STRENGTHENING INTELLECTUAL PROPERTY REGIME IN DIGITAL INDIA

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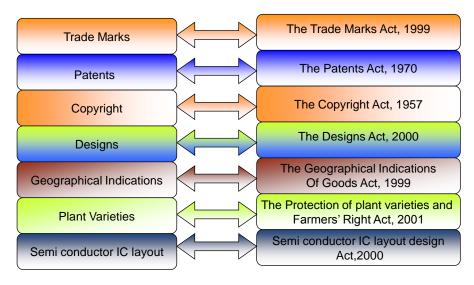
ABSTRACT

A company is aware of the immense value that lies in its Intellectual Property & adopts reasonable industry best practices to protect it. Managing Intellectual Property in conventional sense, requires correct categorization of nature of Intellectual Property, its due registrations under applicable regulations, exploring optimal means of commercial exploitation , and its strategic deployment so that innovation is encouraged and returns are visible. The entire business of developing, managing& safeguarding Intellectual Property has seen a positive revolution in Digital India. Both domestic companies and foreign companies are investing in e-businesses and adopting India as their manufacturing/trader/sales base due to the recent changes brought by IP legislative and policy initiatives& progressive Judicial approach. In addition, Technology has brought drastic changes in ways in which Intellectual property can be used online for e-commerce purposes and the measures required to protect such intellectual property. Despite anonymity cyberspace brings , it has become easier to detect an infringement through e-surveillance & search engines. This paper discusses how Intellectual Property regime is strengthened in Digital India.

What is Intellectual property?

Intellectual Property is a term that means an intangible right that can be exercised with respect to a tangible work. It includes Trademarks, Copyrights, Patents, designs and other IP rights.For example, Copyright Act,1957, Section 14 defines copyright as an exclusive right to make copy, an adaptation and exercise other rights such as communicate to public any literary,dramatic,musical,artistic, cinematographic film and sound recording. An intangible property may change into a tangible property when it is copied to a particular media. For example, for the purposes of computing sales tax on goods,a copyrighted software which is incorporated on an electronic media, such as CD, becomes Goods. The Convention which founded World Intellectual Property Organisation (WIPO) states intellectual Property includes rights relating to literary, artistic, scientific work, performers rights, phonograms, broadcasts, inventions, discoveries, industrial design, trademark, service marks, geographical indications, commercial names, designations, and gives rise to gamut of rights resulting therefrom.

In India, different statutes protect different kinds of Intellectual Property, interalia, The Trademarks Act, 1999, the Copyright Act, 1957, The Patents Act, 1957, The Designs Act 2002, The Geographical Indications Act, 1999.



Different Acts governing IP assets

IP- Duration of Term of Protection

- Patents (20 years)
- Trademarks (10 years + renewals)
- **Copyrights** in published literary, dramatic, musical, and artistic works (Lifetime of author +60 years).
- **Copyright** in photographs ,cinematographic film, sound recordings –(60 years from year in which it was published)
- Broadcast reproduction right-(25 years from the beginning of the calendar year next following the year in which the broadcast is made.)
- **Performers right**-(25 years from the beginning of the calendar year next following the year in which the performance is made)
- Industrial designs (10 years+ renewal permitted once for 5 years)
- Trade-secrets and know how collectively "proprietary technology" (contract period-protected by contract provisions, doctrine of breach of trust)

The common tort law of passing off & confidential Information also apply besides statutory IP rights. Essential Parameters of different forms of Intellectual Property vary. For example, in patents novelty & originality, industrial purpose is required to be fulfilled, the trademarks must be distinctive or have a distinguishing nature, in passing off , the goodwill & reputation of a trader is judged, and originality of expression in copyright. An owner of intellectual property can assign or license his intellectual property for monetization. Incase of infringement, the owner can seek injunction & damages or file civil /criminal action / both against the infringer, seek delivery/destruction of infringing goods .Registration of Intellectual Property gives better protection in terms of legal remedies to the owner though it may not be mandatory as in case of Indian Copyright Act,1957.

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Why protect Intellectual Property in India or globally?

Lord Oliver in a patent case in Asahi, Kanei Kogyo explained that the purpose of law while giving rights of intellectual Property to its owner is to encourage and promote innovation by giving benefit of a monopoly on the inventor. Also companies would safely invest their money into developing IP through scientific & technical research if such exclusive rights are conferred upon the owner. IP can be used to gain returns over investment by licensing/ assigning its rights for agreed duration of time or territory. Licensing for royalty gains can be exclusive/non exclusive rights.

India is a member of World Trade Organisation. India is also a Member of World Intellectual Property organization. The WTO's TRIPS Agreement 1994 emphasizes on importance of protecting Intellectual Property both at national and international level. This Convention advocates principle of national treatment. This means, the persons entitled to the benefits of a Convention are treated in each country in a manner another country treats its own nationals. To comply with the TRIPS Agreement, Indian Government made necessary amendments to patent law enacting Patent (Amendment)Act, 2005. India, being a member country to the Paris Convention and PCT, provides all the filing facilities as provided under these arrangements to applicants for filing convention and national phase patent applications. India's signing of Conventions and treaties that protect Intellectual Property has enabled seamless protection of IP both to domestic businesses & multinational /foreign corporations that do business in India.

Although intellectual property is protected territorially such as in case of copyright , patents or trademarks yet due recognition is given by participating countries to international Conventions such as the Berne Convention of 1886. As nature of trade and relations between countries is turning global & digital, the Conventions that protect intellectual property are becoming more significant in their role.

In addition, India is signatory to the following WIPO-administered International Treaties and Conventions that protect IPR-

- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure
- Paris Convention for the Protection of Industrial Property
- Convention Establishing the World Intellectual Property Organization
- Berne Convention for the Protection of Literary and Artistic Works
- Patent Cooperation Treaty
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks-Madrid Protocol
- Washington Treaty on Intellectual Property in respect of Integrated Circuits
- Nairobi Treaty on the Protection of the Olympic Symbol
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

Recent legislative/policy initiatives to protect IP in India

In recent years Importantlegislative&policy initiatives have strengthened India's IP regime. Apart from the passage of Patent (Amendment)Act, 2005, significant changes were brought in other relevant statutes as well. Recent changes introduced in the Indian copyright regime has made our law stronger. The Copyright (Amendment) Act, 2012 has introduced new independent rights to lyricists, composers and singers as authors of literary and musical works in films and sound recordings which entitles them to receive royalty and other benefits. The Act aims to protect rights of performers by permitting them to record their work for commercial reasons. The amendment has allowed free import of copyrighted works from other countries. It prescribes stringent penalties on persons that circumvent technologies that are used to protect copyrighted works. According to Section 65A any person who circumvents an effective technological measure applied to protect copyright subject to limited exceptions shall be punishable with imprisonment that may extend to two years and fine . Such exceptions include doing acts necessary to test security of a system or for law enforcement purposes or conducting lawful investigation. Any person who unauthorisedly removes digital rights information is punishable with imprisonment of upto 2 years and fine. Owner of copyright whose right is infringed can also avail civil remedies of injunction, claim for damages and delivery up of infringing goods.

In India, a recent development in IP protection is grant of patents for computer programs which are otherwise generally only copyrightable as literary work. Section 3(K) of Patent Act,1970 provides a computer program per se other than its technical application to industry or combination with hardware are not inventions. only such software which lead to a technical effect or assist in solving a technical problem are patentable. As regards business method patents , these although not considered patentable in India, were granted patents where a business method is embedded in software which has a technical effect. Recently, Google was granted patent for advertising business method wherein it could serve content targeted ads in email newsletter based on publisher unique content identifier in email content.

Other statutory changes include enactment of Designs Act,2000 to comply with mandate of TRIPS Agreement. Similarly, the Protection of Plant varieties and Farmers Rights was passed in 2001. Trademarks Act ,1958 was replaced by Trademark Act,1999 due to rapid technological changes & growth of e-commerce.Recently,India also acceded to the Madrid Protocol enabling applicants to file trademark applications in other countries that are members of the Protocol through a simple form. This not only expedites application process but is also quite user

friendly.Indian office is the receiving office under the Madrid Protocol and all communications from the International Bureau under the Madrid Protocol are made by Indian office electronically only.

As a result of these proactive changes in IP legal framework, there have been exponential rise in number of applications filed in India to protect IP by global stakeholders and domestic companies. There is one virtual patent office and 4 physical patent offices in India. Under the Patent Cooperation Treaty, the Indian Patent Office has been recognized as an International Searching Authority and an International Preliminary Examining Authority (ISA/IPEA) by World Intellectual Property Organization in October, 2007, which became operative since 15th October, 2013, wherein only 17 countries hold such recognition. The process of examining applications is dealt with by experts in a digitized mode, records of case are digital and ecommunications flow between department and applicants.

Strengthening of India's laws protecting Intellectual Property has invited the attention of foreign investors/companies. Coupled with proliferation and growth of IT Sector business in India, Digital India is truly magnetic and ready for the 'Make In India' paradigm . Reliable statistics point out that Foreign Direct Investment in India increased to 3509 USD Million in May from 2721 USD Million in April of 2015. Foreign Direct Investment in India averaged 1076.20 USD Million from 1995 until 2015.(http://www.tradingeconomics.com/india/foreign-directinvestment).As per the PWC report on E-commerce in India , The ecommerce sector in India has grown by 34% (CAGR) since 2009 to touch 16.4 billion USD in 2014. The sector is estimated be in the of 22 billion USD in 2015. to range (https://www.pwc.in/en IN/in/assets/pdfs/publications/2015/ecommerce-in-indiaaccelerating-growth.pdf)

India is no longer behind but is proactive in protecting IP rights. For instance, one of the typical concerns about patent regime is evergreening of patents just when they are about expire , however, internal policies are changing. Recently, India's patent office rejected application for patent of Gilead Sciences Inc's Hepatitis C treatment, Sovaldi. According to Patent office the drug must be shown to be more effective only then patent could be granted as a minor change by itself will not suffice.

Aside from the statutory changes in IP sector, the recent amendments to the Information Technology Act,2000 has strengthened IP protection in India. Section 4 of the IT Act,2000 grants legal recognition of electronic records.E-contracts are recognized as legally valid by Section 10A of the Indian Information Technology Act,2000.

Legal recognition of electronic signatures is provided by Section 5 of IT Act 2000. Section 65 prohibits tampering of computer source documents punishable with imprisonment for upto 3 years and fine of upto 2 lakh or both. Hacking of data/computer systems/ network is punishable under Section 66 of IT Act,2000 punishable with upto 3 years of imprisonment and fine upto 5 lakhs.Unauthorised accessing , downloading,copying, extracting or damaging data (including intellectual property) is punishable as per Section 66 of IT Act,2000.

Apart from myriad legal & Policy initiatives, India is aligning its IP regime for a streamlining of security as regards its businesses by making required infrastructure & technology changes. The IP offices now have a robust state of the art building and latest technology has been deployed to digitalise the operations of IP office. This has led to efficient filing and processing of IP applications, and strengthened public delivery of IP services. It has brought transparency and easy accessibility to IP law practice of registration work

Intellectual Property in the Digital space

In a nutshell, traditional principles of IP law which apply in offline world also apply to the virtual world. Unauthorised use of a interalia, a person's words, trademarks, service marks, literary work , images , inventions, the functionality of the software, music , video , source code constitute infringement of owner's intellectual property rights.

With the unprecedented growth of e-commerce &use of internet , the role of Intellectual Property in the business world has undergone a drastic change. It has a huge role to play in branding, advertising, selling a company's goods or services both online and offline. A recent survey conducted by Strategic Partners released on World IP day revealed that Indian Corporate houses believed Intellectual property plays a vital role in the growth of any company.Majority believed that policy makers and government have a critical role to play in creating the right IP legal framework wherein **29%** felt that policy makers are performing their role satisfactorily but **75%** of them commented there is scope for improvement. **67%** Members responded India lacks a sound IP policy and over **50%** of the respondents pointed out that the implementation is ineffective.

These findings become even more relevant in view of changing technological landscape of the country &growth of e-businesses.

A large section of corporate world realizes strength of IP assets in product positioning, lifecycle management, monetization & valuation. A major challenge is the problem of piracy. As per the FICCI India Risk Survey 2014 India Report, threats to Intellectual property are internal (

/webaccess/email/smartphones/hard drives electronic)or external (hacking /malware/phishing/identity theft etc).The 7th Annual Intellectual Property summit in Ahmadabad revealed brands in India lost up to 20% of their business due to counterfeiting. As per FICCI's study, counterfeit brands in India have resulted in a loss of over INR 16,546 crore to the national exchequer in 2012. As more and more business turn to the cyberspace to transact , in B2 B (business to business) and B2C mode (business to consumer), piracy can percolate each industry at a viral rate. Difficulty arises due to peculiar nature of this internet medium assometimes anonymity may make it difficult to trace cyber pirates. On the other hand, detection of online infringement is made easy through simple keyword searches in search engines. As the medium is new, law making & implementation changes need to be more quick paced and made stringent to rein the illegal activity of cybercriminals. For example, (apart from other beneficial provisions incorporated in the amendments to the Information Technology Act in 2008), new guidelines to streamline operations of cybercafé have been introduced in India titled IT (Guidelines for Cybercafe) Rules, 2011 which obligates cybercafeowners to maintain physical and electronic details of identity and address of every user of cybercafé for a period of one year. Such laws enable tracing of cybercriminals who indulge in IP piracy & related cybercrimes. Reliable sources point out that certain arrests of cybercafé owners have already been made while implementing these guidelines in different parts of India. Introduction of such proactive laws have further strengthened IP regime in India. Likewise, stronger regulatory changes to both prevent & curb software piracy and other forms of digital piracy would be key agenda of Digital India. Public needs sensitization through both digital, print media, live shows for spreading legal awareness about importance of IP Protection & legal remedies for infringements.

New challenges to IP protection in cyberspace

Increased use of Information Technology has introduced hybrid versions of infringement today including hacking of copyrighted software, infringement of website source code, webdesign /content, linking, framing, metatagging, cybersquatting etc. New gadgets including scanners, digital camera, recording software, email, ipad, mobiles, webTV, data mining and other software tools enable easy reproduction and circulation of infringing materials such as music files. For the said reason, Definition of 'Fair use' under copyright law may need to be redefined for refinements with changing technologies. Fair use generally includes citing of literary or music works for research and teaching. In digital world, technological measures used to prevent access to copyrighted works could be used for fair use such as publishing essays and papers in paid databases which require subscription for viewing. This doctrine may be misused by some to transgress its real limits. Owners of software prefer licensing software to avoid use of technical means to prevent reverse engineering to keep source code secret.Othertypes of software piracy include counterfeiting, internet download, end user piracy, client server

overuse, illegal hard disk loading, warez sites wherein software's security protection is removed. However risks of using pirated software are varied, ranging from destruction of computer to leakage of private data, loss of technical updation, support, spam, malware.



Spreading this awareness through industry conferences along with active anti counterfeit raids are playing a key role in curbing piracy in India. Every organization is being sensitized to periodically review their IT assets to detect IP infringements or illegal downloading/use of pirated software.As per the KPMG India fraud survey 2012,53% respondents rated cybercrime and 38% rated IP theft as emerging fraud areas. Thus awareness about effective reporting, investigation, installing adequate compliance control processes, conducting surveillance and anticountrefeit raids are mechanisms been put in place to curb this problem to a large extent. Once infringements are detected, enforcement of IP may also have jurisdictional issues to invoke legal actions.

THE PROGRESSIVE JUDICIAL TRENDS

Over the years , Indian courts have passed landmark judgements that strengthen India 's enforcement of IP laws.

Case on Copyright infringements on Internet

In recent case of *Super cassette industries v Myspace inc*(2011) 48PTC 49, plaintiff filed a suit for injunction restraining copyright infringement and claim for damages. Defendant no.1 was

a social networking site which offered variety of entertainment applications, including sharing, viewing of music , images, films based in US Defendant no., 2 was owner of defendant no.1 which offered free online network providing consumers platform tools. Plaintiff contended defendant makes available multimedia content including infringing songs, pictures that users copy and share over internet .It also contained an inbuilt search facility within site to upload or download music and stored these files in its own software format on its servers. The defendants prohibitedcopyright infringement as per its terms of use and set a digital rights management tool for copyright owners to register so that their copyrighted works are not infringed through the site. The court held that primafacie defendants were permitting through the place (website) for profit for infringement envisaged under Section 51(a)(ii) of the Copyright Act.As regards liability as an Intermediary court took the view that defendants provided access only after a limited license to add or modify the work sand by adding advertisements on it which means permitting the place for profit with knowledge. Therefore defendants had not satisfied due diligence criteria and cannot be excluded from liability as they did modify information of users by adding advertisements to it. It is important to mention that as per amended IT Act, 2000, Section 79(3) clearly states that exclusions of liability available to intermediaries are not available to intermediaries incase of conspiracy or abetment.

In Vodafone India Itd v M/s R.K Productions (P)Itd 2013 (54)PTC 149 (Mad), a civil suit for permanent injunction was filed to prevent infringement of copyright of plaintiff in movie "3" and second suit for movie "Dhammu", restraining defendants who were internet service providers and unknown persons using john doe suits. It was contended that case was maintainable against defendants who were internet service providers as they contributed to infringement through their services and also gained monetarily through such actions.Relying upon *Super cassette industries* case, the court held that Section 79 of IT Act,2000 is meant for all other internet wrongs wherein intermediaries may be involved including auctioning, network servicing, news dissemination,uploading of pornographic content but not copyright infringement which is excluded by Section 81 of IT Act,2000. The Court held that even where future infringements are sought to be prevented an action for permanent injunction is maintainable. The court affirmed its earlier interim direction that plaintiff may provide particulars of URL where infringing movie is kept and defendants shall take steps to block it.

Case on Digital Rights management

Indian Courts have passed important judgements as regards Digital Rights management practices aswell. Digital Rights Management and anti-circumvention law means technologies used by copyright owners to control access or use of copyrighted works in digital form and restrictions on such electronic works or devices. Though India is not a party to WCT or WPPT it

contains provisions to permit reverseengineering in limited circumstances. Section 52 of Indian copyright law excludes few acts under umbrella of fair use in copyright. Forinstance, maintaining back up of a document, determining ideas underlying a program or to study its functionality, making copies of a program for non commerciual use. In NEC corp vs Intel corp, NEC made microprocessors that competed with Intel by reverse enginnering Intel's code .The court held that NEC had not infringed Intel's copyright as NEC had used underlying ideas without virtually identically copying their limited expression. In an Indian case, Syed Asifuddin & ors v the State of Andhra Pradesh & anr, the Tata Indicomm employees were arrested on charges of hacking with computer source code under Section 65B Of IT Act,2000 for manipulation of electronic 32 bit number (ESN) programmed into cell phones that were exclusively to be used on Reliance service network. The court held that such tampering of code is a punishable offence under Section 65 of IT Act, 2000 and will not be covered within fair use exceptions to copyright infringement under Section 52 of Copyright Act, 1957 as it comprised of neither reverse engineering for purpose it was supplied for that Is working on Reliance network nor for interoperability asTata was its competitor. Nor was reverse engineering for a lawful purpose.

Judicial approach in Cybersquatting cases

Indian courts passed several judgements upholding trademark rights of its rightful owners in India have. Cyberquatting has been prevalent ever since Internet was introduced .This term means where a person registers a well known domain name or trademame with view to hoard it so that he can then sell it at exorbitant rates malafidely to original rightful owner. Indian courts have dealt with catena of such matters wherein clear principles have been laid down by the courts to decide these cases. A domain name identifies a website as source of origin of goods and services and attracts same level of protection as a brand name. In Satyam Infoway v sifynetsolutions 2004 PTC (28) 566 the appellant used SIFY as main component of its domain name as www.sifymall.com,www.sifyrealestate.com and respondent infringed its domain name using deceptively similar domain name sich as <u>www.sifynett.com.The</u> Supreme court held that appellant was entitled to an injunction order restraining respondent from using domain name in dispute and held respondent guilty of passing off. In another case Tata sons v Greenpeace 178(2011)SLT 70, Tatasued Greenpeacefor online defamation and trademark infringementseeking injunction and damages of ten crores that published Tata v Turtle game which unauthorisedly used their mark Tata. Plaintiff contended damage to its reputation through online game as unlawful criticism of its Dharma port project. The court restrained defendant from conducting any business or using Tata's domain name or mark .Section 135 of Trademark Act, 1999 legal remedies for suits for infringement of registered trademarks or passing off includes injunction, damages or account of profits or delivery up/destruction of infringing goods. Section 103 punishes act of applying false trademark on any goods punishable

with minimum 6 months imprisonment. but extending to three years and fine between 50,000 to 3 lacs. Similarly Section 104 punishes act of selling goods/services with false trademark description.

In *SamsungElectronic company ltd v Kapil Wadhwa & anr MIPR 2012(2) 1* plaintiff filed a suit for trademark infringement alleging defendants were ,making parallel imports and infringing plaintiff registered trademark SAMSUNG. It was also alleged that defendants were deep hyper linking and metatagging thereby infringing registered trademark of plaintiff. The court granted an interim injunction restraining defendants from carrying out the alleged illegal activities.

Caselaw on determining Jurisdiction

The aspect of jurisdiction in cross border IP disputes has recently been decided in *World Wrestling Foundation vs Reshma Collection* 2014(60)PTC452(Del) .In this case, Plaintiff was seeking permanent injunction on ground of infringement of its copyright, infringement of its trademarks, passing off, dilution, rendition of accounts, damages and delivery up etc. The appellant is a company incorporated under the laws of the State of Delaware, United States of America and that all the defendants reside in Mumbai and did not carry on business within the jurisdiction of the Delhi Court. The appellant/plaintiff contended that the Delhi Court has jurisdiction to entertain the said suit placing reliance on the provisions of Section134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957 and contending that plaintiff did infact carry on business in Delhi though it had virtual office it had several clients there through its online website.

Over the years this strengthening of IP legal framework through case law has led to proliferation of electronic commerce in India and many foreign investors prefer investing in Indian businesses .

Conclusion

Various legislative, legal enforcement & administrative changes and progressive judicial approach have contributed towardsstrengthening of India's IP framework in Digital India .Its broad vision & Mission of 'Make in India' is indeed both promising & achievable .India is more a global village today with foreign investors from all parts of the world. India follows and is signatory to international conventions that protect IP and offers international cooperation to protect Intellectual property& businesses across all levels. With Latest infrastructure in IP offices &latest technology deployed in all its administrative offices, Digital India is a lucrative , safe and promising destination for foreign investors intending to do business in India!

Profile of White Paper Author, KARNIKA SETH

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Karnika Seth is an internationally acclaimed Cyberlawyer and Expert on Information Technology & Intellectual Property laws practicing in the Supreme Court of India since year 2000. Ms. Seth is also a distinguished Author and a speaker on pertinent legal issues, in Industry conferences, electronic and print media. She is the Founding Partner of Seth Associates, an established Indian law firm and heads Lex Cyberia, World's first integrated research centre dedicated to promoting knowledge and rendering legal consulting and cyber forensics services in India and across the globe. In recognition of the substantial contribution in the field of commercial laws practice, Ms. Seth was awarded the "Corporate Excellence Award" by Amity Global Business schools in the year 2009 and "Speaker of Eminence Award" in 2013by the Indus Business Academy. She authored a comprehensive book, Computers, Internet & New Technology Laws published by Butterworths Lexis Nexis and received the "Law Day Award" in 2012 from the Hon'ble Chief Justice of India and Hon'ble Law Minister. In 2015, she authored a book titled **Protection of Children on the Internet** published by Universal Publishers which received the Digital Empowerment Award for 2015 from Broadband India Foundation and Government of India . The book elucidates key practices for safeguarding online protection of children. Ms. Seth is also a renowned Speaker and Visiting Faculty to various law enforcement authorities in India, including the National Judicial Academy, the National Police Academy, Central Bureau of Investigations and the National Investigations Agency.

Ms. Seth specializes in handling complex cyberlaw & Intellectual property matters (both civil and criminal) before various courts in India.She is the Principal legal advisor to many multinational groups and government entities.As a cyber law& IPexpert,she has significant & diverse transactional experience encompassing Internet and e-commerce laws,Social Media laws,Intellectual Property ,Defamation, e-governance,International Trade andBusiness laws. She has actively resolved many Cybercrime cases in conjunction with the law enforcement authorities in India.

Ms. Seth is empanelled as legal expert to advise National Internet Exchange of India and the Office of Comptroller of Certifying Authorities constituted under the IT Act, 2000. Her views have been solicited by the Parliament and the Ministry of Information Technology for strengthening the cyberlaws in India. Ms. Seth is appointed as legal expert on the board of Tradeindia Group and as a Advisory board member of the ITS The Education Group, Ghaziabad.

Karnika Seth graduated in Law from the Campus Law Centre, University of Delhi. She received her the Masters degree in Law in Corporate & Commercial laws, Intellectual property, Internet laws, International Trade & Arbitration from the King's college, University of London in the year 2002.
