· The volume of trading necessary to qualify for frequently traded has been increased from 2% to 5%.

· Any payment by the acquirer in respect of non-compete agreement to the seller, which does not exceed 25% of the offer price, would not be added to the offer price.

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· The provisions applicable to disinvestments by central government have been extended even to disinvestments by state government.

A detailed analysis of all the amendments to the Takeover Code would be covered in our next edition.

Home

Meet the A.R.A. LAW Team:

Home

In each issue, we profile one person who is a part of A.R.A. LAW. They will also be sharing their experiences of being with A.R.A. LAW.

Shardulsingh Bayas graduated from the Government Law College (University of Mumbai) in 1999 ranking 4th in the University. From 1998 to 2000 he did his internship with the former Additional Solicitor General for India. Shardul recently completed the Masters of Law (LL.M.) program at the University of Pennsylvania (USA) and Programme of Instruction for Lawyers from Harvard Law School. At Upenn and Harvard he specialized in Cyber Law, Mergers and Acquisitions, Antitrust (Competition Law), Lending Transactions & Securities. At the Firm he has specialized in M &A and Corporate litigation including handling matters at the Supreme Court of India, High Courts and various tribunals. Here is what Shardul has to say:-

Working with ARA Law has been an experience I would cherish for a life time. The Firm encourages initiative and independent thought and equal opportunity is given to all members to fully realize their potential. The best part about A.R.A. is its democratic style of management and operation. The Firm encourages members to share ideas and to play an active role in the growth and development of the Firm. As a professional, the Firm has given me the

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opportunity to develop my legal expertise and skills.

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