

Infringement of Copyright and Doctrine of Fair Use

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ABSTRACT

The paper analyses the Indian laws related to copyright, concept of infringement of copyright and exceptions to the same particularly with regard to fair use or fair dealing of copyright.

Keywords: Copyright, IPR, WIPO, UCC, WPTT, neighbouring rights, TRIPs, WTO, neighbouring rights, fair dealing.

1. INTRODUCTION

Creative work pertaining to literary, dramatic, musical, artistic, cinematography, sound recording, etc. is protected under Intellectual Property Right (IPR) through copyright protection. Copyright is a unique kind of intellectual property importance of which is increasing day by day. It does not fall in the category of industrial property. In fact, copyright was the first intellectual property, which received legal protection in the world. Copyright law, unlike patent and trade secret, protects the expression of an idea rather than the underlying idea itself. Unlike patents, the subject matter of copyright is literary and artistic works. All such works are protected as long as these are original expressions of an idea. The idea/expression dichotomy enables others to express the same or similar idea and receive copyright protection as long as the expression satisfies the test of originality. The most basic right conferred by copyright

is the right to exclude unauthorised reproduction of the copyrighted work. Most laws related to copyright also prohibit certain acts such as performing the work in public, making a sound or audio-visual recording of the work, making a motion picture of the work, broadcasting or publicly communicating the work and translations or adaptations of the work. In addition to these economic rights, most copyright laws recognise moral rights, which normally include the author's right to claim authorship and to protect the work from mutilation or distortion¹. It is said that what is worth copying is worth protecting. This principle is squarely applicable to the protection of copyright in relation to various works like artistic, literary and musical works.

Copyright is the most vulnerable form of intellectual property, as it is the most fragile and prone to abuse and theft. Generally, it is said that advancement of science and technology improves the standard of life in

the society. However, in the case of copyright protection the advancement has posed greater challenges for protection of copyright right from the invention of printing machine by Johannes Gutenberg of Mainz, Germany. With the advent of reprographic technologies like photocopying, etc. it has become more difficult to protect the copyright of the authors. As the protection of intellectual property is based on the principle of economic reward or incentive to the creator, they feel insecure in the present environment. Further, the days of believing that copyright is concerned primarily with lonely starving artists are gone forever as this is now concerned with companies ranging from small to big and not for profit concerns to huge multimedia and publishing conglomerates². Apart from the institutions imparting information, like the libraries, copyright is related to the publishing industry, entertainment industry, and information technology industry.

The unique nature of copyright material does not just extend to the printed word; the original medium for which copyright was designed. It also extends to other forms of intellectual expression including audio tapes, video material, and software though in many countries this has been the subject matter of intense debate. In each and all, it is possible to deprive the copyright owner whilst leaving the original material unchanged and untouched. This is clearly a unique area of theft. Current statistics suggest that the photocopying of copyright material totals around 3,00,000 million pages a year³. In recent years, the control of piracy in copyrighted works is becoming a more pressing issue, particularly with the rapidly advancing technologies that facilitate cheap and easy dissemination of these works. The sad thing is that most of the piracy is often sought to be projected as 'fair use' or 'fair dealing'.

2. OBJECTIVE OF THE COPYRIGHT PROTECTION

The hallmark of any culture is the excellence of its arts and literature. In fact, the quality of creative genius of artists and authors determine the maturity and vitality of protection. What the law offers is not the protection of

the interest of the artist or the author alone. Enrichment of culture is of vital interest to each society and the copyright law protects this social interest (Manu Bhandari vs Kala Vikas Pictures Pvt Ltd, AIR, 1987, Delhi). The Copyright Act has been enacted to check the piracy, i.e., the labour put by the author or the copyright owner may be enjoyed by them and not by the pirates, who indulge in plagiarism and other undesirable and illegal activities of theft of intellectual property (Girish Gandhi vs Union of India, AIR, Raj, 1978 at p. 84). Thus the objects of the copyright protection are (i) enrichment of culture and heritage, (ii) dissemination of information and knowledge, and (iii) protection of the legitimate interests of authors and owners of copyright.

3. HISTORY OF COPYRIGHT LAWS

The first copyright dispute occurred in around 560 BC between Saint Columba and Saint Finnian when Columba secretly copied a Finnian, psalter after granted permission to look at it. When Finnian found out about Columba's copy, he disputed Columba's right to it. Diarmaid Mac Cearbhaill, the then High King of Ireland, ruled in favour of Finnian, saying "To every cow her calf, and to every book its copy".

The origins of copyright systems are generally placed in the practice of various monarchs in granting 'letters patent', arbitrary grants of monopoly over a particular practice or trade. Such grants were an invaluable source of power for rulers who possessed much theoretical authority, but little cash (the abuse of monopolies by the early Stuarts was a major factor leading to the English civil war). In the two centuries, following the invention of the printing press, such grants were given periodically to printers and occasionally to the authors with regard to a particular work. In Britain, the culmination of this practice was the Licensing Act of 1662, which granted a monopoly on the entirety of English publishing to the Stationer's Company of London (the *quid pro quo* for this grant was censorship of heretical and seditious

material). The Stationer's company had developed its own inter-publisher system for regulating competition, now known as Stationer's copyright, which was effectively a private copyright system made enforceable by the Stationer's monopoly. Similar contemporary developments elsewhere (such as Venice) left publisher in a disadvantageous position with the repeal of the Licensing Act in 1681 and widespread objection to monopolies⁴.

Copyright law started with the Statute of Anne, the world's first copyright law passed by the British Parliament in 1709. Yet the principle of protecting the rights of an artist predates this. It may sound like dry history at first blush, but since there was precedent to establish and rights to protect, much time, effort, and money have been spent in legal battles over the centuries. In the US, the principle took hold during the Constitutional Convention of 1787 when James Madison suggested that the Constitution include language secure to literary authors their copyrights for a limited time. The provision was passed unanimously as found in Article I, Section 8, of the US Constitution. It states: "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". Before the free speech, freedom of assembly, freedom of religion, there was copyright protection in the US Constitution. The founding fathers of the US Constitution knew copyright protection could improve society by preserving the economic incentive for people to come up with brilliant ideas and inventions. They also realised the fundamental fairness of granting control of the creative work to the author.

President George Washington signed the first Copyright Law on May 31, 1790. Nine days later, author John Barry registered his work, *The Philadelphia Spelling Book*, in the District Court of Pennsylvania, making it the first writing protected by the copyright. Since then, the Copyright Laws have been revised numerous times. The revisions have been aimed at balancing the author's right to reap the benefits of his or her work, and society's ability to benefit from that same work⁵.

4. INTERNATIONAL LEGAL REGIME OF COPYRIGHT

The copyright has no territorial limits and is transnational in nature. As access to information, which is copyrighted has become easy all over the world, thanks to the advancements made by science and technology, it has become imperative to protect the copyright not only nationally but also internationally. The international efforts to protect the copyright started in the late 19th century with the Berne Convention for the Protection of Literary and Artistic works in 1886. It was entered into force on December 5, 1887 and has been revised five times since then. It is administered by the World Intellectual Property Organisation (WIPO). The Convention is based on the principles of National Treatment and Convention minima. The Convention's scope and applications are very broad encompassing literary and artistic works which include every production in the literary, scientific and artistic domain, irrespective of the mode or form of its expression. Therefore, works such as choreography, painting, architecture, compilations and derivative works find protection under this Convention.

The published and unpublished work of authors of the member countries, are also covered under the protective umbrella of this Convention. It has established a minimum term of protection as life plus 50 years or an alternative of 50 years from publication for anonymous and pseudonymous works under Article 7 of the Convention. It also recognises certain limitations to the exclusive rights such as privilege of fair use and a possible limitation on the right of recording of musical works. Apart from the economic rights, Berne Convention also requires that the authors' moral rights be recognised and endured beyond the life of the copyright as well as term of copyright protection. India is a member of this Convention since April 1, 1928. Another international convention related to copyright is the Universal Copyright Convention (UCC) of 1952 which was developed by certain major States like the USA, USSR (erstwhile) and China as an alternative to Berne Convention.

The basic principle followed by the UCC are similar to those of Berne, except certain aspects like reduced term of protection for minimum 25 years. UCC has simpler procedures and formalities of registration, and special provisions to allow the developing countries to obtain compulsory licenses under certain conditions to translate copyrighted works for teaching, scholarship, and research purposes. One notable feature of the UCC is that it contains a Berne Safeguard Clause, which prohibits a Berne Convention country from denouncing Berne Convention and relying on the UCC in its copyright relations with members of the Berne Convention (Article XVII and appendix declaration relating to Article XVII of the Convention). India is also a member of the UCC.

Another important convention, called Rome Convention, came into existence on May 18, 1964. Rome Convention aims to protect the neighbouring rights, i.e., (i) the rights of performers like dancers, magicians, acrobats and jugglers, (ii) producers of phonograms, and (iii) broadcasting organisations and broadcasters. These rights include right to first fixation of performances, right to prohibit the direct or indirect reproduction of their programmes in the form of phonograms, and the right to fixation, reproduction and rebroadcast. Generally, the protection is granted for 20 years, computed from the end of the year when the fixation was made for phonogram and performances incorporated therein. If the performance is not incorporated in a phonogram, the term will be calculated from the end of the year when the performance took place. For the broadcasts, the year when the broadcast took place will determine the duration of protection.

The digital revolution has made an immense impact on the copyright. The advent of Internet has changed the traditional right of reproduction. In order to meet the challenges of digital era, two treaties were concluded at the WIPO—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in December 1996. Together, these treaties also known as Internet treaties represent a milestone in modernising the international system of copyright and related rights, ushering

the copyright system into the digital age. The purpose of the treaties is to update and improve the protection of the already existing copyright and related rights treaties, which date backs more than a quarter of a century to the days before the development of personal computers and the Internet. The WCT and WPPT contain a number of new standards and serve to clarify the older treaties and most importantly provide responses to the challenges of the new digital technologies. Both treaties require member countries to provide a framework of basic rights, allowing creators to control and/or be compensated for the various ways in which their creations are used and enjoyed by others. Most important, the treaties ensure that the owners of the rights will continue to be adequately and effectively protected when their works are disseminated through new technologies and communications systems such as Internet.

The treaties also clarify that the owners of rights can control whether and how their creations are made available online to individual consumers, e.g., at home via the Internet. The two treaties also break new ground by requiring countries to provide not only the rights themselves, but also two types of technological adjuncts to the rights. The first, known as the 'anti-circumvention' provision, tackles the problem of hacking. It requires countries to provide adequate legal protection and effective remedies against the circumvention of technological measures such as encryption used by the right holders to protect their rights when their creations are disseminated on the Internet.

The second type of technological adjunct safeguards the reliability and integrity of the online marketplaces by requiring countries to prohibit the deliberate alteration or deletion of 'electronic rights management information'⁶. India has yet not signed both these treaties. Another important international trade agreement concerning the copyright is the TRIPS Agreement of World Trade Organisation (WTO). This agreement requires the member states to protect computer programs and compilations of data as literary works and also to protect the neighbouring rights under Article 9 to 14 of the agreement.

5. NATIONAL REGIME GOVERNING COPYRIGHT

In India, the Copyright Act 1957 is the primary legislation relating to the copyright protection. This act as amended by the Copyright Amendment Act, 1999 (w.e.f January 15, 2000) contains 79 sections and is supplemented by 28 Copyrights Rules. It is a comprehensive legislation covering almost all the aspects of the copyright protection in India. The act defines various terms like artistic work, author, adaptation, broadcast, cinematograph film, computer program, copyright society, dramatic work, musical work, performance, and sound recording in the definition clause contained in Section 2 of the Act.

Apart from dealing with the copyright, its meaning, ownership of registration, the act also deals with the other aspects like licenses by owners of copyright, copyright societies, performers and broadcasting and organisation rights. The act provides for a comprehensive scheme to deal with the infringement of copyright and civil remedies for the same. In the preceding paras, the concept copyright, its subject matter, the legal regime in India governing the same and the extent of copyright protection, etc. have been discussed. One of the main objective of copyright legislation is to protect the copyright and the exclusive right to do certain acts in respect of the work. The nature of rights and the extent of protection and licenses, given to the owners of copyrights etc. depend on the nature of the work. Therefore, reproduction of the work in any material form, or performing the work in public in any forms are the most usual methods by which the copyright in any work is commercially exploited for profit. If any person, without authority commercially exploits the work for profit, he will be infringing the copyright.

6. SUBJECT MATTER OF COPYRIGHT PROTECTION

The copyright law in India protects many works such as original literary, dramatic, musical and artistic works, cinematograph films, and sound recordings under

Section 13. Similarly, the computer programs, photographs, and databases are also protected by copyright under Sections 14 and 25. The copyright law does not insist on cent-percent originality as a prerequisite for copyright protection. Thus derivative works such as guide books (E.M. Forster vs A.N. Parasuram, AIR 1964 Madras) Page No. 331, reviews, dictionaries (V. Govindan vs Gopalkrishna Kone, AIR, 1955, Madras.) and other compilations (Satsang vs Kiron Chandra, AIR, 1972, Calcutta) and even commentaries are all protected under the copyrights.

It has also been held by the courts that examination papers (Jagdish Prasad Gupta vs Parameshwar Prasad Singh AIR 1966 Patna) tambola tickets (Rai Toys Industries, Delhi vs Trisea Publication 1966 PTC 597 Delhi), notes and head-notes of judgments published in journals (Eastern Book Co. vs Navin J. Deais, AIR 2001 185 Delhi), and calendar/date-pads (Deepak Printery vs Forward Stationer Mart, 1976, 17 Gujarath Law Reporter) also attract copy right protection.

As far as, the neighbouring rights are concerned, the Indian law protects the rights of performers, producers of phonograms and the broadcasters (Chapter VIII and more particularly Sections 37 and 38 for broadcast reproduction right and performers right). In this context performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer (magicians) and even a person delivering a lecture [Section 2 (qq) of the Act].

7. MEANING OF COPYRIGHT

Copyright is not a single right but it represents a bundle of rights enjoyed by the owners of certain works. Section 14 of the Copyright Act 1957 lists out the various manifestations of copyright in respect to different works. These include the right to reproduce the work whether published or not, right to publish it, right to communicate to the public, right to translate the work, right to perform the work in public, right to adapt it as a cinema or other medium of expression, and the right to give it on lease/hire/rent, etc. The list is only illustrative and not exhaustive.

The rights vary depending on the nature of the work. Copyright confers not only the economic rights such as the right to assign the copyright (under Section 18), right to sell or to offer for sale or hire any computer program whether in circulation or not [under Section 14(b)], collective administration of rights of owners by copyright owners (under Section 34), right to grant licenses (under Section 30), and resale share right in original copies (under Section 53 A). It also protects the moral rights of the authors.

These moral rights, also known as special rights of authors, include the paternity right—the right to be, recognised as an author of a work; and the integrity right—the right against mutilation and distortion of the work. These rights are independent of the authors' copyright and can be exercised even after the assignment either wholly or partially of the said copyright (under Section 57). The authors can restrain or claim damages in respect of the mutilation or distortion of the work.

8. TERM OF COPYRIGHT PROTECTION

The Indian copyright law protects the copyright in literary, dramatic, artistic and musical works for a period of lifetime of the author and 60 years after his death (Section 22). Same applies to computer programs also. In case of photographs and sound recordings the term of protection is 60 years from the beginning of the calendar year following the year in which the photo was taken or the sound recording was made (Sections 25 and 26).

In case of anonymous, pseudonymous and posthumous works, the term is 60 years from the beginning of the calendar year following the year in which the work is first published (Sections 23 and 24). In the case of the neighbouring rights, it is 25 years in case of broadcast reproduction right and 50 years in case of performer's rights. Since TRIPS Agreement insists on a minimum term of 50 years (Article 12), the Indian law provides TRIPS plus protection.

9. INFRINGEMENT OF COPYRIGHT

Copyright is the most fragile and the weakest form of intellectual property as every copyrightable work is generally exposed to the public. The phenomenal advances made in the field of science and technology starting from the invention of printing machine, advent of reprographic technology and recent developments of digital revolution and Internet have posed greater challenges to the copyright protection. It is now possible to make multiple copies of copyrighted works within no time, without affecting the quality of the original work and without caring the national boundaries. Also, there have been plagiarism and piracy right from the recognition of literary property. Copyright infringement and plagiarism are not exactly the same thing. For example, someone is copying a large portion of someone else's work, say more than a paragraph, then one should get permission for copying. Copying without getting permission and without proper attribution tantamount to both infringement and plagiarism.

Copying with permission but without attribution, imply plagiarism, but not infringement, while coping without permission but with attribution, will imply infringed but not plagiarised. Infringement and plagiarism involve more than the specific legality; what is involved here is proper etiquette, what we ought to do. In modern times, it is called infringement. The infringement of copyright in a work occurs when one or more of the following acts take place without the authorisation of the copyright owner:

- ✘ Reproduction of the work in a material form,
- ✘ Publication of the work,
- ✘ Communication of the work to the public,
- ✘ Performance of the work in public,
- ✘ Making of adaptations and translations of the work and doing any of the above acts in relation to a substantive part of the work.

These principles clearly explain the circumstances and instances pertaining to copyright infringement. The Supreme Court in the landmark judgment of *Anand vs. Deluxe Films* [AIR 1978 SC 1613(1627)] has laid down the following principles, which are self-explanatory:

- (i) There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.
- (ii) Where the same idea is being developed in a different manner, it is manifest that the source being common, so similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyright work. If the defendant's work were nothing but a literal imitation of the copyright work with some variations, it would amount to violation of the copyright. In other words, in order to be actionable, the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.
- (iii) One of the surest and safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
- (iv) Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.
- (v) Where, however, apart from the similarities appearing in the two works there are

also material and broad dissimilarities, which negate the intention to copy the original, and the co-incidences appearing in two works are clearly incidental, no infringement of the copyright comes into existence.

- (vi) As the violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down, and
- (vii) Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director, the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play, a film has a much broader perspective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work had expressed in idea. Even so, if the viewer after seeing the film gets a totality of an impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

10. EXCEPTIONS TO COPYRIGHT INFRINGEMENT

The protection of copyright given to owner or licensee is not absolute. It is subject to certain exception and restrictions. Section 52 of the Act gives a lengthy list of acts under the heading 'certain acts not to be infringement of copyright', which can be called statutory exceptions to copyright infringement have been discussed hereunder briefly.

10.1 Fair Dealing

A fair dealing with a literary, dramatic, musical or artistic work but not being a computer program, for the purposes, viz., (i) private use, including research, and (ii) criticism or review, whether of that work or any other work does not amount to infringement of copyright. It may be seen that it is only when the court has determined that a substantial

part of a literary, artistic, dramatic or musical work, has been taken that any question of fair dealing arises. Though, once this question arises, the degree of substantiality, that is to say, the quantity and value of the matter taken, is an important factor in considering whether or not, a fair dealing is there. Further, in considering whether dealing with a particular work was fair, it would have considered whether any competition is likely to exist between two works.

A fair criticism of the ideas and events described in the books or documents would constitute a fair dealing (*Civic Chandran vs. Ammini Amma*, 1996, PTC, 670 (Kerala). Publication of confidential information leaked by the third party cannot constitute fair dealing for the purpose of criticism or review [*Bellof vs. Pressdram* (1973) 1 All.ER.24]. It is only when the court has determined that a substantial part has been taken that any question of fair dealing arises. Though, once the question arises, the degree of substantiality, that is to say, the quantity and the volume of the matter taken, is an important factor in considering whether or not there has been a fair dealing. Further, it is thought that, even under the present law, in considering whether dealing with a particular work was fair, it would have to be considered whether any competition was likely to exist between the two works. But each case will depend on its facts, and what may be fair in one case will not necessarily be fair in other case. Criticism or review may relate not only to literary style but also to be doctrine or philosophy of the author as expounded in his books. A fair criticism of the ideas and events described in the books or documents would constitute fair dealing.

11. CONCLUSION

An analysis of the relevant law and practice shows that the copyright and related rights are associated not only with the cultural world but also with the commercial world. Copyright is not concerned any more with the lonely authors but also with the publishing, entertainment, and also with the IT industry. It is said, "Till recently, the world's richest man was an oil worker. Today he is a knowledge worker". This statement sums up the importance of the knowledge in a rapidly changing society, the world over. In the good old days, the popular adage was that 'Knowledge is power' but in modern times, knowledge has been recognised not only as a source of power but also as the primary source of property. It is this recognition that justifies the protection of intellectual property created either by individuals or by communities more particularly the copyright. Bill Gates, J.K. Rowling and Azim Premji stand testimony to the fact that knowledge is not only power but also property.

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