

The Right to Know and the Copyright

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ABSTRACT

The paper discusses the importance of the right to know and the copyright and how they are relevant for democratic functioning.

Keywords: Copyright, fair deal, right to know, fundamental freedom

1. INTRODUCTION

The interface between the right to know and limited monopoly over creative expressions to the authentic owner represent conflicts of interests. Proprietary concerns on one hand and the social interests on the other need to be reconciled in almost every area where individual rights conflict with social concerns. If the copyright is considered as an extension to the right of speech and expression, it contradicts another fundamental right, i.e., right to know read with the right to life under Article 21. Recently, the right to education, has been incorporated into part III, The Fundamental Rights chapter of the Constitution of India by 86th amendment. Both these rights are equally important and relevant for democratic function.

2. LIBERTY OF THOUGHT, EXPRESSION AND COMMUNICATION

Free expression has three dynamic dimensions. In a democratic society, right

to know, right to think, and right to communicate are the essential components of freedom of speech of expression read with the right to meaningful life. The edifice of democracy stands on the foundation of people's will, which can only be formulated based on knowing, thinking and then expressing that thought which includes receiving and responding to it by others. Exchange of information leads to discussion.

The democratic spirit lies in discussion. In fact, democracy can be rightly described as the governance by discussion. There is no need to guarantee the liberty of thought by law. A man is endowed with the attribute of thinking along with an absolute liberty to do so. It is inherent in every living being, more so in a human being. However, the liberty of thought becomes meaningful only when thought is communicated, accepted or disputed, developed or changed into a different forms. There is need for law to protect this freedom of communication, since it faces threats from the powerful sections including the State. The purpose of discussion and

the freedom of speech and expression will expand the scope of democratic exercise. The discussion and negotiation are now widely practiced as methods in resolving the conflicts between nations and disputes between the people as alternative dispute resolution processes.

While consent is the basis of formulation of the representative democracy, dissent is essential for its meaningful function. Either in manufacturing the consent or developing the dissent, there is dissemination of information and knowledge. Every citizen is expected to be vigilant to secure the benefits of the democracy. The knowledge within accessible range and means of expression would operate as instruments of citizens vigilance. It is also traditionally believed that knowledge should not be considered as a vested proprietary interest to be owned physically.

Freedom of expression along with free flow of information as a human right was considered to be essential in the pursuit of peace and progress by the United Nations in its Universal Declaration of Human Rights (Article 19), in 1948, which reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

International Covenant on Civil and Political Rights reinforced this provision [Article 19(2)] as "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other of his choice."

The integral yoga of informatics literacy education and social transformation is the revolutionary essence of the new social order and the citizens' right to know. The episode between the Czar of Russia and revolutionary leaders explain the linkage between politics and education. The Czar, worried at the prolonged disturbances in his empire, once called the leaders of the revolt for talks. "What do you want", he asked. "A better life", they replied.

Asked to be specific, the leaders said, "Reduce taxes". "Yes, granted, and then?" the Czar prompted. "Give education to our children", replied leaders.

The Czar was reluctant because he knew what would happen to the despotism that the Czars had nurtured in Russia if the power of knowledge was given to the commoners¹. Right to know is nothing but right to empowerment because knowledge is power.

3. RIGHT TO KNOW AND DISSEMINATION OF KNOWLEDGE

Traditional societies, especially the Indian culture, believes in dissemination of knowledge without imposing any cost or consideration. Dissemination is an essential attribute of knowledge. Oral tradition, *Gurukul*, a traditional learning centre, where disciples reside in an *Ashram* (hermitage) and serve the teacher to learn the knowledge) practices that the valuable knowledge passes through the generations uninterrupted. Even though it was criticised that such a tradition led to a situation where documentation is lacking, the flow of knowledge did not stop. The documentation, which is one of the purposes of copyright law, was also not prohibited. From palm leaves to internet, the knowledge has been continuously documented. The *Ramayana*, which embodies the ideal human conduct, has been retold millions of times in hundreds of languages and dialects in myriad forms including the new medium, Internet.

The ancient stories from various *Puranic* literature, mythology, legends and some historically known sources suggest that the original authors did not attach much value to the money but were interested in sacred cause of spreading the ethical and moral values through their creative writings. Every story or poetic expression was created with meaning and purpose or providing eternal peace and tranquility. Several legends in ancient India are replete with episodes wherein writers like Pothana (Bammera Pothana, a Telugu poet from Orugallu, now called Warangal,

is believed to have refused to dedicate his *Bhagawatham* to a local king, inspite of mounting pressures and inducements. He never claimed authorship to that poetic translation of Vyasa's *Bhagawath* in Sanskrit, which he stated was an ordain from Lord Rama, Tyagaraja (Thyagaraja, a Vaggeyakara, a combination of lyricist, composer and singer, who preferred Rama's Sannidhi to Nidhi, saying 'nidhi chaala sukhama, Ramuni Sannidhi seva Sukhama...' in one of his famous keerthana (devotional songs)), Annamaya (Tallapaka Annamacharya, also called Annamayya, a devotee of Lord Venkateswara of Tirumala, in whose praise he sang more than 36 thousand devotional songs which were documented in copper plates, refused to sing in praise of a local king in return to material benefits offered by him. The legend goes that he was imprisoned and harassed before the God himself broke his chains), and Saint Jayadeva (author of Gita Govindam, a famous poetry embodying the eternal love of Lord Krishna and Radha, did not yield to the law of local king that he should sing only his songs or face the imprisonment) never preferred royal patronage and rejected the material wealth when offered in exchange to dedication of creative literary work.

Acharya Ramanuja [a renowned protagonist of Vishisthadvaita (Qualified Monism) belonging to 11th century AD] was a philosopher saint who reformed the Vaishnava cult and broke the walls of secrecy that shrouded the "Tirumanthra", great mantra of Narayana, chanting or meditating which leads to salvation, and offered it to all irrespective of caste, creed or religion, by stating it from the top of the *Gopuram*. Adi Shankara Acharya [a famous protagonist of Advaita (Monism) belonging to 9th century AD], was another great saint who's short but reverberate life presents his philosophy of spreading the knowledge. He reformed the religion to open up learning process breaking the social barriers.

Almost every language and every Indian state has such legendary personalities who never cared for material prospects and went on disseminating the knowledge freely. Thus the exploitation of economic value from the

writings or selling it for money or limiting its reach or monopolising or blocking the wisdom was never the objective for these valuable creators. A stagnated knowledge does not serve the purpose and is almost equivalent to non-existent. Even the modern democratic working requires free flow of information and knowledge without any hurdles. The right to know is not specifically guaranteed by the Constitution of India, but is Read into the Right to Live under Article 21.

Almost all democratic constitutions provided a guarantee for right to freedom of speech and expression. It is aimed that the laws of copyright would enhance the value of such speech and expression, as it guarantees an effective protection from economic exploitation to the creative speeches and expressions like poetry, criticism, etc. from being reproduced without a licence.

First amendment to the US Constitution prohibits Congress from making any law abridging the freedom of speech and expression of press. The same Article 1 (Section 8) states that the "Congress shall have power...to permit progress of science and useful arts by securing for limited time the authors and inventors exclusive rights to their respective writings and discoveries".

Article 19 (Section 1a) of constitution of India, provides for right to freedom of speech and expression. The grounds of restrictions listed under Article 19 (2) do not contain 'copyright'. Does it mean that constitution makers did not contemplate copyright as a restriction on the freedom of speech? The judiciary has recognised the right to know in Article 21 as a necessary ingredient of participatory democracy [Reliance Petroleum Ltd vs Proprietors, Indian Express Newspapers, Bombay (P) Ltd, (1988) 4 SCC 592]. Justice P. Venkatarama Reddy, explained, the basis of right to know in our constitutional democracy in the March 13, 2003 judgment [Supreme Today 93] (2003) 3 nullifying the Amendments to Representation of People's Act in the following words:

"In the Constitution of our democratic Republic, among the fundamental freedoms,

freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post independent era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the courts. Barring a few aberrations, the Executive Government and the Political Parties too have not lagged behind in safeguarding this valuable right, which is the insignia of democratic culture of a nation."

Nurtured by this right, press and electronic media have emerged as powerful instruments to mould the public opinion and to educate, entertain, and enlighten the public.

Freedom of speech and expression, just as equality clause and the guarantee of life and personal liberty has been very broadly construed by the Supreme Court right from 1950s. It has been variously described as a 'basic human right', 'a natural right' and the like. It embraces within its scope the freedom of propagation and inter-change of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right.

'The right to know', as was observed by Justice Mathew is "Which is derived from the concept of freedom of speech, though not absolute is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". As said very aptly: "In a Government like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries."

The next milestone, which showed the way for concretising this right, is the decision in *S.P. Gupta vs Union of India* [(1981) Suppl.

SCC, page 87] in which the Supreme Court dealt with the issue of High Court Judges' transfer. Justice Bhagwati, observed "The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception..."

These two decisions have recognised that the right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(a). The pertinent observations made by the learned Judges in these two cases were in the context of the question whether the privilege under Section 123 of the Evidence Act could be claimed by the State in respect of the Blue Book in the first case, (*Raj Narain's case*), and the file throwing light on the consultation process with the Chief Justice, in the second case. Though the scope and ambit of Article 19(1)(a) vis-a-vis the right to information did not directly arise for consideration in those two landmark decisions, the observations quoted have certain amount of relevance in evaluating the nature and character of the right.

Then, in *Dinesh Trivedi vs Union of India* [(1997) 4 SCC, page 306], the Supreme Court was confronted with the issue whether background papers and investigatory reports which were referred to in *Vohra Committee's Report* could be compelled to be made public. The observations of Chief Justice Ahmadi, are quite pertinent, "In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute."

The next decision, which deserves reference, is the case of *Secretary, Ministry of I & B vs Cricket Association of Bengal* [(1995) 2 SCC page 161]. Has an organiser or producer of any event a right to get the event telecast through an agency of his choice whether national or foreign? That was the

primary question decided in that case. It was highlighted that the right to impart and receive information is a part of the fundamental right under Article 19(1)(a) of the constitution. On this point, Justice Sawant, had this to say at Paragraph 75. "The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property....."

Justice Jeevan Reddy, spoke more or less in the same voice. "The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them."

A conspectus of these cases would reveal that the right to receive and impart information was considered in the context of privilege pleaded by the State in relation to confidential documents relating to public affairs and the freedom of electronic media in broadcasting/telecasting certain events. The right to know is not only against the information from the monopolistic holding of the state but also from the clutches of private corporations and the individuals, unless they infringe upon the confidentiality or privacy respectively. Thus, only the security condition can justify holding of information by the government, and similarly the confidentiality or privacy can block the information flowing from private bodies or persons.

Therefore, the copyright regulation in the context of right to liberty of thought, expression, economic exploitation and right to know as provided to every person or citizen of this country needs to be studied.

4. WHAT IS COPYRIGHT?

Copyright is the exclusive right of the author to derive economic benefits from his own writing or artistic performance or creative work. Copyright regulation basically protects the interests of writer or creator or performer from commercial exploitation by others. As nobody can own or perpetuate perpetual vested interest in knowledge, even the copyright regime throws every creative writing or invention for the world open after certain prescribed period.

The copyright law provides an incentive to creative activity and then permits the society to benefit at large. After the invention of printing press the multiplying of any creative writing became much easier and necessity to protect the right for the creator also increased. Copyright is relatively a modern concept that came into existence with British rule.

The concise Oxford Dictionary defines copyright as "the exclusive right given by law, for certain term of years to an author, composer, etc. to print, publish, and sell copies of his original work". The moral justification for providing legal protection is the principle that a man should reap the fruits of his own creation or mechanical labour.

Copyright is basically the right to copy and make use of literary, dramatic, musical and artistic works and cinematography films, sound records, broadcast and telecast. Technological progress has made piracy of copyright work simple and difficult to control. In the rapidly changing technological environment, copyright protection is being extended to many areas of creative work particularly in the computer industry, relating to computer software and databases. To act as a deterrent against computer software piracy and video piracy, the provisions relating to protection of computer software have been tightened.

According to Paul Goldstein, the traditions of copyright and author's right rest on sharply differing premises. Copyright's philosophical premise is utilitarian: the purpose of copyright is to stimulate production of the widest possible variety of creative goods at the lowest possible price. By contrast, author's right is rooted

in the philosophy of natural rights; an author is entitled to protection of his work as a matter of right and justice. The ideal author's right legislator will vote to extend protection without any showing of social necessity and will reject it only if the extended protection would materially hamper socially valuable uses of protected works. Berne Convention bridges the two traditions, with the result that its extensive minimum standards have dictated substantively similar rules for countries in both camps. Similarities in economic, political, and social structures across the two systems also explain the convergence, as do local industry politics. Professor William Cornish is certainly correct to observe that "Over primary issues of making the rights granted legally effective and so economically meaningful, the two approaches flow together in a single stream. Where there are divergencies, they are often more the product of low political lobbying rather than of high and disinterested thought"².

National laws on copyright and neighbouring rights are far more similar than they are different. Widespread adherence to the Berne Convention for the protection of literary and artistic works explains much of this harmony. Around 140 countries belong to Berne Union. The TRIPS agreement with 135 adherents, brings national laws into more immediate compliance with Berne norms as well as with norms introduced by the TRIPS Agreement itself. A handful of universal principles are common in national copyright laws. One is the axiom that copyright law will protect only original expression, leaving ideas –building blocks of creativity free for all to use. Legislation or case law in every country holds that a literary work's themes, plots, and stock characters are unprotectable, as are discrete colours and shapes in visual art, and rhythm, notes and harmony in music.

Article 9 of the TRIPS Agreement, obligating members to comply with Articles 1 through 21 of the Berne Convention's Paris Act, presumably requires them to protect all forms of 'literary and artistic works' including "every production in the literary, scientific and artistic domain" and not only the examples listed in

Article 2 of the Convention. To these classes of protectable subject matter, Article 10 of the TRIPS Agreement adds that "computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention TRIPs Agreement Article 10(1), and that "compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such" [TRIPs agreement Article 10(2)]. Article 9(2) ("Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such") expresses the traditional principle that has long been a norm of international copyright protection. The origin of the clause can be traced to a Japanese proposal that would have excluded programming languages, rules, or algorithms from the scope of protection for computer programs; the proposal evolved into an exclusion for ideas, procedures, methods, or systems underlying computer programs or databases, which was then expanded and applied to all forms of literary and artistic works.

By throwing open the ideas, themes, plots and stock characters, the copyright laws of different countries and the Berne Convention have secured the discussion, free flow of creative thinking. This is a point of reconciliation between all important right to know and significant copyright. However, one of the most important aspects to maintain the minimum standards as agreed upon by Berne Union, to provide a uniformity and universality of the norms. Appreciating the need and social purpose of leaving knowledge for the universal absorption, the copyright law provided for throwing the expressed knowledge open after a limited period of protection to its creator.

The limitation on monopoly of the knowledge as explained by the term of life of the author and 50 years. The TRIPs agreement provides that in the case of works, other than photographs and applied art, for which the term of protection is calculated on a basis other than a natural life, the term shall be no less than fifty

years from the year of publication or, if the work is not published within fifty years, then fifty years from the year it was created (TRIP Agreement, Article 12). Though the Agreement says it is minimum of the term, which means that the nations are at liberty to increase the term, it is not ethical and reasonable to extend the period of monopoly beyond fifty years. The Sonny Bono Copyright Term Extension Act, 1998 passed by Clinton Government extended the term by another 20 years by increasing the monopoly to the life time of creator and 70 years only to further exploit the economic benefits from Disney cartoon "Steamboat Willie", the cartoon in which Mickey Mouse (though his name was Mortimer in this work) appeared for the first time. The cartoon got its first copyright in 1928. It was created under 1909 Act and so with its single renewal. Steamboat Willie would have passed into the public domain in 1984, available for anyone to use without permission. When the 1976 Act went into effect it gave all pre 1978 works protection until 2004. But the extension under the Bono Act now provides copyright protection for Steamboat Willie till 2023, 95 years from its creation. Thus Disney will still be able to protect Mickey Mouse under trademark law even after the copyright for Steamboat Willie finally expires. Such an extension beyond the 'standard minimum' defeats the objective of limited monopoly.

Another area where the conflict between the right of society to know and the copyright of author or the transferee from him is the doctrine of fair use and varieties of exemptions made available for the use of copyrighted knowledge though it amounts to infringement otherwise. In the absence of fair use doctrine, the copyright law would be harsh, unreasonable and against public policy favouring dissemination of information and knowledge and plainly would have been unenforceable. The old 1909 Copyright Statute of USA was stringent as it gave each copyright holder an exclusive right to 'print, reprint, publish, copy and vend the copyrighted. As stated in this act the right was absolute: the wording was put in such terms that even pencil-and-paper copying was a violation of the US Copyright

Act. The 1909 Statute's terms were so stringent that if enforced to the letter, it could have prevented anyone except the copyright holder from making any copy of any copyrighted work. American courts assumed, in creating a judge-made exception to the absolute language of the 1909 copyright statute, that "the law implies the consent of the copyright owner to a fair use of his publication for the advancement of science or art (statement of Wittenberg who offered a good non-technical description of fair use before it was expanded in 1967 as quoted by Dwight L. Teeter and Bill Loving in *Law of Mass Communications, Freedom and Control of Print and Broadcast Media*, NewYork Foundation Press, 2001, p.854). The fair use doctrine, although a rather elastic yardstick, was a needed improvement.

If the violation is for fair purposes and non-commercial, non-exploitative purposes, it cannot be penalised. The author can copyright the work only when it is original. To prove or establish originality is the pre-requisite for the action for violation, and secondly the defence available to the defendant is 'fair dealing'.

Section 52 gave a detailed explanation as to what is not an infringement, and explained the doctrine of fair dealing or fair use. These provisions, as given below, balance the interests of community with those of individual authors, and permits spread and dissemination of knowledge:

- ✂ A fair dealing with a literary, dramatic, musical or artistic work for private use, including research, criticism or review, whether of that work of any other work
- ✂ Making of copies or adaptation of computer program to use, for back up copies, for using it for inter operability, to observe, study or test of the computer program, or making copies for non-commercial personal use
- ✂ A fair dealing for reporting current events in a newspaper, magazine or similar periodical, or by broadcasting or in a cinematograph film or by means of photograph

- ✘ Reproduction for purpose of judicial proceedings or for report of a judicial proceedings
- ✘ Reproduction of work prepared by Secretariat for the use of members of that legislature
- ✘ Recitation of reasonable extract from a published literary or dramatic work in public
- ✘ The publication in collection for the use of educational institutions
- ✘ Reproduction by teacher in course of institutions or in question papers
- ✘ Performance in the course of educational activities in institutions
- ✘ Paying in public in an enclosed room or in clubs in certain circumstances.
- ✘ Performance in an amateur club given a non-paying audience or for religious institutions including a marriage procession
- ✘ Reproduction in newspaper and magazine of an article on current economic, political, social or religious topics in certain circumstances
- ✘ Publication of report in newspaper, of a lecture delivered in public
- ✘ Making a maximum of three copies for the use of a public library
- ✘ Reproduction of unpublished work kept in a museum or library, where the author is known and publication is made 60 years after his death, it is not infringement
- ✘ Reproduction of any matter published in Official Gazette or reports of Government Commission or other bodies and any judgement or order of court, tribunal or judicial authority not prohibited from publication
- ✘ Production or publication of a translation of Acts of Legislature or rules
- ✘ Publishing a painting or photograph of a work of architecture
- ✘ Publishing of a painting, drawing, photographs or engraving of sculpture which is permanently situated in a public place, and Including such things in the films
- ✘ The use by the author of an artistic work, where the author is not the owner of the copyright therein, provided he does not thereby repeat or imitate the main design of the work
- ✘ Reconstruction of a building referring to original architecture, drawing or plans, and
- ✘ Exhibition of film after the expiration of the term of copyright therein, etc.

4.1 Exemptions

However, in order to protect the interests of users, some exemptions have been prescribed in respect of specific uses of work enjoying copyright. Some of the exemptions are the uses of the work like for the purpose of research or private study; for criticism or review; for reporting current events; in connection with judicial proceeding; and performance by an amateur club or society if the performance is given to a non-paying audience.

The Karnataka High Court justified the provisions of balance between the rights of authors and interests of society [Gramophone Co. of India vs Mars Recording Pvt Ltd 2000 PTC 117 (Kar)]. The provisions under Section 52 are intended to ensure that the monopoly rights should not be detrimental to the larger interests of general public. It is a perfect balance of the statute till the technological advances broke down this balance. The multimedia improved the quality of reproduction and speed of transmission besides converging the entire existing media into one. The Internet and digital media made the rights of individual author very vulnerable.

4.2 Intention

Once the copyright is found to be infringed the motive or intention of the person who violated it is irrelevant. If the conditions under Section 51 are satisfied and none of the exceptions specified in Section 52 are applicable, the infringement would invite the penalty prescribed under the law, irrespective of the good motive or lofty intention of the violator. Even though the defendant acted innocently, the invasion constitutes a wrong as the copyright is a proprietary right.

4.3 Changes in Doctrine of Fair Use

The doctrine of fair use has underwent several changes in India. Importing copyright work into India is an infringement according to Section 51 (b) (iv). Earlier importing for the private and domestic use of the importer was not an infringement. The words "except for the private and domestic use of the importer" omitted by Act 65 of 1984, Section 3 with effect from 8 October, 1984 have become infringement. It was in fact originally a fair use and from 1984 onwards it became unfair. But another provision is added to this Section stating that "Import of one copy of any work, for the private or domestic use of the importer is not an infringement".

The 1995 amendment substituted clause (ii) of Section 51 (a), with regard to communication of the work to the public, which can include even Internet, the copyrighted work. Copyright is deemed to be infringed if any person permits, for profit, any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work. However, an exception is also provided in the same clause stating "Unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright." Thus, lack of knowledge about existence of copyright in the place, which he is communicating to public for profit will absolve from liability for infringement.

Section 52 deals with exceptions and fair use doctrine. Section 52 (1) (aa) specifically refers to exceptions to computer programs' copyright infringement. The making of copies or adaptation of a computer program by the lawful possessor of a copy of such computer program in order to utilise for the purpose for which it was supplied, or to make back up copies for temporary protection is permitted. This is an obvious thing which was restated. But there is no element of exception which doctrine of fair use accorded to other kinds of infringements of other types of copyrights.

However, clause (ab) permits the lawful possessor of a computer program, to obtain any other essential information for interoperability of an independently created computer program, if that information is not readily available. Clause (ac), permits the observation, study, or test of functioning of the computer program in order to determine the ideas and principle which underline any elements of the program while performing such acts necessary for the functions for which the computer program has been supplied. Clause (ad) allows the making of copies or adaptation of the computer program from a personally legally obtained copy for non- commercial personal use.

5. RECENT CASES ON PUBLIC INTEREST AND FAIR USE

In 1998, in *Pro Sieben Media AG vs Carlton UK Television Ltd.* [(1999), 1 WLR 605] the Calton UK TV broadcast a current affairs programme, which critically analysed the issue of cheque book journalism and the sale of stories about people's private lives to the media. The programme included a 30 second sequence taken from an interview, which was the broadcast of the plaintiff Pro Sieben with Mandy Allwood, a woman who was notorious at the time for being pregnant with eight fetuses, and making money out of her situation. The plaintiff complained infringement of his copyright and the defendant pleaded the fair use defence for criticism or review. The trial judge refused to accept the defence of fair use and held there was no sufficient acknowledgment of the author of original programme. The Court of Appeal

reversed the decision finding that there had been sufficient acknowledgement. The Court explained that the exemptions under doctrine of fair use had achieved proper balance between protection of the rights of a creative author and the wider public interest and that the free speech is an important part of that wider public interest. The fair dealing is for the purpose of criticism, that criticism may be strongly expressed and unbalanced without forfeiting the fair dealing defence. The words 'for the purpose of criticism or review' and 'for the purpose of reporting current events' should be construed as composite phrases. The intentions and motives of the user of copyright material were highly relevant in relation to fair dealing. The criticism includes the criticism of ideas and style. The programme was a comment on cheque book journalism in general and the treatment by the media of the Allwood story in particular. The event was a current event, and the use of extract was short, and thus there was no infringement.

5.1 Diana Case

In *Hyde Park Residence Ltd, vs Yelland* (2001 Ch. 143), a newspaper published still photographs taken on a security camera when than Princes of Wales Diana, and her friend Dodi Fayed visited Villa Windsor in Paris on the day prior to their deaths in a car accident. The photographs were stolen by a security guard and sold to the newspaper, which published them more than a year later. Hyde Park had sought summary judgment at the first instance relying on breach of copyright. The defendant relied on the defence of fair dealing for the purpose of reporting current events. The judge upheld it as fair use. However, it was reversed on appeal on motives of the alleged infringer, the extent and purpose of the use, whether that extent was necessary for the purpose of current events in question. In the case the work (photographs by security camera) had not been published or circulated to the general public. This was considered to be one of the important indicators that the use was not fair and not for the purpose of reporting current events.

The Court examined the doctrine of fair use on the touchstone of a reasonable man and said: "A fair minded and honest person would not pay for the dishonestly taken driveway stills and publish them in a newspaper knowing that they had not been published or circulated". Also, the extent of the use was also held to be excessive.

6. WHO DERIVES THE ECONOMIC BENEFIT?

Though the law contains several provisions which try to reduce the rigour of the monopoly created by copyright protection, practically the copyright in the hands of an outright purchasing publisher becomes a tool of economic exploitation of creator's work. Generally the unilateral, arbitrary and unreasonable agreements of copyright transfer all statutory benefits to corporate or commercial publishing houses. As the unscrupulous publishers desire to derive more profits, they increase the price, offer higher commissions for the sellers and pay very less to the author for an outright purchase of copyright and then enjoy the commercial benefits for life of the author and 60 years. In India the book industry is not writer's market. Especially in Andhra Pradesh, the reduced book reading habit and buying capacity offers no incentive to author.

The publisher is cleverly exploiting such a position. This in fact, leads to a situation where the financial incentives for the author are negligible, and discourages him from writing a second book. This defeats the purpose of the copyright law totally. Thus because of these pathetic conditions in developing countries, the law must not be too harsh in protecting the corporate publisher rights; rather it should be soft towards the rights of the authors and interests of the ultimate reading consumer population. If not, the law serves the interests of commercial publishers depriving both, the authors by meagre payments and the readers by collecting the higher price.

An incident, which instead of operating as an incentive to original author for generating an idea and expressing in a tangible manner,

helped those who copied it to make huge profits. In *Indian Express Newspaper (Bombay) Pvt Ltd vs Jagmohan* (AIR 1985 Bom 229), the reporter of Indian Express, Ashwini Sarin investigated the flesh trade in Madhya Pradesh and purchased in Shivpuri village, a woman "Kamla" for Rs 2,300 to establish the trafficking in women. He then wrote series of articles exposing the prostitution trade and involvement of bigwigs from politics and police department on 27th, 29th, and 30th April 1981 and subsequently on 2nd May 1981.

Mr Vijay Tendulkar, well known playwright, scripted a play by name 'Kamla' based on the Indian Express exposure, and staged the play for 150 times in 32 cities and in seven languages. Jagmohan Mundhara, a film producer, planned to produce a film on the same theme based on the script of Vijay Tendulkar. Ashwini Sarin and the Indian Express newspaper complained that Jagmohan and Vijay infringed their copyright. The Indian Express contended that, when series of sensational reports resulted from sweat of brow of the journalists, and forms an effective expression of what was happening around, why not it be protected? How is that others could make capital out of it leaving the original authors of the 'exposure' without any protection to their writing?

The Bombay High Court held that there could not be any copyright in an event, which actually took place. The Court observed that "There is distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour and literary talent to these materials. The ideas, information, national phenomena and events on which an author expends his skill labour, capital, judgment and literary talent are common property and are not the subject of the copyright".

This judgment ignored the skill, capital, talent and labour invested by the journalist besides his skillful expression in the form of investigative story and simply termed the incident as national phenomena and finally refused the copyright to journalists. The Court should have recognised the way the national

phenomena or tragic happening in society was creatively reported by the journalist alerting the authorities.

The justice could have been ordering Vijay Tendulkar and Jagmohan to acknowledge the efforts and risk of journalist and secure his permission on reasonable payment of a share in their proceeds, otherwise, it would amount to permitting a theatre and cinema person to commercially exploit an expression of idea which is not their own, which is against the spirit of copyright regulation.

7. HARSHNESS OF ENFORCEMENT PROCEDURE

An Anton Piller Order can be passed by the court in response to the petition by the copyright holder. It is an *ex parte* order directing the defendant to permit the plaintiff, accompanied by the solicitor or attorney to enter his premises and take inspection of relevant documents and articles and take copies thereof or remove them for safe custody. It is an extra ordinary remedy, which is not generally available for any plaintiff in other civil cases. This special order was extended by the courts to operate against multiple number of unknown defendants who might have been infringing the copyright as per the apprehensions of the plaintiff. It is called John Doe order, the name indicates the common man of the US, against whom the *ex parte* search and seizure order was issued. The US courts limited it to a maximum of ten unknown defendants. But in *Ten Sports* judgment the Supreme Court in India has issued the "John Doe" order against multiple numbers of unknown defendants.

The Supreme Court in India has issued the John Doe order in *Ten Sports* case, in addition to orders the nature of Anton Piller order. The Advocate Commissioner appointed by the Court is permitted by this order to enter the premises of unnamed defendants and record evidence of infringing materials (photographs and video shots), which could be used in civil or criminal proceedings.

The Supreme Court proved that such orders can be passed against an unspecified

number of defendants, which means that authority wider than provided for in developed countries like the US and Canada was made available. This may be found necessary to expedite the action and enabled the judiciary with much needed authorisation to crack down on copyright infringement in the film and broadcast industry. There can be the seizure of the material from the unnamed defendant's premises also. Class actions of a group of defendants were also permitted in this case. It is an abnormal power to check piracy with an urgency that is imperative for Intellectual Property with short shelf life.

It may appear to be reasonable in curbing the video and audio piracy racket, which is rocking the film industry, but generally it creates hardship for hundreds of people. If the unscrupulous publishers can use this, even the authors sometimes, may become victims at the hands of their own copyright assignees. It may be against natural principles of procedural justice embodied under different municipal law generally. Except in cases of video and audio cassettes involving the feature films, this procedure will leave unreasonable harshness to favour copyright holders rather than the authors.

8. CONCLUSION

The purpose of liberalisation, privatisation and globalisation is again to throw the enterprise open to any competitor depending on his efficiency and intelligence in production and marketing. The Internet is the super high way of information, which technically cannot be limited or regulated. By creating a vested interest of property in knowledge in some companies or individuals, the copyright or patent tries to limit the spread and its utility for welfare of mankind. One has to understand the concept of copyright and the context in which the copyright regulation is being made into a rigid law all over the world. In a modern knowledge society of the democratic world, the research is a continuing process and every one in any corner of the world must have freedom to develop from earlier thought and scientific or technological invention or discovery. Rights of individuals in the society and the interests of community has to be

kept in mind in providing exclusive rights over the so called knowledge. The technological advancement has made the violation of copyright very easy and regulation very difficult or sometimes impossible. The advancing technology converges various media into one or another. If the spoken word is the example of inter-personal communication, the book and newspaper represents printed word. Audio is repeatable spoken word. The cinema is a mixture of spoken word and visual word. The speech and scene converge together in cinema, making it more powerful medium. The video is another dimension of cinema, capable of easy multiplying the possibilities of exhibition for an individual or a small gathering. Video includes within itself, audio, cinema, printed or spoken word.

The Internet is convergence of all these media plus a whole lot of world's library of audio-visual and book archives. As the new media techniques are conquering the world of communication, copying is becoming easier and speedier than printing. Multiplication is easy. Exhibition or performing for smaller gatherings has become much more easier. If 'fair dealing' is not allowed, and everything other than 'original' is not hindered from reaching the nook and corner of the world, the copyright regulation would become a hindrance for the democratic need of communication and information flow.

The multinational corporations of advanced countries, who have major stakes of vested interests in monopolising the knowledge, pose a threat if armed with the stricter copyright regulation. As apprehended the patents in pharmaceuticals might threaten the right to life and right to health of an individual in a poor country because the monopoly of drug making. The rigid copyright regime also might threaten the countries with less knowledge in relation to their existence and economic advancement. However, there is still a need to protect the copyright of the authors from clever publishers and commercial exploiters. The enforcing officers and the judicial machinery have to understand the limitations of the statute and interests of individual consumers of 'knowledge' and must have a fair deal between 'originality' and 'fair use'.

As the copyright is an extension of freedom of speech and expression, a constitutionally recognised fundamental right, the individual's right to protect the economic interests derived from the publication, public exhibition and any other kind of multiplication for a protected period must be limited to as minimum period as possible, while expanding the scope of fair use as far as possible.

The limited monopoly should end as soon as possible, and beyond which the

intellectual property should belong to the mankind as a whole.

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“aano bhadra krathave yanthi visvathaha”

Let noble thoughts come to us from every side

- *Rigveda*, I-89-i.