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Infringement of Copyright

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ABSTRACT

The history of various civil societies at different stages underlines the central role that property rights have played in promoting their socio-economic and political development. A human being is a social animal. He performs a moral duty to enrich society through his creative ideas, works, inventions and writings etc. These views are public in their nature, but private property. It has been recognized as a man's natural right from the beginning. But gradually, it acquired the status of legal rights and came to be known as industrial property, such as patents, trademarks, designs, etc. All types of industrial property that are considered to be negative rights prevent the appropriation of personal property. With the passage of time, these rights are, now, known as "intellectual property" and include copyright, design of integrated circuits, geographical indications and trade secrets or patents of traditional rights, design and trademarks. Thus, copyright is a newly emerging "statutory right relating to printing, music, communication, entertainment, computers, etc. The primary purpose of the Copyright Act is to protect the interests of the author.

Keywords: *copyright infringement, Ownership, constitute.*

I. INTRODUCTION

Copyright is a form of property, capable of being created by an individual or a corporate author, and once created, susceptible to commercial exploitation in the same way as any other form of property, the component rights being exclusively directed to securing enjoyment of the economic potential of the property. The Copyright Act, 1957 confers the exclusive right on the owner of the copyright to do or authorized to do certain acts in respect of a work or any substantial part thereof, i.e., to reproduce the work; to issue copies of the work; to perform the work or to communicate it to the public; to make any cinematograph film or sound recording; to translate or to make an adaptation of the work. It is the settled position that an infringement of copyright would arise only when there is a substantial reproduction of the plaintiff's work. However, the law recognises that the reproduction of ideas, systems, information, and matter in the public domain does not form the subject matter of infringement.¹ An author has a property in his intellectual production before it has been published, and may obtain redress against anyone who [1] deprives him of it, or, by improperly obtaining a copy, endeavours to

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publish or to use it without the consent of the author. Generally speaking, the law does not recognise property rights in abstract ideas and does not accord the author or proprietor, the protection of his ideas, which the law does accord to the proprietor of personal property. When an idea is given embodiment in a tangible form, it becomes the subject of property rights that are protected by the Copyright Act [2][3].

II. MEANING OF COPYRIGHT INFRINGEMENT

Copyright infringement is a trespass on a private domain, which is owned by the copyright owner and, therefore, is protected by law and is a violation of copyright, or piracy, which is a synonym in this regard consists in the doing by any person, without the consent of the copyright owner, of anything the sole right to do which conferred by law on the copyright owner. The basic idea of infringement of copyright or copying is a violation of the Eighth Commandment: "Thou shalt not steal" which forms the moral basis of the protective provisions of the Copyright Act. It is clear that when a writer or a playwright produces a play it is the result of his great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the copyrighted work, so deprived of his work is the amount of stealing. It is also clear that it is not necessary that the alleged infringement should be an exact or wordy copy of the original but that its similarity with the original, in large measure, is sufficient to indicate that it is a copy[4].

An idea, principle, theme, subject matter or historical or mythological fact being a common property cannot be the subject of copyright of a particular person. It is always open to anyone to choose an idea as a subject and develop it in their own way and give expression to the idea by treating it differently from others. Where two authors write on the same subject similarities are bound to occur because the central idea of both is the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy [4].

Infringement involves copying, in whole or in part by colourable variation a 'copy' as used in copyright cases, signifies a tangible object which is a reproduction of the original work. Section-51 of the copyright Act, 1957 defines infringement in general terms which may be summed up as –

- a) Doing anything without a license for which the owner of the copyright has exclusive rights,
- b) Permitting for profit without a license 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,

c) Making for sale or hire, selling or offering for sale or hire distributing, exhibiting in public or importing into India any infringing copy of the work. However, bringing one copy to India for the private and domestic use of the importer is permitted [4].

The deceptively simple definition of infringement belies a complex legal reality determination of infringement is treacherously tricky. The definition of infringing copy in section 2(m) of the Act, however, provides some standards and criteria for the determination that an infringement has occurred. It defines infringing copy to mean

- 1) In relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;
- 2) In relation to a cinematograph film, a copy of the film made on any medium by any means;
- 3) In relation to a sound recording, any other recording embodying the same sound recording, made by any means;
- 4) In relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance.

III. ELEMENTS OF INFRINGEMENT

Copying, modifying, displaying, reproducing, communicating or performing a copyrighted work without authorization, all amount to infringement. In order to claim infringement, two elements must be proved

Ownership The party claiming infringement must prove ownership of a valid copyright;

Copyright The claiming infringement must demonstrate that the infringer had access to the work and violated one of the exclusive rights; An important point to remember is that intention to infringe is not essential to establish liability for infringement of copyright. One may be held liable for infringement which is unintentional or which was done unconsciously

IV. ESSENTIAL INGREDIENTS OF INFRINGEMENT OF COPYRIGHT

The infringement of copyright in a work occurs when one or more of the following acts take place –

- (a) Reproduction of the work in a material form;
- (b) Publication of the work;
- (c) Communication of the work to the public;

(d) Performance of the work to the public;

(e) Making adaptations and translations of the work and doing any of the above acts in relation to a substantive part of the work

V. WHICH ACTS DO NOT CONSTITUTE INFRINGEMENTS [5][6]

Statutory Exceptions:- The protection of copyright given to an owner or licence is not absolute. It is subject to certain exceptions and restrictions. Section 52 of the Act gives a lengthy list of acts under the heading "certain acts not to, be an infringement of copyright, which can be called statutory exceptions to copyright infringement. For the purpose of easy understanding, they have been discussed hereunder briefly, with the help of decided cases.

(A) Fair dealing:- The notion of permitting some use of a copyrighted work which is considered to be 'fair' is common in many jurisdictions. For example, in the USA, copyright law has its 'fair use' provisions. In the UK, 'fair dealing' is allowed in relation to copyrighted work. It must be noted at once that this has nothing to do with 'dealing' in a trade sense. It can be roughly equated to 'use'. Thus, fair dealing covers research or private study, criticism, review and reporting of current events. The fair dealing provisions allow the copying or other use of the work which would otherwise be an infringement, and relevant. It may be fair dealing to include 5 per cent of another work for criticism or review. It would not normally be fair dealing to incorporate the whole of the other work. Because the proportion of work taken can be relevant to whether the second author can successfully plead the fair dealing provisions, this immediately brings into question the relationship between fair dealing and the taking of a substantial part of a work. If the part taken is not substantial, then there is no infringement of copyright and no need to rely on the permitted acts.

In India, under Section 52 of the Copyright Act, 1957, a fair dealing with a literary, dramatic, musical or artistic work but not being a computer programme, for the following purposes, does not amount to infringement of copyright. –

- Private use, including research
- Criticism or review, whether of that work or any other work.

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, there has been a "fair dealing". Further, 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. A fair criticism of the ideas and events described in the books or documents would constitute "fair dealing". Publication of confidential information leaked by a third party cannot constitute fair dealing for the purpose of criticism or review.

(B) Making of copies/ adaptation of computer programmes for specific purposes:- The making of copies of, or adaptation of a computer programme by the lawful possessor of a copy of such programme from such copy, for the purpose of utilising the computer programme for the agreed purpose, or for the purpose of making back-up copies purely as temporary protection against loss, destruction or damage, in order to utilise the programme for the agreed purpose, would not amount to infringement of copyright in such computer programme. Similarly, the doing of any act necessary for obtaining information essential for operating interpretability of an independently created computer programme, with other programmes, if such information is not readily available, would not amount to infringement. Further the observation, study or test of the functioning of the computer program for determining the ideas and principles which underline any elements of the programme and making of copies or adaptation of the computer-programme from a personally legally obtained copy for non-commercial personal use, also would not constitute infringement.

(C) Reporting of current events:- A fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events, in a newspaper, magazine, or similar periodical, or by broadcast or in a cinematograph film or by means of photography would not constitute infringement. However, the publication of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of this clause.

(D) Reproduction in connection with Judicial proceedings:- The reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of judicial proceedings would not come within the purview of infringement.

(E) Reproduction for legislative purposes:- The reproduction of a literary, dramatic, musical or artistic work in any work prepared by the secretariat of Legislatures, exclusively for the purpose of use of members, does not amount to infringement.

(F) Reproduction to make certified copies:- In accordance with any law and their supply is not infringement.

(I) Reading/Recitation of extracts:- From a published literary work in public is not infringement. However, the extract must be reasonable.

(J) Publication for use of educational institutions:- Where a collection, mainly composed of

non-copyright material, bona fide intended for the use of educational institutions or short passages from published literary or dramatic works for the same purpose are published, it would not amount to a violation of copyright.

(K) Reproduction by teacher or pupil in the course of instruction, as part of the Questions to be answered in an examination, or in answers to such Questions - would not amount to infringement.

(L) Performance in the course of activities in educational institutions, of a literary, dramatic or musical work by the staff and the students of the institution, or of a cinematography film or a record is not an infringement of copyright in such works. However, the audience must be limited to the staff, students, their parents and guardians etc.

(M) Making and using of sound Recordings under certain circumstances and in enclosed rooms, or in clubs are not run for profit do not amount to infringement.

(N) Performance of literary works etc by an amateur club or society, for the benefit of a non-paying audience or for the benefit of a religious institution is not infringed.

(O) Reproduction of any article on current economic, political, social or religious topics in newspapers and magazines etc. is not copyright infringement.

(P) Publication of a public lecture delivered in public in a magazine, newspaper or other periodical is not a copyright violation.

(Q) Making a maximum of 3 copies of books including pamphlets, a sheet of music, map, chart or plan for use in a public library if such book etc. is not available for sale in India

VI. REMEDIES FOR INFRINGEMENT OF COPYRIGHT [5][7][8]

(A) Civil remedies

1. Injunctions- The primary remedy sought in the majority of Copyright cases is an injunction prohibiting the defendant from continuing to commit acts of infringement. It is the only remedy available against a defendant who demonstrates that, at the time of the infringement, he was unaware and had no reasonable grounds to believe that the work was protected by copyright (the innocent infringer). In such scenarios, the plaintiff cannot recover damages, but the court may compel the defendant to pay the plaintiff all or a portion of the profits made by the sale of the infringing copies, as it deems appropriate under the circumstances. The Specific Relief Act of 1963 contains the law of injunctions.

2. Damages and Accounts of Profits- Section 55 of the Copyright Act allows for

compensation and damages. However, the remedy of injunction may be united with either the remedy of damages or the remedy of accounts, but the remedies of accounts and damages cannot be joined under any circumstances. In a complaint for infringement of copyright, the publishers of a book sought injunctive relief against the creators and distributors of a film based on the book's subject to prevent further screenings of the film. The publishers sought both reliefs of accounts and damages. No objection was submitted by the publishers over the sufficiency of damages, and the damages verdict became final.

3. Other Remedies- Other than section 55 of the act the main remedies are as per the Anton Piller Order, Mareva Injunctions. To win the case,

The following three conditions must be satisfied before the court will make an order:

- i. the plaintiff must show that he has an extremely strong prima facie case;
- ii. the plaintiff must show that he has suffered, or is likely to suffer very serious and irreparable damage if an order is not made; and
- iii. there must be clear evidence that the defendant has in his possession incriminating documents or things and that there is a real possibility that he may destroy such material before any inter parties application can be made on notice.

(B) Criminal Remedies

1. Statutory Schemes- Criminal remedies are addressed under Sections 63 to 70 of the 1957 Copyright Act. Any person who intentionally infringes (a) the copyright in a work or (b) any other right given by the Act (e.g., broadcast reproduction right; author's special rights) or aids and abets such infringement is guilty of an offence under the Act.

2. Judicial Approach- There have been very few prosecutions under the Act, and the cases that have reached the Appellate Courts demonstrate that the High Courts do not view criminal prosecution for copyright infringement with the seriousness it deserves, as evidenced by the Delhi and Bombay High Courts' decisions in *Sivaram Silk Mills v. State and Gulfam Exports and Others v. Sayed Hamid*, respectively. In *Sivaram Silk Mills*, a prosecution was initiated for copyright infringement under Section 63 of the Copyright Act and trade mark infringement under Sections 78 and 79 of the Trade Marks Act 1958 read with Sections 420, 489, and 486 of the Indian Penal Code based on the complaint of the copyright owner. In accordance with the magistrate's instructions, a search was undertaken and infringing items were seized. The magistrate was also aware of the offence.

3. Administrative Remedies

In order to prevent the importation of infringing copies in India, the Copyright Act 1957 makes available an effective and quick administrative remedy to the owner of the copyright. Section 53(1) of the Act empowers the Registrar of Copyrights to make an order prohibiting the importation into India of copies of a copyrighted work made outside India which, if made in India, would infringe copyright in the work, on the application of the owners of copyright in such work, or his duly authorised agent, after making such inquiry as he deems fit.

VII. CONCLUSIONS

An ideal regime for copyright protection would balance the rights of all stakeholders. On one hand, India faces major economic losses due to rampant piracy, especially online; on the other hand, the peculiar socio-economic conditions of the country make it imperative to overlook IPRs to an extent for the greater common good. In these circumstances, perhaps the stress should be on effective implementation of the existing remedies rather than introducing new remedies over and above the existing provisions so that the genuine exceptions to IPRs are not whittled down. With the paradigm shift in the legal regime governing the subject in India, it remains to be seen how such a balance continues to exist.

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