

# ENFORCEMENT OF COPYRIGHT LAW IN INDIA

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## I. INTRODUCTION

The subject matter of copyright is usually described as 'literary and artistic works' i.e. original creations in the fields of literature and arts. The works may be expressed in words, symbols, music, pictures, three-dimensional works or combinations thereof<sup>1</sup>. Indian copyright law which is embodied in the Copyright Act, 1957 protects original literary, dramatic, musical and artistic works; cinematograph films and sound recordings.<sup>2</sup> Broadcasting, cable-relay and telecasting rights are some of the new rights of copyright holders which have come to be incorporated in the Act over a period of time in response to the advancement of technology. Copyright means the exclusive right to do or authorise someone to reproduce the work in any material form including its storing in any medium (by electronic means or otherwise); to release copies of the work to the public not being copies already in circulation; to perform in public or communicate it to public; to make any cinematographic film or sound recording or computer programme.<sup>3</sup> The Copyright Act, 1957 also protects copyright in translation/adaptation of a work.<sup>4</sup> With the advancement in technology, copyright law also witnessed inclusion of 'computer programme and computer data bases' in the definition of 'literary work'.

The copyright law protects only expression i.e. the form in which the ideas are expressed. It does not protect the ideas, themes, plots, historical or legendary facts and violation of copyright is confined to the form, manner and arrangement thereof.

Copyright does not subsist in any design which is registered under the Designs Act, 1911. Copyright in any design, which is capable of being registered under the Designs Act, but which has not been so registered, shall

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<sup>1</sup> WIPO, GENERAL INFORMATION (Geneva, 1997) at 55.

<sup>2</sup> Section 13(1), Copyright Act, 1957.

<sup>3</sup> Section 14, *id.*

<sup>4</sup> *Blackwood & Sons Ltd. v. Parsuram*, AIR 1959 Mad. 410.

cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or with his license, by any other person.<sup>5</sup>

For copyright to subsist in a 'work', the work must be 'original'. It need not be creative or inventive in any way. It will be protected, if it is original i.e. it has not been copied from a pre-existing work, in which copyright subsists and has originated from the author irrespective of its literary quality as long as the work involves medium of labour, skill and judgement. Copyright subsists in any literary, dramatic, musical or artistic work other than a photograph, for the life time of the author and sixty years after his death.<sup>6</sup> In the case of a photograph, cinematographic film, sound recording, government work or work of public undertaking or work of international organization, copyright subsists until sixty years from the beginning of the calendar year next following the year in which the work is first published.<sup>7</sup>

The amendment of 1999 of the Copyright Act, 1957 has provided new rental right in respect of computer programmes; cinematograph films and sound recordings.

The exclusive right to reproduce the work in any material form or to reproduce it in any medium by electronic means extends to computer programmes and also digital copies of such work. Therefore, a computer programme licensee does not have a right to lend or otherwise transfer programme copy, unless authorized by the copyright owner.

## II. INFRINGEMENT OF COPYRIGHT

Section 14 of the Copyright Act, 1957 confers certain exclusive rights in respect of various protected works on the authors of those works which only the author or his assignee or the licensee alone can do or cause to be done. When any of such exclusive right is exercised without such arrangement or licence from the owner of the work or in violation of the conditions contained in the arrangement or the licence, such act of such person amounts to infringement making him liable to be dealt with in accordance with the provisions of the Act.

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<sup>5</sup> Section 15, Copyright Act, 1957.

<sup>6</sup> Section 22, *id.*

<sup>7</sup> Sections 25 to 29, *id.*

Unauthorized appropriation of a copyrighted material, in which the appropriation is substantial or material, also amounts to infringement of copyright in the work. It is not necessary that the alleged infringement should be an exact or verbatim copy of the original, but its resemblance in a large manner is sufficient to indicate that it is a copy.<sup>8</sup> The decision is based on "doctrine of imminent impact." The piracy of a work may be detected by comparing it with the original, that whether any other deviations or mistakes in the original have been reproduced or not.<sup>9</sup>

Copyright law does not prevent any one from making use of a copyrighted work and create a new work with additions, deletions or improvements by putting one's own labour, skill and capital, which is sufficient to give the work a quality, which the original work did not have and which makes the two works quite different.

As stated earlier, ideas are not protectable and everyone is free to express the same sentiments, so long as the subsequent work is done independently and is not copied from the earlier work. In *Walter v. Lane*,<sup>10</sup> the House of Lords by way of example elucidated that if a dozen photographers photograph a favorite view; and each photograph, if taken from the same point and in the same state of light, all photographs would be identical in all respects. There is no copyright in the view itself, but in the supposed picture or photograph. Hence each photographer in such a case will have a copyright in the photograph taken by him.

Infringement of copyright is also committed where a person permits the use of premises for profit, for the communication of the work to the public where such communication constitutes an infringement of the copyright. The only defence open to such a person is lack of knowledge on his part of such an infringement.<sup>11</sup> When a person imports infringing copies of the work, or makes infringing copies for sale, hire or display or converts literary, dramatic, musical or artistic work into cine-film for the purposes of trade, he infringes copyright.<sup>12</sup>

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<sup>8</sup> *R.G. Anand v. Delux Film*, AIR 1978 SC 1613.

<sup>9</sup> *Lallubhai v. Lakshmi Shankar*, AIR 1945 Bom. 51.

<sup>10</sup> 1900 A.C. 539.

<sup>11</sup> Section 51(a)(ii), Copyright Act, 1957.

<sup>12</sup> Section 51(b) read with its Explanation, *id.*

However, the law permits making a copy of the 'original' work for personal use and study. Photocopies of copyrighted material is distributed to students and such copies are made available through private circulation by the educational institutions. They are even distributed at a cost to cover the expenses. So long as the intention is not to trade in them (although it hurts the belly of the author) it is tolerated.<sup>13</sup>

### III. WHAT DOES NOT AMOUNT TO INFRINGEMENT

The essence of law against infringement is that it will not permit a person to make profits and appropriate to himself the labour, skill and capital of another. The author has certain exclusive rights, violation of which by any other would cause the author immense harm and injustice. But without prejudice to the generality of the aforementioned statement certain acts do not constitute infringement such as: fair scholarly use S.52(a); reproduction by a teacher or a pupil in the course of instruction or educational use S. 52(g)&(h); media reporting S.52(b); use of state produced materials or judicial proceedings S.52(c)&(d); reading or reciting in public S.52(f); reconstruction of heritage buildings S.52(x); etc.

### IV. REMEDIES AGAINST INFRINGEMENT

India has amended its Copyright Act in 1994 and 1999 to bring it in conformity with Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs Agreement). The provisions of TRIPs Agreement are binding on members of World Trade Organization (WTO) and are enforceable under its dispute settlement mechanism. Any non-compliance of TRIPs Agreement by any nation may result in retaliation by the complaining party, which may hurt badly the economic interests of the former.

There is no right without a remedy (*Ubi jus ibi remedium*). However providing remedies for infringement of copyright is no easy task, due to its intangible nature. Judges at times have tried to widen the scope of available remedies to protect copyright which in turn act as catalyst to precipitate new developments in the general law of remedies.<sup>14</sup> Copyright Act provides remedies of three types namely: civil, criminal and administrative remedies.

<sup>13</sup> Section 52(a)(ad), *id.*

<sup>14</sup> V.K. Gupta, *Copyright for the XXI Century : Remedies and Enforcement* in A.K. Koul and V.K. Ahuja, (eds.), *LAW OF COPYRIGHT : FROM GUTENBERG'S INVENTION TO INTERNET* (Delhi, 2001) at 86.

### A. Civil Remedies

Injunction, accounts of profits, delivering the infringing copies to the copyright owner and damages are the remedies sought in a civil suit. But in either case owner of the copyright must be a party to the proceedings.<sup>15</sup> However, if the alleged infringer is able to satisfy the court that he had either no knowledge or sufficient grounds to believe that copyright existed in the work, no damages will be awarded.<sup>16</sup>

#### (i) Interlocutory Injunctions

When the copyright owner establishes a *prima facie* case and shows that balance of convenience is in his favour; and that if the interim injunction is denied, it will cause irreparable damage, the court may issue interlocutory injunction, subject to the undertaking by the plaintiff that he will pay compensation to the defendant in case he loses the suit.<sup>17</sup>

However, the court will refuse to issue interlocutory injunction where it will result into irreparable harm to the defendant or where plaintiff's interests can be protected by ordering defendant to keep accounts in this respect. It is also denied where 'fair dealing' is pleaded or where there is unexplainable delay on the part of the plaintiff in filing the suit or his conduct amounts to acquiescence or where there is doubt regarding ownership of the copyright.

#### (ii) Anton Piller Order and Mareva Injunction

Lord Denning in *Anton Piller K.C. v. Manufacturing Process Ltd.*<sup>18</sup> passed an ex-parte order to permit the plaintiff accompanied by his attorney to enter the defendant's premises to inspect infringing copies, relevant documents and materials and take copies there of or remove them for safe custody. Hence Anton Piller Order is also known as "Civil Search Warrant".

Mareva injunction restrains the defendant from disposing of his assets, which may be required to satisfy the plaintiff's claim of infringement. In a Mareva order financial assets of the infringer are removed from the defendant's possession. However, through Mareva order, the defendant

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<sup>15</sup> Section 61, Copyright Act, 1957.

<sup>16</sup> Section 58, *id.*

<sup>17</sup> *American Cyanamid v. Ethicon Ltd.*, 1975 A.C. 396.

<sup>18</sup> (1976) Ch.55.

will not be deprived of things needed for living and conducting legitimate trade. In *CBS v. Lambert*,<sup>19</sup> the order directing seizure of specified valuables such as cars which according to evidence adduced had been bought from the proceeds of infringement, the court reiterated that although financial assets are removed from the defendant's possession; he cannot be deprived of things needed for living and conducting legitimate trade. Orders are frequently made which contain both Anton Piller and Mareva injunction. The scope of the Anton Piller order has been broadened further to include an order for discovery of sources of supply and also that of customers. Permanent injunction is granted when at the stage of trial, infringement of copyright has been established.

#### (iii) Accounts

It is impossible to calculate the actual loss suffered due to reduction in sale of the copyrighted work. Therefore, it is accepted that net profit of the defendant represent approximately the loss of the copyright owner. It is a method to prevent unjust enrichment of the defendant. The infringer is obliged to disclose the number of copies printed and sold and cost of distribution and publication and allow inspection of records related to infringed work.

#### (iv) Damages

A copyright owner has to choose between accounts and damages. He is not entitled to both, since both are alternative and incompatible. Damages are awarded to compensate the plaintiff and to make good the loss he has suffered because of infringement of his copyright.

#### (v) Delivery up of Infringing Copies

The defendant may be required to hand-over infringing copies to the plaintiff.

### *B. Criminal Remedies*

The infringement of copyright has been made a criminal offence under the Copyright Act, punishable with imprisonment which may be from a minimum period of six months to a maximum period of three years and with a fine ranging from Rs. 50,000 to Rs. 2 lakhs.<sup>20</sup> For repeated offence,

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<sup>19</sup> (1983) F.S.R. 346.

<sup>20</sup> Section 63, Copyright Act, 1957.

the minimum punishment is one year which may extend upto three years and fine which shall not be less than Rs. 1 lakh but which and may go upto Rs. 2 lakhs.<sup>21</sup>

However, to avail criminal remedy under the law, *mens rea* has to be established because *mens rea* is an essential element of a criminal wrong and the same is manifested in the form of "knowledge" under the copyright law. In *S.R. Upadhyaya v. G.C. Nepali*,<sup>22</sup> the court observed that there is a presumption of existence of knowledge if a person publishes some thing without getting a right from the copyright owner. This principle is valid not only in individual cases, but also in case of publishing houses.

Criminal remedy can be availed simultaneously with the civil remedy. Copyright infringement has been made a cognizable offence. The amended law as it stands today, empowers a police officer not below the rank of sub-inspector of police to seize infringing material, without a warrant. All seized material shall be produced before a magistrate as soon as practicable.<sup>23</sup>

### C. Administrative Remedies

Administrative remedies consist of moving the Registrar of Copyright to ban the import of infringing copies into India, and transfer such confiscated imported infringed material to the copyright owners.<sup>24</sup>

## V. ENFORCEMENT: NEED FOR EFFICIENT MACHINERY

India being a signatory to TRIPs Agreement has amended its intellectual property rights (IPR) laws. Copyright law is brought at par with international conventions. India is also a signatory to Berne Convention as well as of Universal Copyright Convention.

In India, piracy of copyright materials, particularly popular fiction works, computer software programmes, audio and video tapes and CDs, is a major problem. Indian law provides stronger remedies against piracy. However, there is a notable lack of efficient machinery for enforcement of

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<sup>21</sup> Section 63A, *id.*

<sup>22</sup> AIR 1985 All 275.

<sup>23</sup> Section 64, Copyright Act, 1957.

<sup>24</sup> Section 53, *id.*

the provisions of the Copyright Act, 1957. Infringement is on the rise as is shown by the increased number of raids conducted by police. Yet, what is seized is not even one percent of infringing copies. However the problem of poor enforcement is not peculiar to India alone. It is more or less a global problem.

## VI. CONCLUSION AND SUGGESTIONS

Indian copyright law has been well designed and has been described as a model copyright legislation and in conformity with international standards and obligations under international conventions and TRIPs Agreement. Keeping in view the Indian society's concern for providing education to all and also recognizing right to education as a fundamental right there has to be a balancing of the rights of copyright owner and needs of the society for public good. It is, therefore, suggested that following further measures need to be taken for balancing of such rights.

(i) To improve access to copyrighted works and achieve their goals for education and knowledge transfer, India and other developing countries should adopt broad exemptions for educational, research and literary uses in their national copyright laws.<sup>25</sup> Internet users in developing nations should be entitled to fair use rights for educational and research purposes.<sup>26</sup>

(ii) Section 64 of the Copyright Act needs amendment. At present, power to make search and seizure lies with a sub-inspector of police, while under the Information Technology Act, 2000 this power lies with a senior officer not below the rank of Deputy Superintendent of Police i.e. equivalent to Assistant Commissioner of Police in Delhi. It is suggested that power must be vested with D.S.P. under the Copyright Act to prevent chances of its misuse. Police officials should also be trained and made aware of the importance and the need to comply with the law. Police must establish copyright enforcement cells at appropriate levels to check violations.

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<sup>25</sup> Justice Jagannatha Rao, Presidential Address in Seminar on *Ensuring Proper and Effective Enforcement of Copyright*, at the Campus Law Centre, University of Delhi, March 20, 2004.

<sup>26</sup> *Ibid.*

- (iii) Making of copies may be legalised by paying a fees, which may be a reasonable percentage of the cost price of the copyrighted material. The fees may be paid through libraries/societies etc., which in turn may be remitted to copyright owners.
- (iv) In addition to Copyright Board, Intellectual Property Rights Courts may be established in India.
- (v) Copyright awareness programmes should be held extensively through out India to imbibe copyright culture in the country.
- (vi) Backup copies are frequently made throughout the world for personal study, research, record or protection by various individuals. Law should be modified so that successor of a copied work may legally dispose of such work.

It is high time to remember that India is a leader in softwares and requires copyright protection across the world. We, the people of India are pioneers in software programming, production of creative, artistic works and world-class cinematographic movies and therefore the onus is on us to safeguard our creative interests and adopt copyright culture.