

**EFFICACY OF LAW ON FACILITATION OF
ONLINE COPYRIGHT INFRINGEMENT**

DISSERTATION

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ACKNOWLEDGEMENT

First and foremost I would like to thank the Almighty for giving me the strength about opportunity to undertake the dissertation and to complete it satisfactorily.

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Thank you

Ashvani yadav

LIST OF ABBREVIATION

AIR	: All India Report
CI	: Copyright Infringement
CE	: Copyright Enforcement
CPM	: Common Place Material
DF	: Design feature
HLJ	: House Of Lord Journal
ICO	: International Copyright Order
JI	: Judicial Interpretation
OCI	: Online Copyright Infringement
SP	: Substantial Part
SDI	: Secondary Infringement
SR	: Sound Recording
U P	: Unauthorized printing
WD	: Working Drawing
WIPO	: World Intellectual Property Organisation

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CHAPTER -1

INTRODUCTION

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It can be termed as “The exclusive right given by law for a certain term of years to an author, composer etc. (or his assignee) to print, publish and sell copies of his original work”.

Indian copyright law is at parity with the international standards as contained in TRIPS. The (Indian) Copyright Act, 1957, pursuant to the amendments in the year 1999, fully reflects the Berne Convention for Protection of Literary and Artistic Works, 1886 and the Universal Copyrights Convention, to which India is a party. India is also a party to the Geneva Convention for the Protection of Rights of Producers of Phonograms and is an active member of the World Intellectual Property Organization (WIPO) and United Nations Educational, Scientific and Cultural Organization ("UNESCO").

ORIGIN AND DEVELOPMENT OF COPYRIGHT

The idea of copyright protection emerged with the invention of printing, which made the literary works to be duplicated by mechanical process. Prior, to that hand copying was the sole mean of reproduction.

After, the invention of Guttenberg’s printing press in Germany in 1436, a need to protect the printers and booksellers was recognised and thus certain privileges to printers, publishers and also authors were granted. The art of printing spread quickly in Europe. After 1483, England emerged as a major centre of printing trade in Europe. The spread of this technological innovation led to creation of a class of intermediaries, who made initial investment in bringing out the book, i.e., the printers, who doubled as booksellers as well. They were called the “stationer’s” in England. In 1557, Queen Mary I, granted the privilege of regulating the book trade to the Stationer’s company of London. In 1662, the Licensing Act was passed in England, which prohibited the printing of any book which was not licensed and registered with the Stationers’ Company. This was the first clear law which was aimed at protecting literary copyright and checking piracy. The licence era was short lived. It was only with the passing of the Queen Anne’s Statute of 1709, that, the rights of the authors over their work came to be legally recognised, and the concept of ‘public domain’ was established, though not explicitly.

HISTORY OF COPYRIGHT LAW IN INDIA

Modern copyright law developed in India gradually, in a span of 150 years. The first brush of India with copyright law happened in 1847 through an enactment during the East India Company's regime. The Act passed by Governor-General of India affirmed the applicability of English copyright law to India. According to the 1847 enactment, the term of copyright was for the lifetime of the author plus seven years post-mortem and could not exceed fortytwo years on the whole. Though the author refused publication after his death, the Government had the authority to give licence for its publication. The act of infringement was inclusive of unauthorized printing of a copyright work for "sale, hire or export", or "for selling, publishing or exposing to sale or hire". The suit for infringement under this act could be instituted in the "highest local court exercising original civil jurisdiction". The Act also specifically provided that under a contract of service copyright in "any encyclopaedia, review, magazine, periodical work or work published in a series of books or parts" shall vest in the "proprietor, projector, publisher or conductor". It was deemed that the copies of the infringed work were the property of the proprietor of the copyrighted work for all purposes. Most importantly, the copyright in a work was not automatic unlike today. Registration of the work with Home Office was mandatory for the protection of rights under this enactment. However, the Act specifically reserved the subsistence of copyright in the author, and his right to sue for its infringement to the extent available in any other law except 1847 Act. At the time of its introduction in India, copyright law had already been in the developing stage in Britain for over a century and the provisions of the 1847 enactment were reflected in the later enactments

. The Copyright Act 1911, while repealing earlier statues on the subject, was also made applicable to all the British colonies including India. In 1914, the Indian Copyright Act was enacted which modified some of the provisions of Copyright Act 1911 and added some new provisions to it to make it applicable in India. The Indian Copyright Act 1914 remained applicable in India until it was replaced by the Copyright Act 1957.

COPYRIGHT LAW IN INDIA

In India, the Copyright Act, 1957 (as amended in 1999), the Rules made there under and the International Copyright Order, 1999 govern Copyright and neighbouring rights. This Act has been amended five times i.e. 1983,1984,1992,1999 and most recently in 2012.The Act is divided into 15 chapters with 79 sections. Moreover, the Central Government, by virtue of section 78 is empowered to make rules by notification in the Official Gazette, for carrying out the purposes of this Act. Under the Act, a copyright office was established under the control of a registrar of copyright who was to act under the superintendence and direction of central government. The principal function of this office was to maintain a register of copyright containing the names or titles of work, the names and addresses of authors, etc. The registrar had certain powers like entertaining and disposing of applications for compulsory licenses and to inquire into complaints of importation of infringing copies. A Copyright Board had been set up under the Act and the proceedings before it are deemed to be judici⁹ al proceedings.

The definition of copyright included the exclusive right to communicate works by radio diffusion; the cinematograph was given a separate copyright; the term of copyright protection was extended from 23 to 50 years which was again extended to 60 years in 1992; term of copyright for different categories of work was also specified. The right to produce a translation of a work was made coextensive with other rights arising out of copyright. Provisions relating to assignment of ownership and licensing of copyright including compulsory licensing in certain circumstances,

rights of broadcasting organisations , international copyright, definition of infringement of copyright; exceptions to the exclusive rights conferred upon the author or acts which do not constitute infringement , special rights of authors, civil and criminal remedies against infringement and remedies against groundless threats or legal proceedings were also introduced.

Berne Convention and Universal Copyright Convention

India is a member of the above conventions. The Government of India has passed the International Copyright Order, 1958. According to this Order, any work first published in any country - which is a member of any of the above conventions - is granted the same treatment as if it was first published in India.

Subject Matter of Protection

Now a day the subject matter of protection of Copyright is same throughout the globe because copyright is become of international nature and due to advancement of technology any one can violate the rights of others from any part of the world. As per different sub-sections of section 2 of Copyright Act,1957 and judicial interpretations from time

STATEMENT OF PROBLEM

There is an acute lack of awareness of various issues relating to online copyright infringement. The awareness of copyright infringement is very low on the enforcement of authority in India and most of the IP litigation is confined to metropolitan cities, owing to which a major section of the society is deprived of legal remedies as provided by online copyright infringement. Also, need to determine whether the remedies available under the copyright law are adequate or not.

SCOPE OF STUDY

This study aims at critically evaluating the various facts of online copyright infringement, including a historical background of copyright infringement in India, as well as keeping the views of the efficacy of laws on online copyright infringement. The study also aims to understand the concept of online copyright infringement laws and also the remedies for protection in online infringement.

OBJECTIVE OF STUDY

The dissertation aims at:-

- To study the concept of online copyright Infringement.
- To study the laws of copyright Infringement.
- To study the details of copyright laws .
- To study the various protection on online copyright Infringement.
- To study the emerging trends in online copyright Infringement
- To study the impact of online copyright infringement .
- To study the remedies for copyright laws in india.

HYOPTHESiS

The copyright law in India is able to curb copyright infringement instant . It is right given by the law to the creator of the artistic, musical work and producers of cinemotographic films and sound recording The idea of copyright protection of Emerge with invention of printing which made the literary work .

To protection of all the work in online copyright Infeingement their laws which ate necessary to provide remedy in copyright Infringement Their are many laws introduce for the protection of online copyright Infringement.

RESEARCH METHODOLOGY

The paper is attempt of doctrinal research towards The Efficacy of laws on facilitation of online copyright Infringement. The researcher has taken both primary and secondary sources. The primary sources include-Statutory legislation,regulations and secindary includes – article,journal,books neespaper etc.

REVIEW OF LITERATURE

In an attempt to frame a detailed note on laws on online copyright Infringement.The researcher has consulted the following books in compilation of this researcher work.

- P Narayan, Intellectual property law,1997
- P.S sangal, Intellectual property law ,1994
- S.R meyneni.law of intellectual property 2001
- W R cornish ,Intellectual property lwa ,1999

Chapter – 2
ORIGIN OF COPYRIGHT LAW AND ITS
INFRINGEMENT

I. 1. Origin of infringement in Copyright law.

The concept of copyright is not a new evolution. It is related to the history of man. With the introduction of machines in the field of printing and thereby simultaneously replacing manual writing, it became a protected right. The first statute is traced as the statutes of the University of Paris 1223, which authorized duplication of texts for university use only except other purposes. In early times, since religious literature was written only and there was no concept of market system in the society for its circulation, so there were no problems relating to copying.

Later on due to the effect of Eight Commandments, "THOU SHALT NOT STEAL" in Europe became the moral basis of the protective provisions of the law of copyright. This law did not allow anyone to get a benefit and to appropriate to himself that which had been produced by labour and skill of another, because basic principle is that no man shall steal what belongs to another and this was the reason that the question of copyright began to agitate the minds of authors of texts when printing press came into existence.¹ The notion that an author should have an exclusive "copyright" in his creation took firm shape at the beginning of the eighteenth century. It derived from a confusion earlier strains and there was still a major evolutionary conflict to come before its modern form was finally fixed.

From their early years of the first copying industry - printing - a pattern of exploitation had been developing: an entrepreneur, whose calling was typically that of "Stationer", became the principal risk taker; he acquired the work from its author (if he was not reprinting a classic) and organized its printing and sale. The stationers (forefathers of the modern publisher) were the chief proponents of exclusive rights against copiers. Certainly their own practices - their guild rules and the terms on which they dealt with authors - insisted upon this exclusivity; their regime for "insiders" became a source of trade customs from which general rights against "outsiders" might be distilled.²

In this objective the stationers found an ally in the crown. In 1534 they secured protection against the importation of foreign books; and in 1556, Mary, with her acute concern about religious opposition, granted the stationer's company a charter.

¹ Remedies Regarding Infringement of Copyright in India : An over view – by Dr. Dharmendra Kumar Mishra. Indian Bar Review 2004, July-December; Pages 363-368.

² Cornish & LIEWELYN – Intellectual Property : Patents, Copyright, Trade Mark and Allied Rights Sixth Edition, 2007 – THOMSON, Sweet & Maxwell, South Asian Edition. Pages 375-381.

This gave a power, in addition to the usual supervisory authority over the craft, to search out and destroy books printed in contravention of statute or proclamation.

Elizabeth and her Stuart successors, who supervised it through the Star Chamber and the heads of the established church. Governments determined to censor heterodoxy made concert with the established order of the publishing trade.

The royal predilection for granting special privileges might interfere with the interests of the stationers. Not only was sole privilege to print Bibles, prayer books and laws claimed under the royal prerogative; much wider privileges - not confined to particular, or even new works - were also granted by letter patent. In the long term, it was not the fact of individual grants which mattered, but their cumulative effect. For they might bear the inference that, as with exclusive rights in technical inventions, it needed special authority from the crown to secure legal protection against imitators. So long as the licensing system survived, this line of argument was of no great significance. And stationer's company licensing had considerable vitality.

It outlived the ignominy into which the Star Chamber fell, being kept up by the long Parliament and confirmed in 1662 after Charles II's restoration. But he allowed it to lapse in 1679; and while James II revived it for seven years in 1685, it could not last long in the political climate of his dethronement. Parliament finally refused to renew it in 1694. The stationers, who had argued forcefully against their loss of protection, were left with such claim to "copyright" as they could make out of their own customary practices surrounding registration.

As they also lost their search and seizure powers and equity had not yet begun to grant injunctions to protect any interest that they might establish, their only hope was in common law and this they put to no decisive test. Their needs were equally for definite substantive rights and for effective procedures to enforce them and these needs were reflected in the legislation that they secured in the reign of Anne, the Copyright Act of 1709.

The sole right and liberty of printing books that the Act conferred was given to authors and their assigns; but it stemmed nonetheless from commercial exploitation rather than literary creation pure and simple. Enforcing the right depended upon registering the book's title before publication with the stationers' company, "as hath been usual", and likewise it was enforceable by seizure and penalties. The right lasted for 14 years from first publication "and no longer"; but if the author was still living at the end, the right was "returned" to him for another 14 years. Other "Copyrights" were expressed to be unaffected by the Act.

It was not difficult to argue that an author ought to have some protection over his work before it was published. Since this went uncovered by the Act, it could only lie in a right of literary property at common law. But much more absorbing was the question whether any common law right survived in perpetuity the act of publication.

At first, in the view of majority of judges, history and policy demanded the recognition of this complete property right. The Act of Anne was treated as providing supplemental remedies during the period when unfair completion could most readily injure the first publisher. In the end, the great case of *Donaldson v. Beckett*³ narrowly settled the issue on the other way the statute was taken to delimit the scope of rights after publication absolutely.

It was a most strategic victory for those who would insist that claims to trading exclusivity must be balanced against public interest in the freedom to exploit. Had the case gone the other way, protection for other forms of intellectual endeavour against “misappropriation” would have been pressed in a host of analogies. Given *Donaldson v. Beckett*, new forms of protection had to be secured from the legislature; and even if a lobby succeed, the most that could be hoped for would be an exclusive right of limited duration.

That process had indeed already begun. The engravers had succeeded in 1734 and 1766. Textile designers secured some very temporary protection by statutes which were the precursors of the present registered design system. In 1798 and 1814, sculptures were protected; and eventually - as the technical possibilities for reproducing artistic works expanded - the Fine Arts Copyright Act 1862, brought in paintings, drawings and photographs.

In 1814, the term of statutory right in published books was extended to 28 years or the author’s life, whichever was longer. But sergeant Talfourd’s attempts to have it again extended - for a period of perhaps the author’s life and 60 years - ran into shoal of “economical” argument, put in particularly telling form by T.B. Macaulay. His view of copyright as “a tax on readers for the purpose of giving a bounty to authors” meant that in 1842 the period was extended only to 42 years or the author’s life and 7 years, whichever was longer. That compromise was at last until international pressures obliged parliament to revise its views in Talfourd’s direction. The commercial interest of book publishers had called for a “Copyright” and much the same applied to artistic work.

But in the art of drama and music, exploitation occurred as much through performance as through the sale of copies. Playwright’s composers and their commercial associates sought a “use” right upon each public performance of the work. In 1833 this distinct performing right was given in dramatic works and in 1842 extended to musical work. Despite the nature of the performing right, the wider term, “author’s right”, *was* never introduced into English usage, as it was in most other languages, in place of “Copyright”.

The difference reflects the accretive historical process by which the British law developed. But equally it carries another overtone a change to “author’s right” might well symbolize some preference for creator over entrepreneur. That is something which has rarely attracted much ardour in Britain.

³ (1774) 2 Bro. P.C. 129.

The same point is under-scored in another way. The relation between author and exploiter offers many opportunities for tension and disagreement. In continental Europe the need to safeguard the artistic integrity of the author in the course of such relations was eloquently argued, particularly in the latter nineteenth century; and in many copyright laws the author was accorded moral rights which entrenched making inoperative any surrender of the rights in advance of the time when the author might want to rely upon them

. These typically might include; the right to decide to make the work public; the right to be named as a author; the right to object to revisions affecting honour or reputation. Some systems have gone to the extent of adding a right to have the work withdrawn upon payment of compensation; and the right to object to destruction.

In Britain, this sort of demand seems scarcely have surfaced at all. Instead, in the high age of contractual freedom, relations were left determined by agreement, supported by such terms as the court might imply in the name of business efficacy and subject to the torts of defamation, injurious falsehood and passing off.

Britain could not however afford to reject entirely the ideals of those for whom copyright was a practical expression of reverence for the act of artistic creation. Her commercial position made her a considerable exporter of Copyright material and she had a strong interest in reciprocal copyright arrangements with other countries and their colonies. On the question of protecting foreign works, it was possible to take a number of attitudes

the French for instance, at first granted protection to all authors of works published in France and to works to Frenchmen published anywhere. The Americans, by contrast, underlined their independence from Britain by confining copyrights to citizens and residents; and a century later, while conceding some place to foreign authors, country by country, congress required all legitimate copies of various types of work to be produced in the United states (under the controversial “manufacturing clause”).

The British, true to their own tradition of giving first consideration to home publishers, admitted foreign authors to copyright upon condition that the work was first published within the country.

With protectionist America, the hope of satisfactory mutual arrangements was slender, but with continental Europe and elsewhere the prospects were brighter. A number of bilateral arrangements were worked out.

Then, by the Berne convention of 1886, a multinational system evolved, under which either the personal correction of the author with a Member state, or first - publication in a Member state, was to secure copyright in the other under the principle of national treatment, but this in turn raised questions about the scope of rights offered in each state.

At the Berlin Revision of the convention in 1908, Britain was obliged to accept the majority consensus on two matters; protection was to arise out of the act of creation itself, without any condition of registration or other formality

which obliged Britain to abandon even the traditional requirement of stationer's company registration before suing; and the period of protection for most types of work was to be at least the author's life and 50 years - that quasi - proprietary right against which Macaulay had persuaded Parliament 70 years before.

These changes were adopted in the copyright Act, 1911, the first British legislation to bring the various copyrights within a single text and at the same time to put rights, even in unpublished works, on a statutory footing. There was, however some concession to public interest arguments; in the later years of the copyright in published works there were certain provisions for automatic licences.

If the author gained by this intrusion of foreign ideals, the entrepreneur was by no means forgotten. The 1911 Act gave the producers of sound recordings their own exclusive right to prevent reproductions of their recordings (and, as the court later held also to prevent public performances of them).

The right was indiscriminately labeled copyright, even though it was conferred not upon the executants artist whose performance was recorded but upon the business which organized the recording. It was thus not an author's right at all, but something which continental theory would scrupulously distinguish as a "neighbouring right".

An important precedent was set for an age that was to see a great increase in the technical possibilities for artistic expression. Similar observation has been made by the apex court of India in *R.G. Anand vs. Delux Films*.⁴

"It is obvious that when a writer or a dramatist produces a drama, 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 copyright work, his act amounts to theft by depriving the original owner of the copyright of the product of his labour".

⁴ AIR 1978, SC 1913.

First of all, this right applied to 'books' and was extended to other works in due course. Thus the first Act was passed in 1709 relating to copyright in England, which provided to an author the exclusive privilege of printing, reprinting and publishing his own original work. At present, it has too much importance all over the world due to the rapid technological development in this area.

In India, the protection of copyright begins since 1847, when the East India Company enforced English

Act of 1842 to those areas which were under its control. But the first statute was passed 'in 1914 as the India copyright Act, 1914. This Act was in existence until after the independence, when a new copyright Act of 1957 was made.

Thereafter, the Act was undergone through many amendments to make it fully compatible together with copyright Rules 1958. It provides protection to all original literary, dramatic musical and artistic works, cinematograph films and sound recording.

It also brought other sectors within its purview such as satellite broadcasting, computer software and digital technology. At present, after the issuance of the International Copyright order 1999, the provisions of the order extend to nationals of all World Trade Organisation (WTO) member countries and India is one of the members of the WTO, also. By this way copyright has its global importance.

Nature of Copyright

'Copyright' is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such as books, songs, films, paintings, computer programs etc. The object of copyright law is to protect the author of the copyright work from an unlawful reproduction or exploitation of his works by others.

One of the constant themes in the history of copyright law is that it has been influenced by foreign and international treaties and developments. There are a number of international treaties that impact upon copyright law.

Berne Convention and Universal Copyright Convention are two Conventions that lay down minimum standards for copyright protection and provide for reciprocity of protection between those countries which have ratified the conventions. At the present time, each convention has a significant numbers (Berne has well over 100) and many countries, including India, have ratified both conventions.

The Berne copyright convention is administered by the World Intellectual Property Organization and the UCC by UNESCO, the United nations Educational, Scientific and Cultural Organization. The Berne copyright convention dates from 1886 and has European origins. It has been and continues to be very successful, but as a means of enforcing other states to join an International 'Club' without requiring the Berne Convention to be watered down the Universal Copyright Convention came into existence in 1952.

Article 1 of the Universal Copyright Convention states that the countries to which the convention applies constitute a union for the protection of the rights of authors in their literary and artistic works. Generally, the term of protection is the life of the author and 50 years after his death, but countries in the Union may grant longer terms (Article 7).

Article 1 of the Universal Copyright Convention states that each contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, and printings, engravings and sculptures. The minimum term of protection shall not be less than the life of the author and 25 years after his death.

One important difference between the conventions is that the Berne Copyright Convention requires no formalities whereas the Universal copyright Convention permits contracting states to require compliance with formalities, including deposit, registration and the payment of fees.

Another important international development is TRIPs, (Trade Related Aspects of Intellectual Property Rights). There are a number of Provision in TRIPs that relate to copyright. The most important of these is that members must implement Articles 1-21 of the Berne Convention excluding Article 6 bis of that Convention dealing with moral rights [TRIPs Article 9(1)]. One of the consequences of this is that disputes over compliances with Berne can now be considered by the WTO.

In addition, the TRIPs Agreement contains certain ‘Berne-plus’ features, as regards various aspects of copyright. For example, under TRIPs, protection must be given to computer programs as literary works within the Berne Convention [TRIPs Act

10(1)].

In December, 1996, two treaties were agreed at Geneva: the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty. Both treaties were intended to supplement the existing Conventions to reflect, in particular, technological changes and changes in practice.

In India, the first Copyright Act was passed in 1914. This was nothing but a copy of the U.K. Copyright Act, 1911, with suitable modifications to make it applicable to the then British India. The next Act which is the current statute was the Copyright Act, 1957 which adopted many of the principles and provisions contained in the U.K. Act of 1956, but it also introduced many new provisions.

The present law of Copyright in India is contained in the aforementioned Copyright Act, 1957 as amended subsequently. Besides consolidating and amending the law relating to Copyright, it also introduced a number of changes and new provisions. No Copyright exists in any work except as provided in the said Act (Sec. 16). Copyright subsists only in the items of work specified in Sec 13 of the Act, namely (a) original literary, dramatic, musical and artistic work, (b) cinematograph film and (c) records. The scope of the works, however, has been the subject of various judicial interpretations.

The Copyright Act, 1957 provides for the setting up of a Copyright office under the control of Registrar of Copyright for the purpose the registration and certain other functions. A body called Copyright Board was created under the Act. The Board is authorized to deal with certain kinds of disputes pertaining to Copyright.

The orders passed by the Registrar and the Board in certain matters are appealable. Infringement of Copyright can be stopped by an action of infringement. The remedies available are an injunction and damages or account of profits and in some cases conversion damages. Infringement of Copyright is also an offence punishable with imprisonment and fine.

The Copyright Act, 1957 came into force on 21st January 1958. On the same day, the Central Government under powers conferred by the said Act passed two orders, S.R.O. No. 271 and S.R.O. No. 272 in respect of international Copyright, both being dated 21.01.1958. Copyright protection is given only to works first published in India irrespective of the nationality of the author except where the author is foreign national whose country does not give Copyright protection in India to the extent available in the home country on reciprocal basis.

Works of International Organizations like United Nation Organizations and its specialised agencies and Organization of American State are granted Copyright protection in India irrespective of the place of publication provided they are first published by the International Organization and there is no

Copyright for the work in India at the time of publication and Copyright in the work belongs to the Organization. Works of foreign authors first published in India will be granted protection in India on reciprocal basis, that is, provided similar protection is granted to Indian authors.

India is a member of Berne convention and Universal Copyright Convention. The Copyright Act, 1957 conforms to these two Conventions.

Both these Conventions were revised at Paris in 1971 enabling developing countries to grant compulsory licences for translation and reproduction of works of foreign origin required for specified purposes.

The Copyright (Amended) Act, 1983 was enacted with a view to avail of these benefits. The Copyright Amended Act, 1983 makes a number of other amendment to the Act of 1957 in connection with publication of certain unpublished works, empowerment of the Copyright Board and broadcasting authorities. These Amended Act of 1983 came into force on 9th August 1984.

The Copyright (Amended Act) 1984 introduced certain important amendments the object of which is mainly to discourage and prevent the widespread piracy prevailing in video film records. It came into force with effect from 8th October, 1984.

Consequent upon India signing the GATT and entering the global market economy, a number of changes have been made in the Copyright Act, 1957 by the Amended Act of 1994, to give effect to the obligation arising from the signing of the GATT and to make Indian law more in line with the present law in many developed countries.

In the rapidly changing technological environment, Copyright protection is being extended to many areas of creative work particularly in computer industry, relating to computer software and databases. This has found recognition in the 1994 Amendment Act. The Act was finally amended by the Copyright (Amendment) Act, 1999.

The tenure of Copyright, as per present Indian law, is the lifetime of the author and 60 years after his / her death.

Copyright is an incorporeal property in nature. The property in the work is justified by the fact that the right owner has created or made it. As he is the owner of the property, he can dispose of it by outright sale (assignment of his right) or by licensing. Since the subject of the property is incorporeal, it gives a dominium over the work a right in the work programme.

The property is an 'intellectual property' in the sense that it originates in the mind of persons before it is reduced to material form. However,

it is noteworthy that ideas and thoughts are not protected which merely exist in a man's brain as ideas and thoughts are not works under the copyright law. But once reduced to writing or other material form, the result becomes a work worthy of protection.

Further, copyright is a bundle of exclusive rights

. It is called a negative right, which means that the right owner can prevent all others from copying

his work, or doing any other acts which, according to copy right law, can only be done by him.

This is also referred to as a monopoly, as it is recognized that the product of a person's skill and

labour is his property. However, the term 'monopoly' is misleading.

The reason is that if it can be shown that two precisely similar works were, in fact, produced wholly independently of one another, there can be no infringement of copyright by one of the other.

Origin and development of copyright at International Level.

i. Contents -

The first international convention on the law of copyright was the Berne convention for the protection of Literary and Artistic Works, 1886. The convention was adopted and signed initially by ten countries, it has now a membership of 136 states, more than half of whom are developing countries. The universality of the Berne Convention is evident from the fact that its membership extends to a number of states in all continents.

States at present party to this convention include those in Africa (38), in America (26), in Asia and the Pacific (26) including of course, India and in Europe (46). The Berne convention has been revised several times in order to improve the international system of protection which the convention provides.

Changes have been effected in order to cope with the challenges of accelerating development of technologies in the field of utilization of author's work in order to recognize new rights as also to allow for appropriate revisions of established ones. An additional Act was included in 1896. The first major revision, however took place in Berlin in 1908, twenty two years after the initial formulation of the Berne convention in 1886. This was followed by the revisions in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971. These revisions have successively helped to enrich the contents of the convention.⁵

Each revision has added to and embellished. Briefly the additional Act of 1896 extended the duration of the right of translation to the normal term; it also took a step towards protection of architectural works. The Berlin Act of 1908 added choreographic works and entertainments in dumb show, photographic and similar works, works of applied art, cinematographic work as well as derivative works (translation, adaptations etc.) to the list of protected works.

The Rome Act of 1928 further extended the enumeration of protected work to include lectures, addresses, sermons and other of an oral nature. It also recognized the right of broadcasting as also the So called moral rights. The Brussels Act of 1948 reinforced protection of works of applied art; extended the right of authors of dramatic and musical works to cover "any communication to the public of the performance of their works

⁵ Intellectual Property Rights – by Dr. J.K. Das, First Edition – 2008, Pages 79-80.

”, the right of broadcasting was to cover any communication to the public by wire or by re-broadcasting of the broadcast of the work; obliged member states to provide for a term of protection covering fifty years after the death of the author; and included a provision for droit de suite an interest in the sale of original works or manuscripts subsequent to the initial or first interest.

Purpose

The purpose of the Stockholm revision of 1967 was to cater for the rapid technological developments as well as the needs of developing countries and to introduce administrative and structural changes. For the first time the right of reproduction of the work was expressly accorded to authors. As for the preferential provisions for developing countries worked out in Stockholm, these were further taken up at the Paris Revision Conference in 1971,

where new compromises were worked out. The substantive provisions of the Stockholm Act (other than the appendix) which had also never entered into force were, however, adopted by the Paris Revision Conference in fact as they had been worked out and included in the Stockholm Act

The purpose of the Berne convention has indicated “to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic work”.

Article – 1 lays down that the countries to which the convention applies constitute a Union for protection of the rights of authors in their literary and artistic works. The basic principles of the convention include “national treatment” according to which works originating in one of the member states are to be given the same protection in each of these states as the later grant to works of their own nationals; also the principle of automatic protection, according to which such national treatment is not dependent on any formality;

In other works protection is granted automatically and is not subject to the formality of registration, notice or deposit.

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 of adaptations and translations of the work and doing any of the above acts in relation to a substantive part of the work;

Doing anyone of the above acts in relation to a substantive part of the work will amount to infringement of copyright. Mere difference in dimensions or in accurate reproduction where substantial part of the work is immaterial for bringing an act into the sphere of infringement of copyright.⁶

The Supreme Court of India in landmark judgement of R.G. Anand v. Deluxe Films,⁷ clearly, explains the circumstances and instances pertaining to copyright infringement. The court has laid down the following propositions for holding infringement of copyright –

- i. There is no infringement of copyright in copying an idea, theme, plot, historical or legendary fact. Infringement and expression of the idea of author of the original work.

⁶ The Emerging challenges to the Legal Protection of creativity under copyright law an overview – by Dr. V. Tayal and Mr. Tariq, Supreme Court Journal (Apex Court Expression – Reverted – SCJ) 2008. January : Pages 20-22.

⁷ AIR 1978 SC 1613.

- ii. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the court should determine whether or not the similarities are on fundamental or substantial aspect of the mode of expression adopted in the copyright work.
If the defendant's work is literal imitation of some work having copyright, with some variation it may amount of infringement of copyright.
- iii. The better test is to see whether a spectator or the viewer after having read or seen both the works is clearly of opinion with an unmistakable expression but 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. If the similarities appear in two works with material and broad dissimilarities negating the intention to copy the original and the coincidence in the two works are merely incidental, then there would be no infringement of copyright.
- vi. As a 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.
- vii. The viewer's test is material to prove infringement of copyright. If the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

Doctrine of fair dealing.

Considering various situations in which it would not be proper to force a user to obtain consent of the owner of a copyright, the legislature has provided several exceptions in law. These exceptions are enumerated in section 52 of the copyright Act

1957. "Fair dealing", is one of the most important and debatable exception under section 52 of the Act.

There is burning question to the publishing community that how much of someone else's work may be used without asking permission. The answer rests in the concept of "fair dealing" or "fair use".

Fair use was traditionally defined as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent. The Whitford committee report recommended a general defense of fair dealing with a work a dealing not ‘unreasonably prejudicing the copyright owner’s legitimate interests’.

Thus under the fair dealing doctrine of copyright law, an author may make limited use of another author’s work without asking permission. The fair dealing or fair use privilege is perhaps the most significant limitation or a copyright owner’s excluding rights.

The notion of permitting some use of a copyright work which is considered to be fair is common in many jurisdictions. For example, section 107 of the copyright Act, 1976 of the USA has allowed fair use in relation to a copyright work.

Section 107 of the Act. requires a case-by-case determination whether a particular use is fair and the statute notes many nonexclusive factors to be considered. This approach was “intended to restate the judicial doctrine of fair use not to change, narrow or enlarge it in any way”.

In the U.K., Fair dealing is allowed in relation to copyright work of the various permitted acts in chapter - III of the copyright, designs and patents Acts 1988, the most well known are the fair dealing defences that are found in sections 29 and 30

fair dealing for the purposes of criticism or review;

III. fair dealing for the purposes of reporting current events.

One of the notable features of U.K., Copyright law is that fair dealing is only permitted for the purposes specially listed in the copyright, Designs and Patents Act 1988.

It means dealing must be fair for the purposes of reserve or private study, criticism or review, or the reporting of current events. As such, it is irrelevant that the use might be fair for a purpose not specified in the Act, or that it is fair in general.

The restricted approach adopted in the U.K. should be contrasted American copyright law which has a general defence of fair use, according to that; if the court is satisfied that the use is fair then there will be no infringement.

In India, section 52(i) of the copyright Act 1957 provides that a fair dealing with a literary, dramatic, musical or artistic work not being computer programme for the following purposes does not constitute infringement -

I. research or private study;

II. criticism or review whether of that work or of any other work;

III. reporting current events in a newspaper, magazine or similar periodical or by broadcast or in a cinematograph film or by means of photographs.

The explanation to the above provision stipulates that whether dealing with a particular work was fair, it would have to be considered whether any competition was likely to exist between two works. The Kerala High Court has explained the meaning and expressions of fair dealing in *Civic Chandran v. Ammini Amma*.

⁸ The court held that, “the degree of substantiality that is to say the quality and value of the matter taken is an important factor in considering whether or not there has been a ‘fair dealing’. Each case depends on its facts and what may 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 book’. The court further declared that, fair criticism of the ideas and events described in the books or documents would constitute ‘fair dealing

’. Publication of confidential information leaked by third party can not constitute fair dealing for the purpose of criticism or review. [Beloff v. Pressdram].⁹

Kerala High Court in a recent judgment of M/s. Info seek solutions v. M/s. Kerala Law Times,¹⁰ clarifies the law of copyright in regard of the ‘judgment delivered by the court of law.

The court said, “Judgments being documents, recording facts which have been enquired into or may have been taken notice of for the benefit of the public or for resolution of disputes in accordance with

the law of the land, by the court as an agent authorized and accredited for that purpose by the law, the judgments are public documents. The information as to judgments and the source .

are in the public domain and cannot be subjected to copyright. Being public documents, judgments are essentially in public domain and cannot be treated as something over which copyright could exit.

The judgments of the superior courts constitute an important source of law (And) none can have copyright over the

CHAPTER-3

CONCEPT, MEANING AND DEFINITIONS OF COPY RIGHTS.

Copyright law confers upon the owner of the copyrighted work a bundle of exclusive rights in respect of the reproduction of the work and other acts. The owner of the copyright along has a sole right in relation to such work and he has the right to exclude all others from reproducing his work without his permission. If anybody else does any of the acts without the authority of the owner of the copyright, the owner of the copyright can maintain an action for infringement of his copyright against the wrongdoer.

Therefore the question of infringement of copyright comes into picture when the people intend to take undue advantage and cause economic loss to the people who by virtue of hard labour have earned those rights.

What is apparent is that the technological change has made reproduction of copyright material easy and cheap and also at the same time it has made piracy of copyright work simple and difficult to control.

They have made copyright infringement international in character when a work is transmitted from one point to another or made available for the public to access, numerous parties are involved in the transmission.

These include entities that provide Internet access or online services. When such service providers participate in transmitting or making available materials provided by another, which infringe copyright or related rights, they are liable. Such liability could arise in one of two ways if the service provider itself is found to have engaged in unauthorized acts of reproduction or communication to the public or

if it is held responsible or contributing to or making possible the act of infringement by another. It is the potential liability of online service and access providers for infringements taking place through their services.

The Digital Millennium copyright Act, 1998 shields qualifying Internet Service Providers from much of the potential liability. It insulates service providers from vicarious (but not direct) liability for copyright infringement,

both for acting as a conduit for infringing material (conduit activity) as well as infringing activities of their users and the contents of those user's web pages (user activity) on the Internet Service Providers.

The Information Technology Act, 2000 provides that a network service provider is not subject to criminal or civil liability for third party material for which or to which the providers merely provides access.

Home taping by audio video recording has posed further challenges to the rights of copyright owners of cinematographic films and sound recordings. By using audio and video recording devices any number of copies of the films or sound recording can be made available at a very low cost which may result onto a substantial loss to the copyright owners. Further 'home taping' reproduction of a broadcast may also be made by recording of the air from the satellite broadcast, thereby infringing the rights of broadcasting organizations and performers.

Perhaps the most difficult task for intellectual property owners is detecting infringement and identifying the infringer. Given the worldwide reach of Internet, the millions of websites on the World wide-web, the ease of access to and copying of others intellectual property and the framed anonymity of this new medium detection become cumbersome.

The sufferings of a creator can best be seen by looking at R.G. Anand v. Delux Films, where the court clearly held that if the mediums are different, providing violation becomes all the more difficult.

Concept of Copyright.

Whether copyright subsisted in a concept was an issue which came up before Delhi High Court in Anil Gupta v. Kunal Dasgupta . The plaintiff conceived the idea of producing a reality television programme containing the process of match making to the point of actual spouse selection in which ordinary persons would participate before a TV audience. The plaintiff devised a unique and novel concept of leaving it to the prerogative of a woman to select a groom from a variety of suitors. The concept was named as 'swayamvar'. The plaintiff disclosed this concept to defendant under confidential agreement in 1998 and a concept note was sent to him for the purpose of the production of the T.V. serial.

Subsequently, the plaintiff came to know about the defendant's plans of launching a high reality show for matchmaking by the name of

'Shubha Vivah'. The plaintiff filed a suit for copying violation of the concept of reality show of matchmaking and violation of confidential information.

The defendant contended that the concept was in public domain and there was no copyright in ideas. It was also contended that information given was a broad, vague and rough preliminary note which

could not have protection under confidential information. The Court held : that idea per se has no copyright.

But if the idea is developed into a concept fledged with adequate details, then the same is capable of registration under the copyright Act. The novelty and innovation of the concept of the plaintiff resides in combing a reality TV show with a subject like matchmaking for the purpose of marriage

.....Therefore, originality lies in the concept of plaintiff by conceiving a reality TV programme of matchmaking and spouse selection by transposing mythological swayamvar to give prerogative to woman to select a groom from variety of suitors and making it presentable to audience and to explore it for commercial marketing

. Therefore, the very concept of matchmaking in view of concept of the plaintiff giving choice to the bride was a novel concept in original thought capable of being protected [(2002)] 25 PTC 1, P 15].

The court, for the very first time, held that the concept might be subject matter of copyright protection. The judgement is a deviation from the well settled principle that copyright subsists in the expression. In *Zee Telefilms Ltd. v. Sundia Communications Pvt. Ltd.*, , the Bombay High

Court observed that the Law did not recognize property rights in abstract ideas, nor is an idea protected by a copyright and it become copyrighted work only when the idea was given embodiment in a tangible form. But where the plaintiff had developed an idea into various concept notes, character sketches, detailed plot of episodes, they would become subject matter of copyright protection.

The concept of 'copyright' and 'neighbouring right's' have assumed significance in the content of contemporary scientific, economic, social, political, and legal environment not only in India, but also in the entire world. The scope of copyright, which was restricted only to the protection of literary and artistic works, in the earlier days, has now been broadened to include not only literary and artistic works, but also dramatic and musical works, cinematograph film and sound recording. I

In addition, neighbouring rights which consist of the right of performers, the rights of producers of phonograms and the rights of broadcasting organizations are also covered by copyright Law. The reason why scope of the copyright has become so vast, are the technological innovations which took place in the last two centuries.

Technological innovations, e.g. computers, audio recording, video recording, reprography, cable Television, satellite broadcasting and most recently, the Internet have posed challenges to copyright laws from time to time and forced the nations to amend their laws.

Meaning and definition of Copyright.

According to Black's Law Dictionary copyright means right to transcript, imitation, reproduction, to sell, to public, to print copies or original work.

In British legal parlance, 'copyright' is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such as books, songs, films and computer programs.

Section – 14 of the Copyright Act, 1957 give comprehensive definition of the term

'copyright', the section read as under -

Section – 14 (Meaning of copyright) :- For the purposes of this Act, "Copyright means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof namely –

(a) In the case of a literary, dramatic or musical work, not being a computer programme –

i. to produce the work in any material form including the storing of it in any medium by electronic means; ii. to issue copies of the work to the public not being copies already in

circulation; iii. to perform the work in public, or communicate it to the public; iv. to make any cinematograph film or sound recording in respect of the work;

v. to make any translation of the work; vi. to make any adaptation of the work;

vii. to do, in relation to a translation of an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi).

(b) In the case of a computer programme –

i. to do of the acts specified in clause (a);

ii. to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme; provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental;

(c) In the case of an artistic work –

i. to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work; ii. to communicate the work to the public; iii. to issue copies of the work to the public not being copies already in circulation; iv. to include the work in any cinematograph films;

v. to make any adaptation of the work;

vi. to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clause (i) to (iv).

(d) In the case of a cinematograph film –

i. to make copy of the film, including a photograph of any image forming part thereof;

ii. to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier decisions; iii. to communicate the film to the public.

(e) In the case of a sound recording –

i. to make any other sound recording embodying it;

ii. to sell or give on hire, or offer for sale or hire any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions; iii. to communicate the sound recording to the public.

The Calcutta High Court in *Mohindra Chandra v. Emperor*, AIR 1928 declared that whether a material has been copied or not is a question of fact which can be decided by a court by considering the degree of resemblance.

In short, copyright is not the mere creature but a natural and civil right. Also though presently, under the existing law, it is a creature of statute, it is an incorporeal property right and is a part of

intellectual property. It is a right which protects the expression of an idea in a tangible form and not the idea itself. Copyright means the exclusive right to copy or reproduce a work in which the copyright subsists fully or partly, in any material form. In India, copyright is recognized, granted and enforced by the Indian copyright Act, 1957. According to section 14 of the copyright Act – 1957. According to section 14 of the Copyright Act 1957 :

“Copyright means the exclusive right to do or authorise others to do certain acts in relation to –

- (1) Literary, dramatic, artistic, computer and musical works;
- (2) Cinematography film and
- (3) Sound recording.

Thus, it is a right, which enable the authors, composers, artists, designers, and producers to control over the reproduction, communication, distribution and exploitation of such a work in public. Now, it is extended to creators of computer programmes, also.

Whale says “the first thing to understand is that it is not merely the right to copy. The word “Copyright” is, therefore, a misnomer”. (Whale on Copyright IV, (1993 Edn.) Sweet and Maxwell, P.1].

It is also stated in section -1 of U.K. Copyright Act, 1956 that copyright means the exclusive right by virtue and subject to the provisions of the Act to do and to authorise other person to do certain acts in relation to that work.

Apart from this, no attempt has been done to carve out any hard and fast statutory meaning of the term copyright.

Copyright is a property right that subsists in certain specified types of works as provided for by the Copyright, Designs and Patents Act 1988. Examples of the works in which copyright subsists are original literary works, films and sound recordings. The owner or the copyright subsisting in a work has the exclusive right to do certain acts in relation to the work, such as making a copy, broadcasting or selling copies to the public.

These are examples of the acts restricted by copyright. The owner of the copyright can control the exploitation of the work, for example, by making or selling copies to the public or by granting permission to another to do this in return for a payment. A common example is where the owner of the copyright in a work of literature permits a publishing company to print and sell copies of the work in book form in return for royalty payments, usually an agreed percentage of the price the publisher obtains for the books.

If person performs one of the acts restricted by copyright without the permission or licence of the copyright owner, the latter can sue for infringement of his copyright and obtain remedies, for example, damages and an injunction. However, there are limits and certain closely drawn exceptions are available, such as fair dealing with the work. An example would be where a person makes a single copy of a few pages of a book for the purpose of private study. Other acts may be carried out in relation to the work if they are not restricted by the copyright, for example, borrowing a recording of music from a friend to listen to in private.

A broad classification can be made between the various types of copyright work.

Some, such as literary, dramatic, musical and artistic works, are required to be original

As will be seen later, this is easily satisfied and the work in question need not be unique in any particular way. Other works such as films, sound recordings, broadcasts, cable programmes and typographical arrangements can be described as derivative or entrepreneurial works and there is no requirement for originality; for example, repeat broadcasts each attract their own copyright. Copyright extends beyond mere literal copying and covers acts such as making a translation of a literary work, performing a work in public and other acts relating to technological developments, such as broadcasting the work or storing it in a computer.

Remedies of copyright Infringement

Fundamentally and conceptually, copyright law should not give rise to monopolies, and it is permissible for any person to produce a work which is similar to a pre-existing work as long as the later work is not taken from the first. It is theoretically possible, if unlikely, for two persons independently to produce identical works, and each will be considered to be the author of his work for copyright purposes. For example, two photographers may each take a photograph of Nelson's Column within minutes of each other from the same spot using similar cameras, lenses and films, after selecting the same exposure times and aperture settings. The two photographs might be indistinguishable from each other but copyright will, nevertheless, subsist in both photographs, separately. The logical reason for this situation is that both of the photographers have used skill and

judgment independently in taking their photographs and both should be able to prevent other persons from printing copies of their respective photographs.

Another feature of copyright law which limits its potency is that it does not protect ideas, it merely protects the expression of an idea. Barbara Cartland does not have a monopoly in romantic novels. Anyone else is free to write a romantic novel, since the concept of a romantic novel is an idea and not protected by copyright. However, writing a romantic novel by taking parts of a Barbara Cartland novel infringes copyright, because the actual novel is the expression of the idea. Just how far back one can go from the expression as formulated in a novel to the ideas underlying the novel is not easy to answer. If a person gleans the detailed plot of a novel and then writes a novel based on that detailed plot, there is an argument that there has been an infringement of copyright even though the text of the original novel has not been referred to further or copied during the process of writing the second novel

A detailed plot, including settings, incidents and the sequence of events can be described as a nonliteral form of expression. However, the boundary between idea and expression is notoriously difficult to draw. Suffice it to say at this stage that judges have been reluctant to sympathise with a defendant who has taken a short cut to producing his work by making an unfair use of the claimant's work, especially when the two works are likely to compete.

Copyright is also restricted in its lifespan; it is of limited duration, although it must be said that copyright law is rather generous in this respect. For example, copyright in a literary work endures until the end of the period of 70 years from the end of the calendar year in which the author dies." Approximately, therefore, copyright lasts for the life of the author plus 70 years." This temporal generosity can be justified on the basis that copyright law does not lock away the ideas underlying a work.

Ownership of the copyright in a work will often remain with the author of the work, the author being the person who created it or made the arrangements necessary for its creation, depending on the nature of the work. However, if a literary, dramatic, musical or artistic work is created by an employee working during the course of employment, his employer will own the copyright subject to agreement to the contrary. Additionally, copyright, like other forms of property, can be dealt with; it may be assigned; it may pass under a will or intestacy or operation of law, and licences may be granted in respect of it.

Full acknowledgement of moral rights is a relatively recent concept in UK copyright law, though well established in other European countries reflecting differences in the historical development and conceptual foundations of copyright between the UK and continental Europe." These moral rights,

such as the right to be recognised as the author of a work and the right to object to a derogatory treatment of the work, remain with the author irrespective of subsequent ownership and dealings with the ownership of the copyright.

They recognise the creator's contribution, a way of giving legal effect to the fact that the act of producing a work is an act of creation and that the creator has a link or bond with the work which should be preserved regardless of hard economic considerations. The tort of defamation has, of course, long been available and could provide remedies if an author's work were to be distorted or if a work was falsely attributed to someone, depending on the circumstances, for example, if a dreadful musical composition was falsely attributed to a famous and brilliant composer. But the difficulties of suing in defamation and the attendant expense and uncertainty are good reasons for the author-work nexus to be specifically recognised and enforceable in copyright law."

Copyright law adopts a very practical posture and takes under its umbrella many types of works which lack literary or artistic merit and may or may not have commercial importance. Thus, everyday and commonplace items, such as lists of customers, football coupons, drawings for engineering equipment, tables of figures, a personal letter and even a shopping list, can fall within the scope of copyright law." One important reason for protecting such things is that some of them are likely to be of economic value and usually will be the result of investment and a significant amount of work, such as a computer database.

Without protection there are many who would freely copy such things without having to take the trouble to create them for themselves and who would be able, as a consequence, to sell the copied items more cheaply than the person who developed or produced the original.

this were to happen, the incentive for investment would be severely limited. Neither is copyright generally concerned with the quality or merit of a work, the rationale being that it would be unacceptable for judges to become arbiters of artistic or literary taste or fashion. Copy-

right implicitly accepts that tastes differ between people and over a period of time. If the converse were true, many avant garde works would be without protection from unauthorised copying and exploitation.

The pace of technological development in recent times has been unprecedented, but copyright law has striven to keep pace and the current legislation, the Copyright, Designs and Patents Act 1988, attempted to provide a framework which will be resilient to future changes

." A recent example of copyright being adapted to prevent the unfair use of works created by or associated with modern technology is

CHAPTER-4

ONLINE COPYRIGHT INFRINGEMENT

The essence of the law of copyright is that it does not permit to make profit and appropriate to himself the labour, skill and capital of another. The law is strong enough to restrain what otherwise would be an injustice. At every stage in the law of copyright, and of performing rights, the author of a work has exclusive right with regard to certain restricted acts. If these acts are performed by another person; without the consent of the owner of copyright, then the person infringes copyright in that work. Thus, while infringement in its literal sense conveys a breach of some right which a person enjoys, in its application to copyright it refers to some unauthorised use of a copyright work. Section-51 of the Copyright Act, 1957 defines infringement in general terms which may be summed up as _____.

- (a) doing anything without license for which the owner of copyright has exclusive rights;
- (b) permitting for profit without 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 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 in India for the private and domestic use of the importer is permitted.

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 _____

- (i) In relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematograph film;
- (ii) In relation to a cinematographic film, a copy of the film made on any medium by any means.
- (iii) In relation to a sound recording, any other recording embodying the same sound recording, made by any means;

- (iv) 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.

Ownership of Copyright.

The basic rule as to ownership as laid down in section 2(d) of the Copyright Act, of 1957 is that the author is the first owner of any copyright in it. Under the Act the author remains –

1. In relation to a literary or dramatic work, the author of the work.
2. In relation to a musical work, the composer.
3. In relation to an artistic work other than a photograph, the artist.
4. In relation to a photograph, the person who has taken the photograph.
5. In relation to a cinematograph film and sound recording, the producer.

i. Copying : Infringement requires proof of copying. While exact reproduction would undoubtedly constitute infringement, the difficulty arises in cases which involve similarity (between the copyrighted work and the infringing work) which may or may not be to substantial extent. In such cases the court will conclude infringement if –

- (a) The defendant had access to the copyrighted work;
- (b) The defendant's work is substantially similar to the copyrighted work.

ii. Access : The plaintiff must prove that the copyrighted work is the source from which the infringing work is derived. From this, it is essential to prove that the defendant had access to the copyrighted work. The defendant however can rebut this allegation by showing that –

- (1) The plaintiff copied from the defendant; or
- (2) They both copied from a common source; or
- (3) They arrived at their results independently.

Presence of striking similarities between the two works coupled with the fact that the defendant's work was later in point of time and he had access to the plaintiff's work will, in the absence of a convincing explanation to the contrary (by the defendant), lead the court to a conclusion of infringement. An important point to remember is that a work may be copied by imitating a copy of it.

iii. Similarity :- Any action for infringement hinges on the question of similarity. The plaintiff must prove that the infringing work is substantially similar to the copyrighted work. The criterion applicable is qualitative and not quantitative.

iv. In other words, it does not matter how much is taken but the worth of the work taken. This has been summed up beautifully by Laddie, Prescott and Victoria in their book.

The Modern Law of copyright. They say "copyright in a work is infringed by taking a substantial part of it. But what is the meaning of 'substantial' ? It is a question of fact and degree, a matter for the jury. Sheer arithmetical quantity alone is not the test; for a short extract may be a vital part of a work, and 'the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken'.

One test may be whether the part taken is novel, or striking, or is merely a commonplace arrangement of ordinary works or well known data. The question is, therefore, bound-up with that of originality, that is, not necessarily originality in the popular sense of that term, but whether the author has employed more than negligible skill or labour and the defendant has appropriated it.

While there is near unanimity of opinion on the point that copyright is infringed by substantial taking, determination of substantial taking is by no means an easy task. For this purpose, similarity is divided into three types –

- (1) Unprotectible similarities;
- (2) Literal Similarities;
- (3) Non-literal similarities

In other words, one of the main objects of copyright legislation is to protect the copyright from infringement and piracy. The owner has the exclusive right to do certain acts in respect of the work. If any other person does any of these acts without proper authority he would be guilty of infringement of the copyright work.

Under Section 51 of the Copyright Act, 1957, infringement of copyright has been explained.

Copyright in a work shall be deemed to be infringed –

(a) When any person without the licence granted by the owner of the copyright or the Registrar of copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act –

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) 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, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) When any person –

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India any infringing copies of the work.

[Provided that nothing in sub-clause].

(v) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation – for the purpose of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an ‘infringing copy’.

Above provision states clearly that, to constitute infringement of copyright, two elements are essential. First, there must be sufficient objective similarity between the infringing work and the copyright work.

Secondly, the copyright work must be the source from which the infringing work is derived.

II. 5. 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 of adaptations and translations of the work and doing any of the above acts in relation to a substantive part of the work.

Doing any one of the above acts in relation to a substantive part of the work will amount to infringement of copyright. Mere difference in dimensions or in accurate reproduction where substantial part of the work is immaterial for bringing an act into the sphere of infringement of copyright.

The Supreme Court in the land mark judgment of *Anand v. Deluxe Films*, AIR 1978, SC 1613, clearly explains the circumstances and instances pertaining to copyright infringement. The court has laid down in the following propositions for holding infringement of copyright –

- (i) There is no infringement of copyright in copying an idea, theme, plot, historical or legendary fact. Infringement and expression of the idea of author of the original work.
- (ii) Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the court 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 is literal imitation of some work having copyright, with

(iii) some variations, it may amount of infringement of copyright.

(iv) The better test is to see whether a spectator or the viewer after having read or seen both the works is clearly of opinion with an unmistakable expression that the subsequent work appears to be copy of the original.

(v) 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.

(vi) If similarities appear in two works with material and broad dissimilarities negating the intention to copy the original and the coincidence in the two works is merely incidental, then there would be no infringement of copyright.

(vii) As a 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.

(viii) The viewer's test is material to prove infringement of copyright. If the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

Spirit of Copyright Act.

The Copyright Act does not enlist circumstances that would result in infringement of copyright. Instead comprehensive provisions have been added in the Act to bring possible infringements within the fold. According to the copyright Act, 1957, the infringement of a work place when a person does anything that is the preserve of copyright owner, without a license from him or the Registrar of copyright or acts in contravention of the express conditions contained in the license if granted. Infringements in a case of performance also cover persons who permit the use of a place for profit if

such performance amounts to violation of copyright. Infringement also embraces the cases where a person imports infringing copies of the work or makes copies for sale, hire or displays such copies for trade.

There are wide varieties of acts which may constitute infringement of copyright.

For a party to be liable for direct infringement, there must be ‘some element of direct action or participation’ in the act of infringement, such as distribution or display of copyrighted work. Similarly, for a party to be liable for contributory infringement it must have knowledge of the infringing activity and have induced, caused or materially contributed to the infringement.

Indirect infringers are -

persons who do not themselves violate a right, but whose action or omissions contribute to such a violation, they may act unlawfully because of a breach of a duty of care. An employer is liable for infringement of copyright committed by his employees in the course of their employment.

This is so even if the employee is ignorant that he is committing an infringement or if the employer has given general instructions not to commit any act of infringement. Borrowing a part of the speech that was only two and a half minutes duration in a three – hour film may cause infringement. When any person permits for profit any place to be used for the communication of the work to be public, such communication constitutes an infringement of the copyright in the work. When any person makes for sale or hires any infringing copies of the work, it is an infringement of copyright.

Criterion for determining Infringement.

There are two fundamental elements required to determine the cases of infringement of copyright –

- (i) There must be sufficient objective similarity between the infringing work and the copyrighted work or a substantial part thereof.
- (ii) The copyrighted work must be source from which the infringement work is derived.

The ultimate test “has there been a reproduction of plaintiff’s work in a substantial form ?” The ‘substantial’ embraces within its ambit two conceptions namely –

- (a) The one of being ‘Considerable’ i.e., as regards quantity, this meaning is directly attributed to the words when the quality of infringed work is uniform.
- (b) The other being ‘important’ or material, that is as regards quality.

This meaning may be attributed to the word when the quality of the infringed work is not uniform, as when some parts are vital while the others are not.

In the former case, while the reproduction of 10% of the infringed work is not substantial, but in the latter case, even 4% which represents the vital part or the cream of the infringed work, may be held to be substantial. In determining what is substantial part, the court shall consider –

- (a) The value of the part appropriated;
- (b) It’s relative value to each work;
- (c) The purpose itself in each, and
- (d) How far the pirated matter will, by reason of reproduction of the substantial part, tend to supersede the plaintiff’s work or interfere with it’s sale.

The grave man of copyright infringement is essentially the unlawful copying of original matter from the copyrighted work, it must be shown that the latter, rather than common sources of knowledge available to all were used as the source, for reproducing the same work. The true test of piracy is to ascertain whether the defendant had in fact used the original plan, arrangement and illustration of plaintiff's model of his own work, or whether his work is the result of his own skill or labour and use of common materials and common sources of knowledge open to all men and the resemblances are either accidental or arise from the nature of the subject.

In most cases there is no direct evidence of copying. Copying can only be deduced by inference from all the surroundings circumstances, i.e. in case of infringement of literary work, the defendant's work containing the same errors as in the plaintiff's work or similarity in language or idiosyncrasies in style may provide some evidence of copying. One of the surest test to determine whether or not there has been a violation of a copyright is to see, if the reader, spectator or the viewer, after having read or seen both the works, would be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first; in other words the court is to test on the visual appearance of the object and drawing, designs or artistic work by applying what is called the "Lay observer test". If to the lay observer it does not appear to be reproduction, there is no infringement of the copyright in the artistic work. Some of the ways to prove infringement are comparison of works, colourable imitation of work, reprography, replica of original picture etc. Substantially for the purpose of copyright work is to be judged by quality rather than quantity.

The expert opinion should be sought for to decide the question of infringement of copyright. Infringement of copyright has to be tested on the visual appearance of the drawing and the object in question.

In order to succeed in an action for infringement the plaintiff has to establish –

- (i) That there is a close similarity between two works,
- (ii) That the defendant has directly or indirectly made an unlawful use of the plaintiff's work.
- (iii) That there is a chain of causation linking the plaintiff's copyrighted work with defendant's alleged infringing copy.
- (iv) That the defendant had access to the plaintiff's work on an infringing copy of work.

What the defendants do must be interfere with author's proprietary rights and cause him injury. Profit is very important element. It must be considered whether there has been admission of any important portion of the public with or without payment.

By contrast for a party to be vicariously liable, it need not have knowledge of the infringement, but must have been benefited financially and had right and ability to supervise the activity.

Copyright as a means of Exploiting a Work.

Copyright provides a very useful and effective way of exploiting a work economically. It provides a mechanism for allocation of risks and income derived from the sale of the work. For example, if a poet compiles an anthology of poems, this will be protected as a literary work even if unpublished. Copyright provides remedies in respect of published and unpublished works. If an unpublished work is copied and sold by someone without the permission of the copyright owner, remedies such as damages, additional damages, accounts of profits and injunctions are available depending on the circumstances. They are, however, available only to the owner of the copyright or an exclusive licensee.

A beneficial owner of the copyright cannot obtain damages or a perpetual injunction without joining the owner of the legal title to the copyright, although a beneficial owner may be able to obtain an interim injunction on his own. If the poet in the example wants his anthology of poems published, he might decide to approach prospective publishers, and if one agrees to publish, the poet might grant an

exclusive licence to the publisher allowing him to print and sell copies of the poems in book form. Alternatively, the poet might agree to assign the copyright to the publisher. In either case, the publisher usually takes the risk - he pays the cost of printing, binding, marketing and distributing. In return, the poet will be paid a royalty of, say, 10 per cent of the income obtained by the publisher on sales of the anthology.

An added attraction, in the case of an exclusive licence, for example, a licence granting the exclusive rights of publishing the work in the UK, is that the publisher has the right to sue for infringement, and if the publisher is successful, the poet will be entitled to a share of the damages awarded equivalent to his lost royalties attributable to the infringement."

Depending on the terms of the exclusive licence, the poet may be free to make agreements in respect of other modes of expression of the poems, such as a sound recording of the poems being recited by a famous actor. Of course, if the poet assigns the work to the publisher, the publisher will be entitled to sue for infringement as owner of the copyright and the assignment agreement will usually provide for a division of the damages awarded between the author and the publisher. For the author,

a major attraction of the exclusive licence, or for that matter an assignment, to a publisher is that copyright actions tend to be fairly expensive and daunting for an individual to pursue, but a reputable publishing company will not hesitate in enforcing its rights under copyright law and, indirectly, the rights of the author.

A copyright can be considered to comprise a bundle of rights, associated with the acts restricted by the copyright. These are the acts that only the copyright owner is allowed to do or authorise. These acts include copying, issuing copies to the public, performing, playing or showing the work in public and broadcasting the work. These can be exploited separately and a copyright owner must be careful not to assign or grant more than necessary. For example,

the owner of the copyright in a dramatic work might grant an exclusive right to publish the work in book form to a literary publisher. The owner may then later grant other rights to others, such as the right to perform the work on stage, or even the right to make it into a film. In this way, the income the owner derives from the work can be maximised.

Copying

Making a copy of a work is the act which most people think of in terms of copyright infringement, for example, making a photocopy of pages in a book or duplicating a music cassette. But 'copying' has a technical meaning which varies depending on the nature of the work in question. Section 17 of the 1988 Act comprehensively deals with the concept of copying, and generally copying is a restricted act for all categories of copyright works. When considering the definitions of copying, it is essential to recognize that many of the words and terms used are themselves widely defined in the Act.

Section 17(2) defines copying, in relation to a literary, dramatic, musical or artistic work, as reproducing the work in any material form. This does not extend to taking the idea underlying the work. For example, in *Breville Europe plc v. Thorn EMI Domestic Appliances Ltd.*, it was held that taking the idea of using triangular dividers in a sandwich toaster would not infringe the copyright in the claimant's drawings. The defendant's toaster was created independently and no use was made of the skill, labour and effort expended in creating the drawings."

Reproducing in a material form is stated by Section 17(2) to include storing the work in any medium by electronic means. Thus, recording a copy of any of the 'original' works of copyright in modern

computer storage media falls within the meaning of copying, acknowledging the fact that a work can be stored electronically in an intangible form and copied without the need for paper. 'Electronic' has an extremely wide meaning going well beyond an engineer's understanding of the word. Under Section 178

'electronic' means actuated by electric, magnetic, electro-magnetic, electro-chemical or electromechanical energy. However, Section 17(2) is phrased in terms of storing the work in any medium rather than storing the work in or on any medium, although this is unlikely to cause problems in practice because the phrase 'reproducing the work in any material form' should be wide enough in its own right to include any form of storage, given the spirit of the Act.

The inclusion of electronic storage as a means of reproducing a work in a material form means that a musical work recorded on magnetic tape or CD will infringe unless the recording was made with the copyright owner's licence. In the past, there have been problems with some forms of storing works. For example, in *Boosey v Whight* it was held that the manufacture of a paper roll with perforations in it so that it could be used to play music on a mechanical organ did not infringe the copyright in the music so represented. However, this case was decided under the Copyright Act 1842 Section 15, which was in terms of the author's right being to prevent copying sheet music regarded as a book. That is, it envisaged copying sheet music as sheet music. It is submitted that making a 'piano roll' will infringe under the current legislation. By analogy, storing a work on punched card or paper is no different to storing the work as magnetic pulses on a disc. Music on punched tape is reproduced in a material form.

As regards films, television broadcasts and cable programmes, copying includes making a photograph of the whole or any substantial part of any image forming part of the film, broadcast or cable programme. Therefore, taking a single photograph of a substantial part of one frame of a film or a photograph capturing a substantial part of a momentary display on a television monitor, being the result of either a broadcast or cable programme, infringes copyright. In *Spelling-Goldberg*

Productions Inc v BPC Publishing Ltd, the claimant made a 'Starsky and Hutch' film and the defendant copied and published a photograph of one frame of the film

It was held that the making of a copy of a single frame of the film was an infringement of the copyright in the film because a single frame was a part of the film within the meaning of the Copyright Act 1956 Section 13(10). The generous definition of 'photograph' contained in the 1988 'Act should be considered in relation to this form of copying and the fact that photographs and films are mutually exclusive." It should also be noted that section 17(4) states that copying includes making a photograph, and that making a film of a film or a film of a television broadcast will probably be deemed to fall within the act of copying. It is possible in such examples that photographs of some kind may be used in an intermediate process, in which case there will be an infringement in respect of the intermediate copies as, under section 17(6), copying includes the making of copies which are transient or incidental to some other use of the work.

Copying in relation to a typographical arrangement of a published edition simply means making a facsimile copy of the arrangement. Section 178 offers some assistance with the meaning of 'facsimile copy', stating that it includes a copy which is reduced or enlarged in scale. It is reasonable to assume that the word 'facsimile' has its ordinary dictionary meaning, an exact copy or duplicate of something, especially in relation to printed material. This is obviously intended to catch copying by the use of

Table : The restricted act of copying

Work Restricted act

Literary, dramatic, musical, artistic : section 17(2) Reproducing the work in any material form, including storing the work in any medium by Artistic (additional) : section 17(3) Film, TV broadcast, cable programme : section 17(4)

Typographical arrangement of a published edition : section 17(5)

All works : section 17(6) electronic means

Includes making a copy in 3-D of a 2-D work and making a copy in 2-D of a 3-D work, for example, making a painting of a sculpture or constructing a building from an architectural drawing

Includes making a photograph of a whole or any substantial part

Making a facsimile copy of the arrangement

Includes the making of copies which are transient or are incidental to some other use of the work photocopying technology. It will also apply to copies transmitted using 'fax' machines (facsimile transmission machines) and conversion into digital form for storage on computer media so that it may be reproduced faithfully in the future. Not only can the copyright in the typographical arrangement of published editions be infringed by digital storage or the use of a fax machine, but also copyright in other works, especially

the original works, may be infringed. For example, a person faxing a drawing will infringe the copyright in the drawing because he has made a copy of it, unless, of course, he has permission from the copyright owner to do this. Facsimile transmission is carried out by the sender's machine scanning a document and converting the data contained in the document into digital codes which are then transmitted over the telecommunications system to the receiving machine, which converts the digital data back to an image

. The person receiving a facsimile will obtain a faithful copy of the original although there may be some degradation in print quality. The above table summarises the scope of the restricted act of copying as it applies to different categories of works. It should be recalled that, generally, copying is a restricted act for all types of work.

Copying-dimensional shift.

In respect of artistic works, copying is extended to include the making of a copy of a two-dimensional work in three dimensions and vice versa." Thus, making a three-dimensional model from a drawing is copying, as is making a drawing of a three-dimensional sculpture. Copyright can be infringed indirectly and this means that the process of 'reverse engineering'," copying an article by inspecting it, taking measurements and examining details of its construction and using the knowledge thus gained to make the copies, may infringe the copyright in any original drawings of the article concerned. In *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd*, the claimant designed and made motor cars and also made spare parts for its cars. The claimant also granted licences to other companies permitting them to copy and sell spare parts for the claimant's cars in return for a royalty payment. The defendant refused to obtain a licence and manufactured replacement exhaust pipes for the claimant's cars by copying the shape and dimensions of the exhaust pipes made by the claimant for the Morris Marina car.

The defendant simply bought a Morris Marina and removed the exhaust pipe and examined it to see how it was made, what its contours were, etc. The claimant claimed that the defendant's exhaust pipes infringed the copyright in the original drawings of the exhaust pipes. It was held that the defendant had infringed the copyright subsisting in the drawings of the exhaust pipes by the process of reverse engineering, but the claimant would not be allowed to assert its rights under copyright law. It was said, in the House of Lords, that car owners have an inherent right to repair their cars in the most economical way possible, and for that purpose it was essential that there was a free market in spare parts. This required the adoption of the non-derogation from grant principle in *Browne v Flower* in which Parker J said (at 225): the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements.

Lord Templeman thought this principle could apply to a car just as easily as to land. He said:

The principle applied to a motor car manufactured in accordance with engineering drawings and sold with components which are bound to fail during the life of the car prohibits the copyright owner from exercising his copyright powers in such a way as to prevent the car from functioning unless the owner of the car buys replacement parts from the copyright owner or his licensee.

Therefore, although there had been a technical infringement of copyright, the claimant was not allowed to derogate from or interfere with the car owner's right to a free market in spare parts. This case is important because it shows how the courts are prepared to control actual or potential abuse of a copyright, but changes to copyright and design law have removed the possibility of infringing artistic copyright by copying an article made to a drawing if the article is subject to a design right and is not itself an artistic work. However, this does not apply until 1 August 1999 to design documents and models which were created before 1 August 1989. Nevertheless, it is clear that the British Leyland defence survives the 1988 Act, both in respect of the transitional provisions and in relation to infringements occurring thereafter: *Flogates Ltd v Refco Ltd*.

The British Leyland principle, that the owner of a complex article that will require replacement parts cannot be deprived of a free market in such parts, can be criticised in that it interferes with and curtails a clear statutory right, particularly as the 1988

Act contains numerous permitted acts, excusing what would otherwise infringe. The principle should be applied, therefore, only sparingly. The Judicial Committee of the Privy Council

Indicating that the principle should not be extended in its application and scope, went so far as to direct some criticism at it, saying that it was constitutionally questionable for a judicially declared head of public policy to override or qualify an express statutory provision. In *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd.*, which concerned the spare parts market (‘aftermarket’) for cartridges for laser printers and photocopiers, it was held the principle could not be regarded as being founded upon any principle of the law of contract or property, but was based on an overriding public policy. Lord Hoffmann, delivering the judgment of their Lordships, said (at 826):

Their Lordships consider that once one departs from the case in which the unfairness to the customer and the anti-competitive nature of the monopoly is as plain and obvious as it appeared to the House in *British Leyland*, the jurisprudential and economic basis for the doctrine becomes extremely fragile.

A number of factors in the Canon case distinguish it from *British Leyland*. The toner cartridges would normally be replaced when nothing was wrong with the printer or copier that could be described as requiring repair. It would have simply run out of toner. The cost is more like a normal running cost, such as servicing a car, rather than a repair. The aftermarket itself was different in that the cost of new cartridges was a much higher proportion of the cost of the printer or copier compared with the cost of an exhaust pipe in relation to the cost of a car. Cartridges are replaced much more frequently than exhaust pipes. Basically, the decision is a triumph for market forces. Lord Hoffmann accepted that customers are likely to calculate the lifetime cost of a printer or copier, taking into account the cost of cartridges, in comparing different manufacturers' products. If customers do this, it cannot be said that controlling the aftermarket is anti-competitive and a manufacturer who charges too much for his cartridges is likely to sell fewer machines.

The Judicial Committee of the Privy Council in *Canon* also directed some criticism at a line of authorities including *Dorling v Honnor Marine Ltd* and *LB (Plastics) Ltd v Swish Products Ltd* on copying by reproducing an article represented in a drawing or other graphic work. The Committee had been invited to depart from the e authorities and decide that copying a functional three-dimensional object is not an indirect reproduction of the drawings

. Lord Hoffmann said that such cases did not sufficiently distinguish between the reproduction of an artistic work (whether in two-dimensional form or threedimensional form) and the use of the information contained in an artistic work, such as a drawing together with additional text as the instructions for making a three-dimensional object. Although plainly derived from the drawing, the object does not reproduce the drawing. For example, in *Burke and Margot Burke Ltd v Spicers Dress Design*,

it was held that a frock made by the defendant (whether spread out or held up to view) was not a reproduction of the claimant's sketch of the frock. However, as the sketch showed the frock worn by a woman, Clauson J said that there might have been an infringement had the complaint been that the frock had been worn by a woman posing as in the sketch. The Committee declined to depart from previous law, partly because the law had changed and, in *British Leyland*, the House of Lords decided after much consideration to follow the earlier cases.

Under previous law, there was a defence under the Copyright Act 1956 section 9(8) to the effect that there was no infringement of artistic copyright by a 'dimensional shift' if the alleged infringing object would not appear to persons, not being experts in relation to such objects, to be a reproduction of the artistic work.

In other words, for an infringement, the object copied in a different number of dimensions from an artistic work would have to look like the artistic work in the eyes of the layman. He should have been able to recognise the artistic work in the copy.

This test became known as the 'lay recognition test', and was neither easy nor fair to apply as many drawings, particularly engineering drawings, do not appear to be much like the objects they represent in the eyes of a layman." For example, in *Merlet v. Mothercare plc*²⁴ defendant had copied a baby's rain cape designed by the claimant

On the question of infringement of the drawings made by the claimant for the cape, it was held in the Court of Appeal that the section 9(8) defence succeeded because the layman would not recognise the claimant's drawing by comparison with garments made by the defendant.

The drawing was in the form of a cutting plan and it was not permissible for the purposes of applying the 'lay recognition test' to unstick the defendant's garment. However, that test, which limited the strength of protection in relation to three-dimensional articles offered primarily through the medium of drawings, has now been abandoned by the 1988 Act.

The test itself was criticised by senior judges and clearly had failed to achieve its purpose of limiting the scope of copyright. It also provided some indefensible anomalies. For example, simple objects produced from simple drawings would be protected, while complex equipment produced from engineering drawings,

difficult for the layman to comprehend, would fail to attract such protection because the notional non-expert would fail to recognise one from the other.

Judges had even shown an inclination to fail to take account of differences in scale when applying the test. For example, in *Guildford Kapwood Ltd v Embsay Fabrics Ltd*, although the defendant's fabric, greatly magnified, did resemble part of the claimant's lapping diagram,

Walton J, regarding himself as the notional non-expert, did not think that the fabric appeared to be a reproduction of the lapping diagram.

The 'lay recognition test' emphasised visual appearance. In *Interlego AG v Tyco Industries Inc.* it was said that what mattered in relation to artistic works, especially drawings, is that which is visually significant. Indeed, in *Anacon Corp Ltd v Environmental Research Technology Ltd.*, Jacob J held that making a printed circuit board from a circuit diagram did not infringe the artistic copyright in the diagram because the finished board did not look anything like the diagram

. However, Jacob J failed to note that, under section 17(2), 'reproducing in a material form' includes storage by electronic means which cannot, by its nature, have any relevant visual significance.

It is submitted that, in respect of that part of the judgment, Jacob J was unduly influenced by the 1956 Act. 'Dimensional shift' copying applies only to artistic works. For example, in *Bradbury,*

Agnew & Co v Day, the claimant owned the copyright in a cartoon in *Punch* magazine. Some actors who enacted the cartoon on stage by dressing up and posing to look like the cartoon were held to have infringed the copyright in the cartoon.

The actors formed a three-dimensional representation of a twodimensional artistic work, that is, the cartoon. However, in *Brigid Foley Ltd v Elliott*, it was held that converting a two- dimensional literary work, a knitting pattern, into a three-dimensional object, a woolly jumper, was not an infringement of

the copyright subsisting in the knitting pattern, and was not a reproduction in a material form for the purposes of copyright.

Copying and alteration.

Significant difficulties may arise in infringement actions if the defendant has produced his work based on a previous original work but has made considerable alterations. Two approaches are possible: first, it is a question of whether the second work is sufficiently the result of skill and labour so that it becomes itself an original work of copyright; second, the distinction between idea and expression may be relevant to this situation. A person might freely admit that he has used another work during the preparation of his own, but may claim that he has not copied the expression of the first work and that his use of it was simply to 'determine the unprotected ideas contained therein. In other words, he has not made use of the copyrightable elements of the work, but only of the underlying ideas. *Glyn v Weston Feature30* provides an example of the former approach, that is whether the second person has used sufficient skill and effort to produce a new and distinct original work of copyright. In that case, a film entitled *Pimple's Three Weeks (without the Option)*, which was a send-up of a risqué play *Three Weeks*, was held not to infringe copyright in the play because very little of the original remained. It could not be said that the film was a reproduction of a substantial part of the incidents described in the play.

It may be the case that the defendant's work contains a number of similar elements but nothing identical to parts of the claimant's work. In *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, the claimant owned the copyright in a fabric design comprising horizontal stripes of irregular thickness with flowers scattered around the design in a manner described as somewhat impressionistic. The defendant created a similar design based on stripes and scattered flowers but whilst it looked very similar, there were many detailed differences. In such cases, the test for infringement is in two stages, the first being a comparison of the two works, looking at both the similarities and the differences so as to assess whether the second work has been copied from the first. If there is no copying, then there can be no infringement. Once the court is satisfied that there has been copying, the question is then whether the copied parts represent a substantial part of the claimant's work. The focus should then be on similarities rather than differences and whether the parts now accepted to have been copied represent a substantial part of the claimant's work. Where what has been copied is not identical but similar, the court has to decide whether the defendant's work incorporates a substantial part of the skill and labour involved in the creation of the claimant's work and where, as in the present case, there were a number of similarities, the cumulative effect of those similarities ought to be considered.

If all that can be shown to be taken is a basic idea, bearing in mind the oft-used phrase 'copyright protects expression not idea', it is unlikely that infringement will be found. In *Designers Guild, Lord Hoffmann*" distinguished two categories of ideas. Some he said were not protected because they had no connection with the literary, dramatic, musical or artistic nature of the work, such as a drawing disclosing an inventive concept. Other ideas, whilst they may be ideas of a literary, dramatic, musical or artistic nature, were not protected if they lacked originality or were so commonplace that they could not be a substantial part of the work, such as the idea underlying a drawing showing illiterate persons how to vote.

Judges are generally unsympathetic to a person who has created a work by

making use of a prior work of copyright. It seems wrong in principle that someone can take a short cut to producing his own work by relying on the skill and effort of others. If there is evidence that the defendant has used the claimant's work in some way, judges appear to be reluctant to find for the defendant, regardless of fine distinctions between idea and expression. For example, in *Blanco Products Ltd v Mandops (Agrochemical Specialists) Ltd*, the defendant started to sell a herbicide invented by the claimant and called 'Trifluralin' after the expiry of the patent. The defendant sold the herbicide together with a leaflet and label which were partly identical to those used by the claimant. After the claimant complained, the defendant produced a second leaflet using a different format and language.

The claimant still complained, and eventually the defendant started using a third version based on the second one, claiming that the information in the claimant's leaflet was in the public domain and that, although copyright protected the expression of language, it did not protect the content of it. As a matter of fact, it was found that most of the information in the defendant's leaflet could be traced to the public domain.

Nevertheless, it was held that" there was an arguable case of infringement of copyright, although the claimant was refused an injunction. Plainly, if the defendant had simply taken the trouble to locate and use information in the public domain in the preparation of its leaflet there would have been no infringement. But the fact that the defendant had used the claimant's original leaflet did not help its case and Buckley LJ said that, concerning infringement, the question was whether, by using the claimant's literature, the defendant was making use of the skill and judgment of the claimant.

Of course, if there is a substantial amount of language copying and the same characters and incidents are used, then the fact that the two works may have other differences will not help the defendant's cause. In *Ravenscroft v Herbert*, the defendant wrote a work of fiction but had used the claimant's non-fictional work as a source to provide credibility in relation to historical facts. The claimant's work concerned a spear reputed to have been the one used on Christ at the crucifixion, and to have been a source of inspiration for Nazi Germany. The spear is part of the Hapsburg treasure in the Hofburg Museum in Vienna. The defendant's claim to have used only historical facts from the claimant's work was rejected on the basis of substantial copying, particularly in terms of language copying, incidents and in the interpretation of events. Altogether, it was held that the infringing part represented only 4 per cent of the defendant's work, but in assessing damages that 4 per cent was rated as being worth 15 per cent in terms of its value to the whole of the work.

Copyright owners have occasionally complained about parodies of their works, that is satirical or comic send-ups. A parody usually involves a fair amount of alteration, but the link with the first work is quite blatant since the effect of the parody might largely be lost otherwise. Of particular importance, since the passing of the 1988 Act, in addition to the question of whether a substantial part of the first work has been copied, is that infringement of the author's moral rights may also be a significant issue." In *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd.*, a song entitled 'Rock-a-Billy' was parodied in another song which used 'the words 'Rock-a-Philip, Rock' in the chorus, but otherwise, the words of the two songs were different. It was held that the parody did not infringe the copyright in the original song. However, in *Schweppes Ltd v Wellingtons Ltd.* the defendant produced a label for a bottle which was very much like the claimant's famous bottle labels, except instead of using the word 'Schweppes' the defendant used the word 'Schlurppes'. Even though it was accepted that the defendant's label was a parody, it was held that the claimant's copyright had been infringed. There is no reason why parodies should be treated any differently to other works which are derived from or based on prior works,

although they do seem to have been looked on more kindly by the judiciary. Any difference in treatment runs counter to the Act and confirmation that the same principles apply to parodies as to other copies of works was indicated in *Williamson Music Ltd v Pearson Partnership Ltd*, a case involving a parody of the Rodgers and Hammerstein song 'There is Nothin' Like a Dame' for the purpose of advertising a bus company on television

. It was held that the test for determining whether a parody amounted to an infringement of the parodied work was whether the parody made substantial use of the expression of the original work. In other words, to find an infringement by the restricted act of copying, the second work must contain a reproduction in a material form of a qualitatively substantial part of the first work. To this must be added the fact that the 'author' of the second work must have made use of the first work in creating the second, that is there must be some causal connection between the works." II. 12.
Copying – causal connection

The infringing work must be derived from the claimant's work. There must be a causal connection as independent creation of a similar work does not infringe. In an action for copyright infringement by copying, proof of copying and the question as to which party bears the burden of proof are frequently important issues. Of course, the claimant has the burden of proving that the defendant has copied but, having discharged that burden, it can fairly be said that the burden of proof then shifts to the defendant in that he then is given the opportunity to rebut the inference of copying by offering an alternative explanation of the similarities between his work and the claimant's work. In *Francis, Day & Hunter*

Ltd v Bron, it was alleged that the defendant had reproduced the first eight bars of the song 'In a little Spanish Town' in his song 'Why' ('I'll never let you go, Why, because I love you'). The case is also of interest because it deals with the possibility of subconsciously infringing copyright. Willmer LJ accepted counsel's submission that in order to constitute reproduction:

1. there must be a sufficient objective similarity between the two works (an objective issue, that is, would the 'reasonable man' consider the two works sufficiently similar), and
2. there must also be some causal connection between the two works (a subjective question but not to be presumed as a matter of law merely upon proof of access).

In his judgment, Diplock LJ described the issue of proof of copying in very clear terms:

The degree of objective similarity is, of course, not merely important, indeed essential, in proving the first element in infringement, namely, that the defendant's work can properly be described as a reproduction or adaptation of the copyright work; it is also very cogent material from which to draw the inference that the defendant has in fact copied, whether consciously or unconsciously, the copyright work.

But it is not the only material. Even complete identity of the two works i.e. the works are identical] may not be conclusive evidence of copying, for it may be proved that it was impossible for the author of the alleged infringing work to have had access to the copyright work. And, once you have eliminated the impossible (namely, copying), that which remains (namely, coincidence) however improbable is the truth; I quote inaccurately, but not unconsciously, from Sherlock Holmes.

As indicated by Diplock LJ, factual similarity coupled with proof of access does not raise an irrefutable presumption of copying, at most it raises a prima facie case for the defendant to answer. Thus, in such cases, the burden of proof will shift to the defendant who will then have to satisfy the court, on a balance of probabilities, that he had not copied the first work and that any similarity is the 'result of coincidence, not copying. This approach was later accepted by the House of Lords in *LB (Plastics) Ltd v Swish Products Ltd*. where it was held, inter alia, that a striking similarity combined with proof of access raised a prima facie case of infringement that the defendant had to answer.

The nature of the similarities is also important. If the information copied is incorrect in its original form, this may be excellent proof of copying. For example, in *Billhoier Maschinenfabrik GmbH v TH Dixon & Co Ltd.*, Hoffman J said (at 123):

. . . it is the resemblances in inessentials, the small, redundant, even mistaken elements of the copyright work, which carry the greatest weight. This is because they are least likely to have been the result of independent design (original emphasis)

This is a very good reason why authors may deliberately include redundant material, mistakes or dummy entries in their work. It will be very hard for a defendant to give a plausible reason for their existence in his work. Unless admitted by the defendant, the claimant has to prove his work is a work in which copyright subsists, that he is the owner of that copyright (or the exclusive licensee), that the defendant has copied from it and that he has taken a substantial part. The inclusion of a few 'deliberate mistakes'

In his work will remove one of those barriers. As subsistence and ownership will not frequently be in issue, the outcome will be determined solely on the issue of whether a substantial part has been taken unless the defendant is relying on a particular defence to infringement. *IBCOS Computers Ltd v Barclays Mercantile Highland Finance Ltd* clearly demonstrates the effectiveness of errors and redundant material in proving copying.

It also shows that the amount of such material does not have to be great to convince a judge that copying has occurred.

The possibility of subconscious copying has already been mentioned above. Musical works are particularly susceptible to this form of copying, where the author of the second piece of music has heard the first music some time before, but has no contemporary conscious recollection of the first piece of music and certainly does not deliberately set out to copy it. This is what was alleged in the *Francis, Day & Hunter Ltd v Bran* case, where it was accepted by the judge at first instance that there had been no conscious copying. Nevertheless

, the first eight bars of each song were virtually identical (these are reproduced in the law report). Even so, there must be some causal link between the works - truly independent and coincidental similarity is not copyright infringement. In the Court of Appeal, Willmer LJ said (at 614):

... 'in order to establish liability [on the grounds of subconscious copying] it must be shown that the of the offending work was in fact familiar with the work alleged to have been copied.

At first sight, the notion of subconscious copying might appear bizarre, but it appears to be accepted also in the law of breach of confidence. Of course, if the first song has been popular, it will be difficult for a defendant to claim that he has not heard of it and has truly written his work independently in ignorance of it. In terms of music and, to some extent also, computer programs, the

author should consider taking deliberate measures to make sure that his work does not appear to be similar to an existing work.

The ultimate safeguard against allegations of subconscious copying is for the author to cut himself off from the rest of society, or that part of society knowledgeable about the particular class of works, and to create his work in a 'clean-room' environment. But, surely, copyright law does not and should not intend that authors should have to take such extreme measures. Nevertheless,

proof that the defendant has taken such measures will help his argument that he has not infringed copyright. In *Plix Products Ltd v Frank M Winstone (Merchants)* the fact that the defendant had instructed his designer to work alone without talking to others involved in the design of kiwifruit packs and without referring to existing packs showed that there had been no direct copying. However, it was held that the defendant had copied through the medium of the New Zealand Kiwifruit Authority's specification for kiwifruit packs which was, in turn, derived from the claimant's design. This New Zealand case is also notable in that it accepts that copyright can be infringed by copying from a verbal description, as is, in principle, also a possibility under UK law as section 16(3)(b) admits infringement by indirect copying.

Giving a design brief to a person engaged to create a work of copyright can itself infringe. It is all a matter of design freedom. For example, if a person after seeing a copyright work instructs another person to create something similar, the first might be guilty of infringement if the design freedom is so limited that the creation of a work substantially similar is almost inevitable. The same might apply if one person instructs another to create a number of works which are somewhat like the copyright work if the first, having knowledge of the copyright work, then selects the one most like the copyright work for commercial exploitation."

Certainly, the restricted act of copying should be construed as being concerned with an intentional act. The remedies available for copyright infringement give some support to this approach because, by Section 97(1), the claimant is not entitled to damages if it is shown that the defendant did not know and had no reason to believe that copyright subsisted in the first work at the time of the infringement. The difficulty is that, if the burden of proof shifts to the defendant, he may find it almost impossible to show that he did not base his work on a previous work which has become very well known, even though it was popular several years earlier.

If there is evidence that the defendant has copied in the past, this may be admissible as similar fact evidence. In *Designers 'Guild Ltd v Russell Williams (Textiles) Ltd*, at first instance, the claimant had evidence that a third party had made an allegation of copying one of its designs by the defendant. Evidence of copying in one case only is not, per se, evidence of copying in another case but may be relevant when judging the truth of any denial of copying or other explanation of the reason for an objective similarity by the defendant. In *Stoddard International plc v. William Lomas Carpets Ltd.*, the claimant relied, inter alia, on similar fact evidence relating to two other instances of producing carpet designs which were lookalikes of carpet designs owned by a third party. However, this evidence was very unsatisfactory and failed to indicate a propensity to copy or produce lookalikes.

Issuing copies of the work to the public.

The doctrine of exhaustion of rights is concerned with the freedom of movement of goods. Thus, a person who has put his goods into circulation cannot prevent someone, who lawfully acquires them, from reselling them or importing them into another country for resale. The doctrine is a cornerstone of the Common Market. The market would be too easily distorted if a company could sell identical products in different Member States at different prices. Of course, exhaustion of rights should not and does not prejudice the right of a person to put goods into circulation for the first time.

Issuing copies of a work to the public is a restricted act that applies to all categories of works. It is defined by section 18(1) as the issue to the public of copies of the work. Under section 18(2) this means (a) putting into circulation in the European Economic Area (EEA) copies not previously put into circulation in the EEA by or with the consent of the copyright owner, or (b) putting into circulation outside the EEA copies not previously put into circulation in the EEA or elsewhere. This does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation," or any subsequent importation of such copies into the UK or another EEA state except so far as (a) above applies to putting into circulation in the EEA copies previously put into circulation outside the EEA.

The main thrust of these complicated provisions is that the copyright owner can take action against anyone who issues a copy of his work to the public for the first time without his consent. However, as in the exhaustion of rights doctrine, in respect of copies already put into circulation by or with the consent of the owner, he loses effective control over them. He cannot, for example, take action against someone who has lawfully bought copies of his work in France and who now wishes to

import them into the UK for the purpose of selling them to the public. The precise application of these provisions depends to some extent on whether the relevant act takes place in the EEA.

This act applies to each and every copy of the work and, under section 18(4), includes the original. Thus, the issue to the public of some copies of a work does not exhaust the right in respect of other copies not yet issued to the public.

As an example of the workings of section 18 consider the following possibilities in respect of 100 copies of a book:

1. if they are infringing copies-issuing them to the public anywhere will infringe under section 18;
2. if they are copies made for the copyright owner, but he has not consented to their sale (expressly or impliedly) - issuing them to the public anywhere will infringe under section 18;
3. if the owner consented to their sale in the UK-- the buyer can resell them or export them for resale anywhere;
4. if the owner consented to their sale in Norway (an EEA state) - as 3 above;
5. if the owner consented to their sale in the USA - the buyer can resell them or export them anywhere except to an EEA state.

The subsequent acts that can be done include hiring or loan, but this may infringe under section 18A which controls rental or lending.

It can be seen from the examples above that the owner's right to issue to the public is not restricted to the issue of infringing copies, and it is possible to infringe by issuing to the public copies which were authorised by the copyright owner." This will be rare as in most cases the person in possession of the copies will have the copyright owner's express or implied consent to issue the copies to the public, for example, in the case of a publishing agreement. One example where the issue of authorised copies may infringe under section 18 is where copies have been made by a printer on behalf of the copyright owner, but an employee of the printer has stolen some and sold them surreptitiously);

Broadcasting or inclusion in a cable programme service.

Under the surprisingly brief section 20, the broadcasting of a work or its inclusion in a cable programme service is an act restricted by the copyright in all categories of work except typographical arrangements of published editions. 'Broadcast' is defined in section 6 and the meaning of 'cable programme service' is to be found in section 7. They are of vital importance because, if the activity concerned falls outside the definitions, such as a cable programme service run for the purposes of business or an interactive service, then there is no infringement of copyright and therefore no need to obtain licences. In many respects, the restricted acts of broadcasting and inclusion in a cable programme service are a wider form of the restricted acts relating to public performance, playing or showing, especially the meaning of 'broadcast' is expressed in terms of reception by or presentation to members of the public. Similarly, a cable programme service may be one directed at members of the public, although this is only one possibility.

Operating a website on the Internet was held to be operating a cable programme service in *Shetland Times Ltd v Dr Jonathan Wills*. The defendant had included headlines from the claimant's website in published on the Internet. The headlines fell within the meaning of a cable programme, being any item included in a cable programme service. Lord Hamilton found that the defendant infringed copyright by including cable programmes in a cable programme service. As a cable programme service is defined as a '... service which consists wholly or mainly in sending visual images, sounds or other information...', this form of infringement is very wide, as it would appear that the inclusion of information infringes, whether or not it is a work of copyright.

Thus, including a small amount of information, too trivial to be protected by copyright as a work in its own right, should infringe if done without permission. Even a small amount of information can be described as an item. Lord Hamilton also considered that the headlines could be protected as literary works and that it was arguable, therefore, that there was an infringement by copying under section 17. However, he failed to note the possible double infringement under section 20, for if the headlines were also literary works, there would also be an infringement of copyright by including them as literary works as well as cable programmes in a cable programme service.

Secondary Infringements of Copyrights.

In addition to infringement of copyright through the acts restricted by the copyright in the work, there are certain other infringements known as secondary infringements. Some of the criminal offences provided for under the 1988 Act closely follow the equivalent secondary infringements and the same level of knowledge is required, for example, in some cases knowing or having reason to believe that the article concerned is an infringing copy. The distinction between primary infringement and secondary infringement is that the former involves making the infringing copy or making the infringing performance, while the latter involves 'dealing' with those copies, providing the premises or apparatus for the performance or making an article for the purpose of making infringing copies. If a secondary infringement has been committed, there will almost certainly have been a corresponding infringement of one or more of the acts restricted by copyright.'! For a secondary infringement the person responsible must have knowledge or reason to believe that the copies are infringing copies or whatever. It would seem from the wording that the person involved must have either actual knowledge or, at least, a subjective reasonable belief that the relevant activity involves a secondary infringement. Under the Copyright Act 1956, only actual knowledge was sufficient for the corresponding secondary infringements, but nevertheless the courts tended to take a liberal view of this and in *Columbia Picture Industries v Robinson* it was held that, inter alia, the knowledge required extended to the "situation where a defendant deliberately refrained from inquiry and shut his eyes to the obvious. The phrase 'has reason to believe' in the Copyright, Designs and Patents Act 1988 Sections 22-26 is new and, in *LA Gear Inc v Hi-Tec Sports plc*, it was said that it could not be construed in accordance with the 1956 Act. The test must be objective in that it requires a consideration of whether the reasonable man, with knowledge of the facts known to the defendant, would have formed the belief that the item was an infringing copy, In the trial at first instance, Morritt J suggested that, once apprised of the facts, the defendant should be allowed sufficient time to evaluate those facts so as to be in a position to draw the conclusion that he is dealing with infringing copies. This is not inconsistent with an objective approach - the reasonable man also may need time for the facts to 'sink in'. Seeking an indemnity from a supplier after being warned that infringing articles were to be supplied indicates the presence of a 'reason to believe' , Situations where it may be plausible for a defendant not to have 'reason to believe include where he believes that the copyright has expired, where copyright does not subsist in the work or where the copies have been made with the copyright owner's permission.

Where legal proceedings have been initiated against a defendant alleging secondary infringement of copyright, this fact alone does not necessarily mean that he has reason to believe that he is, for example, making or selling infringing copies. Nor does the fact that the defendant had put money aside for a fighting fund for the pending litigation show that he has the requisite knowledge: *Metix (UK) Ltd v GH Maughan (Plastics) Ltd*. After all, the defendant may consider that he has a good chance of successfully defending the action because he does not think that the copies are infringing copies or that he did not have reason to believe that he was infringing at the relevant time.

The need to show a mental element on the part of a secondary infringer must be contrasted with the acts restricted by copyright under sections 16-21, in which the question of the infringer's mental element does not arise. If he commits one of the acts, he infringes copyright regardless of whether he knows that copyright subsists in the existing work and regardless of whether or not it is reasonable for the infringer to suspect that copyright subsists in the work. The strictness of this state of affairs is tempered by the fact that the availability of the remedy of damages is dependent upon the infringer's mental state.

Secondary infringement of copyright involves any of the following activities:

1. importing an infringing copy into the UK, other than for private or domestic use; (section 22);
2. possessing or 'dealing' with an infringing copy; this includes possession in the course of business, selling, letting for hire, offering or exposing for sale or hire, exhibiting or distributing in the course of business or distributing (otherwise than in the course of business) to such an extent as to affect prejudicially the owner of the copyright (section 23);
3. making, importing into the UK, possessing in the course of business or selling, letting for hire, offering or exposing for sale or hire an article specifically designed or adapted for making infringing copies of a work (section 24(1));
4. transmission of the work by means of a telecommunications system (excluding by broadcast or inclusion in a cable programme service) without the licence of the copyright owner, knowing or having reason to believe that infringing copies of the work will be made in the UK or elsewhere (section 24(2));

Permitting the use of premises, being a place of public entertainment, for an infringing performance; a 'place of public entertainment' includes places that are only occasionally

made available for hire for the purposes of public entertainment, for example, a room in a public house which is hired out from time to time for functions such as weddings (section 25);

5. where copyright is infringed by a public performance of the work, or by playing or showing the work in public, supplying the apparatus or a substantial part of it for the playing of sound recordings, the showing of films or the receiving of visual images or of sounds conveyed by electronic means (section 26);
6. an occupier of premises who gives permission for the apparatus to be brought onto those premises may also be liable for the infringement [(section 26(3)];
7. supplying a copy of a sound recording or film used to infringe copyright [section 26(4)].

In all cases, apart from those involving public performances, to be liable the person concerned must have actual knowledge or have had reason to believe, for example, that the copy is an infringing copy or that the copy supplied by him is to be used in such a way so as to infringe copyright. However, there is a subtle difference in the mental element required for the infringement under section 25 in that the person giving permission for the premises to be used for the performance will be liable unless, at the time he gave permission, he believed on reasonable grounds that the performance would not infringe copyright. A similar expression is used in section 26(2) in terms of providing apparatus the normal use of which involves a public performance.

Therefore, for these two instances, the test is a blend of the subjective and the objective. It is plain from the wording that the defendant will carry the burden of proof. He will have to show that he did

not believe that copyright would be infringed, and furthermore that this belief was based on reasonable grounds. This might be an onerous burden,

but the activities involved give rise to civil liability only, which accounts for the difference in the mental element compared to the other secondary infringements. Some of the secondary infringements involve 'infringing copies' of the work, and the meaning of this phrase is given in section 27 as being:

constituted an infringement of copyright, or

1. an article which has been or is proposed to be imported into the UK and its making in the UK would have infringed copyright or would have been a breach of an exclusive licence agreement, or
2. copies which are infringing copies by virtue of several provisions relating to the 'acts permitted in relation to copyright works'.

Under section 27(5), the provisions relating to imported copies are abrogated in favour of any enforceable Community right within the meaning of the European Communities Act 1972 section 2(1). This provision is not really necessary and only restates the effects of the UK's obligations as a member of the European Community. These obligations are separate from and prevail over inconsistent national law. Therefore, if the importation into the UK of an otherwise infringing copy is permitted by European Community law (for example, under the exhaustion of rights principle), that copy will not be deemed to be an infringing copy and the persons involved in its importation and subsequent dealings with it will not be liable for secondary infringement. However, if a person then makes copies from the imported copy once it is within the UK that person will have infringed copyright, unless this also is permitted by prevailing European Community law.

There is a presumption, under section 27(4), that an article is an infringing copy in any proceedings where the question arises. If it is shown that the article is a copy of the work and copyright subsists or has subsisted at any time in the work, it is presumed that the article was made at a time when copyright subsisted in the work unless the contrary is proved. A person copying or dealing with a copy of any type of work should not only satisfy himself that copyright in the work had expired at the time the copy was made, or that copyright did not otherwise subsist in the work at that time, but should also be able to adduce evidence to that effect to the satisfaction of the court. Bearing in mind that, in this matter, regardless of whether the proceedings are civil or criminal, proof on a balance of probabilities will suffice.

In *Pensher Security Door Co Ltd v Sunderland City Council*, the council placed contracts for the refurbishment of blocks of flats which included the provision of new security doors. It was held the doors supplied infringed the transitional copyright in the drawings of the doors and that the council had the requisite knowledge after being warned by the copyright owner that the doors supplied were infringing copies. The council argued, inter alia, that once the doors had been fitted to the flats, they were no longer infringing copies for the purposes of section 27. Furthermore,

the council did not act in the course of business. Both of these arguments were rejected by the trial judge and the appeal to the Court of Appeal was dismissed. Aldous LJ said that even though the doors had become part of the block of flats,

They remained articles for the purposes of section 23. As regards whether the council possessed the doors in the course of business, Aldous LJ saw no reason for departing from case law in other areas such as trade descriptions law and under the Unfair Contract Terms Act 1977. He said (at 281):

As has been made clear in such cases as *Davies v Sumner* and in *R&B Customs Brokers*, transactions which are only incidental to a business may not be possessed in the course of that business. However, doors to flats are not incidental to the business of managing and letting flats. They are an integral part of that business.

Definition of infringement.

Copyright is a proprietary right and accordingly its infringement is actionable without proof of damage or likelihood of damage. If therefore infringement is established there is no need to consider whether the defendant's work is likely to compete with the plaintiff's work.

Copyright infringement occurs when someone other than the copyright holder copies the "expression" of a work. This means that the idea or information behind the work is not protected, but

how the idea is expressed is protected. For example, there have been many movies about Pirates, but only one Jack Sparrow.

Copyright infringement can occur even if someone does not copy a work exactly. This example of copyright infringement is most easily apparent in music and art. Copyright infringement occurs if the infringing work is "substantially similar" to the copyrighted work

II. 17. Statutory definition of infringement.

Section 51 of Copyright Act, copyright in a work is deemed to be infringed –

(a) When any person without a licence from the owner of the copyright, or the Registrar of copyright, or in contravention of the conditions of a licence granted or any conditions imposed by a competent authority under the Act :

(i) Does anything, the exclusive right to do which is conferred upon the owner of the copyright, or

(ii) Permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, or

(b) When any person -

- (i) makes for sale or hire or sells or lets for hire or by way of trade displays or offers for sale or hire any infringing copies of the work, or
- (ii) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, any infringing copies of the work, or
- (iii) exhibits in public by way of trade any infringing copies of the work, or
- (iv) imports into India any infringing copies of the work except one copy of any work, for the private and domestic use of the importer.

The reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film will be deemed to be an infringing copy.

Definition of infringement under U.K. Law – Section 16(2), Section 16(3), and Section 16(4) of the 1988 Act –

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorizes another to do, any of the acts restricted by the copyright.

(3) Reference in this part to the doing of an act restricted by the copyright in a work are to the doing of it –

(a) in relation to the work as a whole or any substantial part of it, and

(b) either directly or indirectly, and it is immaterial whether any intervening acts themselves infringe copyright.

(4) This chapter has effect subject to –

- (a) The provisions of Chapter III (acts permitted in relation to copyright works) and (b)
The provisions of chapter – VII (provisions with respect to copyright licensing).

CHAPTER-5

COPYRIGHT AMENDMENT ACT 2012 ON PROVISIONS OF INFRINGEMENTS

The Amendment has introduced the following changes:

- a fair dealing exception has been extended to the reporting of current events, including the reporting of a lecture delivered in public. Earlier, fair dealing exception was limited for (i) private or personal use, including research, and [ii] criticism or review, whether of that work or of any other work. Further, it has been clarified that the storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy, does not constitute infringement.

Following new exceptions have been added in Section 52:

- transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;
- the transient and incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy: Provided that if the person responsible for the storage of a copy, on a complaint from which any person has been prevented, he require such person to produce an order within fourteen days from the competent court for the continued prevention of such storage;
- the storing of a work in any medium by electronic means by a non-commercial library, for preservation if the library already possesses a non-digital copy of the work;
- the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device;

- the adaptation, reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format;
- the importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material, that is purely incidental to other lawfully.
- Section 52 (1) (j), which deals with the provision relating to version recording has been deleted and a separate Section 31 C has been incorporated, which is discussed in this hotline.

II. 18. What constitutes infringement of copyright?

In order to constitute infringement of copyright two elements are essential. First, there must be sufficient objective similarity between the infringing work and the copyright work. Secondly, the copyright work must be the source from which the infringing work is derived, but, it need not be the direct source. In I.C.C. Development (International) Ltd. vs. Even Green Service Station.⁶⁴ The Delhi High Court held that the International Cricket Committee Development (International) Ltd., the plaintiff, which organized the Cricket World Cup, 2003 in South Africa, Zimbabwe and Kenya, cannot claim an exclusive right to use the words 'ICC' and 'World Cup' as they are already in public domain. However the court inducted the defendants from using the Logo of the plaintiff "ICC World Cup South Africa 2003" denoting black and white striped colours of Zebra and Mascot "Dazzler", as they were designed and registered by the plaintiff under the relevant copyright laws.

Equivalent Citation : MIPR2013(1)201, 2013(54)PTC222(Del)

IN THE HIGH COURT OF DELHI

CS(OS) No. 2722/2012 & IA 16485/012, 19780/2012 & 2846/2013

Decided On : 13.03.2013 Appellants : Star India Pvt. Ltd.

Vs.

Respondent : Piyush Agarwal & Ors.

[Alongwith CS (OS) No. 3232/2012 & IA 20275-78/2012 & IA 506/2013 and C.S.

(O.S.) No. 2780/2012 & IA 16834/2012].

Copyright - Right to monetization of rights - Claim of paramount rights over all information emanating from a cricketing event by virtue of organising and promoting the sport of cricket in India - BCCI by an agreement has assigned a “bouquet of rights” exclusively to Plaintiff - Two of such rights, are regarding “Mobile Rights” and “Mobile Activation Rights”

- Alleged that the Defendants had violated those rights by dissemination of match information through live score cards, match updates and score alerts via Short Messaging Service (SMS)/Mobile Value Added Services (MVAS - Whether BCCI had the right to monetize the information arising from a cricket match organised by it and whether the Defendants were free-riding on the efforts of the Plaintiff/BCCI.

In this case the plaintiff, Star India Pvt. Ltd. (STAR), filed three cases against Piyush Agarwal (Cricbuzz), Idea Cellular (IDEA) and On Mobile Global Ltd. (ONMOBILE). Though the Board of Cricket Control in India (BCCI) has been arrayed as the common defendant in all the three cases, it is supporting the plaintiff, claiming paramount rights over all information emanating from a cricketing event by virtue of organising and promoting the sport of cricket In India. The common case of STAR and

BCCI is that the latter, by an agreement dated 10.08.2012, has assigned a ‘bouquet of rights’ exclusively to STAR. Two of such rights, are regarding ‘Mobile Rights’ and “Mobile Activation Rights’. The plaintiff as sought an interim injunction against the defendants alleging that the latter has violated those rights, which as per the agreement with BCCI were Exclusively assigned to the plaintiff.

The defendants have disputed these claims of STAR Inter alia that that there is no such right as claimed by the plaintiff. In the absence of a legal right, the same cannot be enforced and no relief as prayed by the plaintiff maybe granted making the suit liable to be dismissed under Order VII Rule 11 of the Code of Civil Procedure (CPC) for the lack of a cause of action.

The court found that the following issues arise before this Court for consideration :

- a. Whether BCCI has the right to monetize the information arising from a cricket match organized by it.
- b. Whether the defendants are free-riding on the efforts of the plaintiff/BCCI
- c. Whether the score alert/match updates are already in public domain.
- d. Whether the defendants have a freedom under Article 19(1)(a) to disseminate contemporaneous match information.
- e. Whether the public interest needs to be kept in mind before considering the rival claims.
- f. Whether the plaintiff is entitled to an interim injunction. In the light of the above issues, the

court hereby order the following :

- a. A limited interim injunction restraining the defendants from disseminating contemporaneous match information in the form of ball-by-ball or minute-by-minute score updates/match alerts for a premium, without obtaining a license from the plaintiff.
- b. There shall be no restriction upon the defendants to report 'noteworthy information' or 'news' from cricket matches (as discussed in paragraph 49), as and when they arise, because 'stale news is no news'.
- c. There shall be no requirement for the license if the defendants do it gratuitously or after a time lag of 15 minutes.

In view of the above, the application of the plaintiff under order XXXIX Rule 1 & 2 of CPC is allowed to the extent indicated above, whereas the application of the defendant under order VII Rule 11 stands dismissed.

II. 19. Infringing copy.

This section further explains that, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film will be deemed to be an "infringing copy".

The term "infringing copy" is defined under Section 2(m) of the Act, as meaning. (i) in relation to a literary, dramatic, musical or artistic, a reproduction of it, except in the form of a cinematograph film;

(ii) in relation to a cinematograph film, making a copy of the film on any medium by any means;

(iii) in relation to a sound recording, making any other recording embodying the same sound recording, made by any means;

(iv) in relation to a programme in which a broadcast reproduction right subsists under Section 37, the sound recording or a cinematographic film of such programme or performance, if such copy, or sound recording, or reproduction as the case may be, is made or imported in contravention of the provisions of the Act. In other words, the copyright legislation in India follows the principle "What is worth copying is worth protecting."

Where the same idea is being developed in a different manner, it is manifest that the source being common, 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 copyrighted work. If the defendants work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright.

When it appears to be a flagrant and blatant attempt on the part of defendants to imitate the plaintiffs design work and colour scheme, etc. for the same products with a view to deceive the purchasers and exploit and encash their goodwill in order to pass off their products as that of the plaintiffs. In such a case the plaintiffs are entitled to the grant of injunction prayed for.

The main object to give protection is to prevent the adoption of the colour scheme, get up layout or other features either wholly or partly in such a manner that may create an impression or confusion or deception in the minds of the purchasing public as to source and origin of the products.

II. 20. Common forms of infringement.

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

- (i) reproduction of the work in a material form;
- (ii) publication of the work;
- (i) communication of the work to the public;
- (ii) performance of the work in public;

(v) making of adaptations and translations of the work and doing any of the above acts in relation to a substantive part of the work.

II. 21. Principles for deciding infringement of copyright.

The following principles, which are self-explanatory have been laid down by the Supreme Court in the land-mark judgment of Anand Vs. Deluxe Films. These principles clearly explain the circumstances and instances pertaining to copyright infringement.

(a) 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.

(b) Where the same idea is being developed in a different manner, it is manifest that the source being common, 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 is nothing but a literal imitation of the copyright work with some variations here and there 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.

One of the surest and safest test to determine whether or not. there has been a violation of 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.

(c) 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 .

(d) Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the co-incidences appearing in the two works are clearly incidental no infringement of the copyright comes into

(e) As a 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.

(f) 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 the idea. Even so,

(g) if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

Factors involved in determination of infringement.

It is worthwhile to take note of the factors involved in the determination of infringement of copyright, as explained by well known author, on Intellectual Property, W.R. Cornish. They are (i) In case of copying :-(a) casual connection. i.e. the owner must show that there is a casual connection

between the original work and alleged infringement copy apart from a sufficient degree of objective similarity between the two works.

(ii) In case of subconscious copying and indirect copying :--In case of substantial copying, factors like unaltered copying, extent of defendant's alteration, character of plaintiff's and defendant's works, nature of plaintiff's effort, extent of plaintiff's effort, manner in which the defendant has taken advantage of plaintiff's work, the possibility of serious interference with the plaintiff's exploitation of his work and reproduction by the original author, have to be considered.

In other words, copying may be direct, subconscious and indirect. In deciding the nature and extent of copying, all the aforementioned factors would be relevant.

Section 48 provides that the register of the copyrights would be deemed

as a prima facie evidence of the particulars entered therein. As a matter of fact, when the concept is registered, the same is protected from public domain. Section 44 of the Act provides that a Register of copyright shall be maintained, in which the names or titles of works and the names and addresses of owners of copyright and such other particulars may be entered.

II. 23. Which acts do not constitute infringements - Statutory Exceptions.

The protection of copyright given to an 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,

Fair dealing :-The notion of permitting some use of a copyright 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 a copyright 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 current events. The fair dealing provisions allow the copying or other use of the work which would otherwise be an infringement, and in relevant. It may be fair dealing to include 5 per cent of another work for the purpose of 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. It may be that, in some cases, the existence of the permitted acts is illusory. The problem lies in the determination of the relative thresholds of substantiality and the permitted act in question.

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; and
- 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 a 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 third party cannot constitute fair dealing

for the purpose of criticism or review.

- (ii) 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 a temporary protection against loss, destruction or damage, in order to utilise the programme for 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 interoperability 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 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.

- (iii) 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.
- (iv) 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 a judicial proceedings would not come within the purview of infringement.
- (v) 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.

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

- (vi) Reading/Recitation of extracts :-From a published literary work in public is not infringement. However the extract must be reasonable.
- (vii) Publication for use of educational institutions :-where a collection, mainly composed of noncopyright 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 violation of copyright.
- (viii) 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.
- (ix) 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 infringement of copyright in such works. However the audience must be limited to the staff, students, their parents and guardians etc.

- (x) Making and using of sound Recordings under certain circumstances and in enclosed rooms, or clubs not run for profit do not amount to infringement.
- (xi) Performance of literary works etc by an amateur club or society, for the benefit of non-paying audience or for the benefit of a religious institution is not infringed.
- (xii) Reproduction of an article on current economic, political, social or religious topics in newspapers and magazines etc, is .not copyright infringement.
- (xiii) Publication of a public lecture delivered in public in a magazine, newspaper or other periodical is not a copyright violation.

- (xiv) Making a maximum of 3 copies of books including pamphlets, sheet of music, map, chart or plan for use of a public library if such book etc. is not available for sale in India; and
- (xv) reproduction of an unpublished literary, dramatic or musical work kept in a library, museum or other institution, for the purpose of research or private study;
- (xvi) reproduction or publication of any matter published in official

Gazette or reports of Government Commission or other bodies appointed by Government. .

- (xvii) reproduction of any judgment, or order of a court, tribunal, or other judicial authority, not prohibited from publication. In terms of Section 52(1)(q) of the Act, reproduction of a judgement of the court is an exception to the infringement of the copyright.

No one can claim copyright in the judgements and orders of the courts merely on the ground that he had first published them in his book. While dealing whether plaintiff can claim copyright in the head notes of a journal, the court in *Eastern Book Company vs. Navin J. Desai*, held that merely by correcting certain typographical or grammatical mistakes in the raw source and by adding commas, full stops and by giving paragraph numbers to the judgement will not make their work as the original literary work entitled to protection under the Copyright Act. Plaintiffs, therefore, have no copyright

in the judgements published in their law reports/journals. There being no copyright in the plaintiffs there is no question of the defendant infringing any alleged copyright.

In this case, the plaintiffs, M/s. EBC are engaged in business of printing and publishing of various book relating to the field of law and they claimed to have copyright in around 500 titles. Besides, they also publish law reports under the name and style of SCC, SCC (CrI.) and SCC (L & S) etc. They also publish data-base packages available on CD ROM for finding S.C. ruling on any point of law, in the name and style of SCC on-line SC case Finder' and 'SC cases Full Text on CD-ROM". They challenged the action of the defendants who developed a software package called. "The Laws" published in two CD ROMS and "Grant Jurix" in three CD ROMs; on the ground that the short notes and head-notes published in the plaintiffs SCC were copied by the defendants, along with the entire text of the edited judgments verbatim published in the plaintiffs law report SCC; along with and including the style and formatting, the copy editing the paragraph numbers, footnote numbers and the cross references etc.

The defendants contended that their package was wider in scope/coverage because of the feature of 'hyperlinking' adopted by them, as to the period of judgments, no. of judgments, Central Acts, and equivalents etc. The High Court speaking through Justice S.K. Mahajan reviewed the entire relevant case-law and scheme of the Copyright Act, 1957 and held that "mere reproduction of a part of the judgment in the head-note is not an abridgment of the judgment of the judgment and no copyright can be claimed therein. However, the court held that if the headnotes are not the reproduced copies of

the judgment and were written by using knowledge, labour, judgment or literary skill or task, the publisher will have copyright in them.

- (xviii) production or publication of translation of Acts of Legislature or Rules
- (xix) making or publishing of a painting, drawing, engraving or photograph of a work of architecture or its display.
- (xx) making or publishing of a painting, drawings or photographs or engravings of sculpture or other artistic works permanently situated in a public place.
- (xxi) inclusion in a cinematographic film of any artistic work permanently situated in a public place.

Eg: documentaries on well known statues, painting etc;

All these acts do not constitute infringement of copyright.

The exceptions to infringements listed in Section 52(1) apply also to the doing of any act in relation to the translation of a literary, dramatic or musical work or the adaptation of such work as they apply in relation to the work itself.

Special provisions in relation to sound recordings and video-films.

The 1984 Amendment to the Copyright Act, inserted a new provision in the form of Section 52-A, in relation to the sound recordings and video films. This provision deals with the particulars to be included in Sound Recordings and Video Films. The object behind making such provision appears to be the fragile nature of the copyright in video films and audio-cassettes.

As a result of this provision, no person should publish a sound recording in respect of any work unless the following particulars are given- (a) the name and address of the person making the sound recording;

- (b) the name and address of the owner of the copyright in such work; and
- (c) the year of its first publication;

Similarly, no person can publish validly a video film in respect of any work unless the following particulars are displayed in the video film, when exhibited and on the video-cassette or other container thereof, viz:-

- (a) if such work is cinema, certified for exhibition under the provisions of the cinematograph Act, 1952, a certificate granted by the Board of Film certification;

- (b) the name and address of the producer of the video film and the details of the necessary licence & consent; and
- (c) the name and address of the owner of the copyright in such work;

These particulars included in sound recordings and video films help the prevention of video-piracy and piracy and audio-cassettes.

II. 25. Determination of question of Copyright Infringement.

Normally, the court should be reluctant to sit as an expert to decide the question of infringement without the aid of the expert evidence. The proper course is to get the opinion of such experts who may be appointed as commissioners to investigate and report on the matter in issue. If there is no reservation claim of copyright in a work, no copyright can be claimed on the basis of mere fact that there is some printed matter but, has no claim of copyright. Therefore for a better protection of copyright, the owner should claim reservation of copyright by a mark (c) or the expression 'copyright reserved' or 'copyright'.

Infringement of copyright is a Question of fact and it is a matter which can be established by evidence adduced before the trial courts. Therefore, unless there is evidence on the aspect of infringement of the copyright of the complainant, it would not be possible to decide whether there is infringement of the copyright.

II. 26. Lay observer test.

Generally, the Courts in India follow the 'lay observer test' to determine infringement of copyright. According to this test, "whether or not there has been violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works should be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first. If to the "lay observer" it would not appear to be reproduction, there is no infringement of copyright in the works. Earlier this view was upheld by the Kerala High Court in R. Madhavan vs. S.K. Nayar, which held that dissimilar novels do not involve infringement of copyright.

The Delhi High Court laid down that the infringement of copyright has to be tested on the visual appearance of the drawing and the object in Question. The purpose of functional utility, efficacy of

different parts and components of the object or the material of which they be made are relevant for the purpose of copyright.

Enlargement of law books from student edition to lawyers edition does not amount to infringement of copyright. Similarly play, drama or movie produced based on the true life incidents reported in Newspapers, but in a Quite different manner does not lead to the infringement of copyright. Publishing notes from the syllabus prescribed by university is not infringement of copyright.

On the other hand, making the replica of original picture. Colourable limitation of work and unauthorised broadcasting to general public amount to infringement of copyright. Even an advertisement by a person claiming a right in a copyright which was owned by another and offering to sell the same constitutes an infringement of the right.

Importation of Infringing copies.

There is a possibility that a work which as copyrighted abroad i.e., outside India, may be sought to be imported into India. If imported into India, there may be a chance of violation of copyright therein. Therefore if the owner of a copyright in any work feels that infringing copies of his work are being imported or likely to be imported into India he may request the Registrar of copyright for an order not to import such copies of the work. The Registrar may after making necessary enquiries order that copies of such work should not be imported into India. He may also authorise any person to enter any ship, dock or premises where any such copies may be found and examine them in collaboration with the customs authorities. If any such copies are confiscated, they are to be delivered to the owner of the copyright.

The word "import" in Sections 51 and 53 of the copyright Act means "bringing into India from outside India." It is not limited to importation for commerce only but also includes importation for transit across the country. In a notable judgment in Penguin Books Ltd., England Vs. India Book Distributors and

Others the Delhi High Court dealt with the validity of issuing copies of titles of foreign books imported into India, by Indian Distributors.

The court held that even though the Indian Distributors are not guilty of piracy or primary infringement, by importing the foreign books, when they issue copies of these titles for public distribution, they would be guilty of secondary infringement. The principle that can be deduced from this judgment is that "knowingly importing into India for sale or hire, infringing copies of a work without the consent of the owner of the copyright, amounts to infringement of copyright." Therefore an importer of books cannot disregard the copyright laws of other countries. In case of conflict between International Law and Municipal Law, the Municipal law prevails.

Relevant factor for payment of exemplary damages.

In the case of claim for payment of exemplary damages, the object of infringement for the benevolent object of distribution of books among the poor children would not attract exemplary damages. However the Delhi High Court assessed the damages at 17.5% of the publication cost of the books and awarded

CONCLUSION&SUGGESTION

A close intimation of an existing recording using alternate performers is not a copyright infringement. In case of musical record, it is only such record which embodies sound recording which amounts to infringement, but if another signal is created such as in the case of version recording,

it is not an infringement. Thus the use of the word "records embodying the record" or the "record embodying the same record" clearly mean that it is only when the same signal has been kept, would there be a violation.

Similarly frame or image which forms part of a film is not included in the Term 'photograph'. Thus using a theme/image similar to the popular T.V. serial 'Kyunki Saas Bhi Kabhi Bahu Thi' produced by a telecast on Star T'V., by the manufacturers of 'Tide' detergent powder for advertisement of a T.V. Commercial with the title 'Kyun ki Bahu Bhi Kabhi Saas Baneqi' was held not to be an infringement of copyright of Star .

There are use of online copyright Infringement which are for protection of the copyright holder for the use of only original work in internet.

Copyright law in india is basically provide all the rule and regulation for the protection of online copyright Infringement india.

There are copyholder who are enjoy the all right when he registered the copyright Act then no one can misuse the copyright holder rights profit and content.

Their are Amendment in 2012the copyright Infringement .copyright Infringement dose no occur when any one use the material that cannot be protected by copyright Act.

Copyright Infringement occurs when someone other than the copyright holder copies. The expression of a work means that the idea or information behind the idea or information behind but how the idea is expressed is protected.

Copyright Infringement can occur even if someone does not even if someone does not copy a work exactly the example of copyright it is most easily apparent in music and art. It occurs if the Infringement similar to the copyrighted work.

To fully understand copyright infringement you must understand what right you hold a copyright holder you own more than just the right to reproduce the work filed with the US copyright office. This is right to reproduce copy duplicate or transcribe the work in any fixed form.

Copyright Infringement would occur if someone other than the copyright owner made a copyright work and resold it.

Some of the exception such as a fair dealing is for education purpose which were earlier applicable only in relation to certain types of work. A fair dealing exception has been extended to the reporting of current event including the delivery of lecture.

The online copyright Infringement is basically for the misuse of the Internet copyright misrepresentation in artistic and musical work.

So the protection of the Copyright there are various laws and rules which can control the copyright holder to use for his own purpose with his rights there are fraud conduct by the person for the profit purpose In india there are copyright laws in india and lot of remedies.

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