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LEGAL REMEDIES FOR THE INFRINGEMENT OF COPYRIGHT



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ABSTRACT

Copyright law confers upon the owner of the work a bundle of rights in respect of reproduction of the work and the other acts which enables the owner to get financial benefits by exercising such rights. Infringement of copyright transgresses these rights of the copyright owner and causes huge economic loss to the owner and the country as well. The content of this paper is intended to provide a general guide to the subject matter and highlights the remedies which are available in the case of copyright infringement in India.

KEY WORDS: Copyright, infringement, remedies, civil, criminal.

INTRODUCTION:

Copyright

"Imagination," said George Bernard Shaw, "is the beginning of creation". The ability to imagine is what sparks off ideas or feelings, which might then be transformed into a painting, a novel, a new invention or a piece of music. Copyright protects the expression of an idea; it encourages people to 'create'.

For example if an individual comes up with a brilliant new painting and someone else simply photographs it and starts mass-producing prints, then the painter is much less able to make a living

from his work. The laws of copyright are designed to prevent this happening.

Copyright may subsist in a wide range of creative, intellectual, or artistic forms or "works". These include poems, theses, plays, and other literary works, movies, choreographic works (dances, ballets, etc.), musical compositions, audio recordings, paintings, drawings, sculptures, photographs, software, radio and television broadcasts of live and other performances, and, in some jurisdictions, industrial designs. Copyright is one of the laws covered by the umbrella term intellectual property.

Copyright infringement:

It is the unauthorized use of material which is covered by copyright law, in a manner that violates one of the original copyright owner's exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works that build upon it. The slang term bootleg (derived from the use of the shank of a boot for the purposes of smuggling) is often used to describe illicitly copied material. For electronic and audio-visual media, unauthorized reproduction and distribution is occasionally referred to as piracy or theft. Critics of the use of the term "piracy" to describe such practices contend that it unfairly equates copyright infringement with more sinister activity, though courts often hold that under law the two terms are interchangeable.

Copyright law confers upon the owner of the work of bundle of exclusive rights in respect of the reproduction of the work and other acts which enables the owner to get financial benefits by exercising such rights. If any of these acts relating to the work is carried out by a person other than the owner without a license from the owner or a competent authority under the Act, it constitutes infringement of copyright in the work. Since copyright is granted only for a limited period, there will be no infringement if the reproduction of the work or other acts concerned are carried out after the term of the copyright has expired. The exclusive rights conferred on the owner depends on the nature of the work in which copyright subsists. Accordingly the type of acts which will constitute infringement will also depend upon the nature of the work. Section 51 defines infringement of copyright generally. Section 52 gives a long list of acts which do not constitute infringement of copyright. These are in the nature of exceptions to the exclusive rights conferred upon copyright owner. They also serve as defenses in an action for infringement of copyright.

The exclusive rights granted under the Act extends also to a translation or adaptation of the work or to a substantial part thereof (Section 14(a) of The Copyright Act of India 1957). Thus copyright will be infringed if a substantial part of the work is reproduced. What amounts to a substantial part of the work will depend upon the circumstances of the case. 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 plaintiffs' work {Weatherby v International Horse Agency (1902) 2 Ch 297, Performing Rights Society v Hawthorns (1933) Ch 855}.

Meaning and types of infringement:

Copyright infringement issue has raised an alarm in today's world. When a person intentionally or unintentionally copies or uses the work of another creator, without his prior consent or permission, or any contract or license or assignment with the author as covered by the copyright law, it amounts to infringement. Infringement can be broadly classified into two:-

1. Primary infringement;
2. Secondary infringement.

Primary infringement deals with the real act of copying, while secondary infringement deals with other kinds of dealing like selling the pirated books, importing etc.

3.2 Causal Connection

When two works are similar and when the defendant has access and opportunity to copy the plaintiff's work the court may infer causal connection. One factor which may be very helpful in providing this causal link is the fact that infringing works contain the same mistakes that occur in the first work.

What is copying? It can be accumulation of insubstantial taking, subconscious copying. Music composers sometimes subconsciously copy songs that they had heard a decade ago.

Statutory definition of infringement:

Sec. 51 of The Copyright Act of India 1957.

Copyright in a work is deemed to be infringed –

(a) when any person without a license from the owner of the copyright, or the Register of Copyright, or in contravention of the conditions of a license granted or any conditions imposed by a competent authority under the Act:

- does any right, the exclusive right to do which is conferred upon the owner of the copyright, or

- (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,

- 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

- 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.

Proceedings in matters of Infringement:

The Act provides not only Civil but also Criminal remedies, in case of infringement of Copyright, against the infringer. The two remedies are distinct and independent and can be availed of simultaneously.

But in *Cheran P. Joseph Vs. K. Prabhakarn Nair* AIR 1967 Kar, 234. held that, a criminal court may not give a finding on the question of infringement if the same issue is pending for the decision in a civil suit.

However, a criminal proceeding does not enable the owner to get an injunction i.e. if a convict infringer repeats the infringement the owner will have to initiate fresh proceedings. So, in such cases it

is advisable to initiate Criminal as well as Civil proceeding simultaneously, if the stakes are very high. In the matters of criminal proceedings the knowledge or men's rea is essential.

Remedies against Piracy :

Kinds of Remedies : There are three kinds of remedies against infringement of copyright, namely Civil remedies, Criminal remedies, Administrative remedies

i.) Civil remedies

Civil remedies have dealt under section 55 of the Indian Copyright Act, 1957. Kind of Civil Remedies to which a plaintiff is entitled :

1. Anton Pillar Order
2. Interlocutory Injunction
3. Damages or account of profits

Anton pillar order : The procedure of law always provides equal opportunities to both the parties to present their case. However, in certain cases the court may, on an application by the plaintiff, pass an ex-parte order requiring the defendant to allow the plaintiff accompanied by attorney to enter his premises and make an inspection of relevant documents and articles and take copies thereof or remove them for safe custody. Such order is called Anton Pillar Order. Such orders necessary when there exists an apprehension in the mind of the plaintiff and the court that following the regular procedure would give time to the defendant to destroy relevant documents and (copies of) the articles, defeating the ends of justice.

Such an order is, however, passed very cautiously by the court; only when the plaintiff in his application makes the fullest possible disclosure of all material facts within his knowledge and the court is convinced thereby

Interlocutory injunction: Interlocutory injunction secures the immediate protection of copyright from an existent infringement or from the continuance of infringement or an anticipated infringement. A plaintiff may pray for an interlocutory injunction pending trial or further orders.

For obtaining an interlocutory injunction the plaintiff has to establish:

1. A prima facie case,
2. Balance of convenience in his favour,
3. That refusal to grant interlocutory injunction would cause irreparable injury to the plaintiff.

The defendant, if injured as a result of such injunction, is entitled to compensation by virtue of an undertaking as to damages which are made by the plaintiff. Such an undertaking on the part of the plaintiff is a condition precedent for the grant of interlocutory injunction.

Interlocutory injunction may be refused when:

1. The interest of the plaintiff can be protected by ordering the defendant to keep an account of profits,
2. The defendant has pleaded and established bonafide fair dealing.
3. The plaintiff has been guilty of undue delay in coming to the court, or
4. His conduct amounted to acquiescence in the infringement.
5. There are substantial doubts about the plaintiff's right to succeed in the action.

The grant of interlocutory injunction would depend on the overall circumstances of the case.

Damages on account of profits

The plaintiff is entitled to two types of damages, viz.,

- (a) One for infringement of his copyright, and
- (b) The other for conversion of his copyrighted work into another form.

Account of profits : A plaintiff, if successful, is also entitled to account of profits as an alternative to damages.

ii.) Criminal remedies

Criminal remedies have been dealt under sec. 63, 63 A, 63 B, 65, 65 A, 65 B

Offence of infringement of copyright or other rights conferred by this Act. According to sec. 63, any person who knowingly infringes or abets the infringement of- (a) the copyright in a work, or (b) any other right conferred by this Act, [except the right conferred by section 53A] [shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lacs rupees : Provided that [where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.] Explanation.-Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.

Enhanced penalty on second and subsequent convictions. – According to sec. 63 A , whoever having already been convicted of an offence under section 63 is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lac rupees but which may extend to two lacs rupees : Provided that [where the infringement has not been made for gain in the course of trade or business] the court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than one year or a fine of less than one lac rupees: Provided further that for the purposes of this section, no cognizance shall be taken of any conviction made before the commencement of the Copyright (Amendment) Act, 1984.]

Knowing use of infringing copy of computer programme to be an offence. According to sec 63 B, any person who knowingly makes use on a computer of an infringing copy of a computer programme shall be punishable with imprisonment for a term which shall not be less than seven days but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that where the computer programme has not been used for gain or in the course of trade or business, the court may, for adequate and special reasons to be mentioned in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees."

Possession of plates for purpose of making infringing copies. – According to sec 65, Any person who knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists shall be punishable with imprisonment which may extend to [two

years and shall also be liable to fine].

In *Cheran P. Joseph Vs. K. Prabhakarn Nair* AIR 1967 Karnataka, 234, the court held that clear and cogent proof of knowledge is necessary to establish the commission of offence.

Insertion of new sections 65A and 65 B. After section 65 of the principal Act, the following sections inserted as per the Copyright (Amendment) Act, 2012, namely:-

"65 A. (1) Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) shall prevent any person from,-

(a) doing anything referred to therein for a purpose not expressly prohibited by this Act:

Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

(b) doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or

(c) conducting any lawful investigation; or

(d) doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; or

(e) operator; or

(f) doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

(g) taking measures necessary in the interest of national security.

Protection of technological measures.

65 B. Any person, who knowingly,-

(z) removes or alters any rights management information without Management authority, or Information.

(iz) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine:

Provided that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII against the persons indulging in such acts." . .

Court where criminal proceedings are to be initiated

No court inferior to that of a Metropolitan Magistrate or a Magistrate of the First Class can try an offence under the Act. The conduct of the criminal proceedings is governed by the Criminal Procedure Code. The court trying the offence may order that all copies or instruments for making infringing copies in possession of the alleged offender be delivered to the owner of the copyright without any further proceedings. The court may also order a police officer of the rank of Sub-Inspector and above to seize without warrant, all infringing copies of the work and accessories for making infringing copies and produce them before the Magistrate.

iii.)Administrative remedies

Administrative remedies consist of moving the Registrar of Copyrights to ban the import of infringing copies into India when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright and seeking the delivery.

Protection of Authors Special Rights :

Besides the infringement of copyright, which is actionable, the moral rights of the author known as "special rights" are also protect able. These special rights are :-

- (1) to claim authorship of the work, and
- (2) to restrain or claim damages if in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright, if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.

This special right is not available in respect of any adaptation of a computer programme for certain purpose or to make backup copies for protection against loss, destruction or damage.

These rights of the author can be exercised even after the assignment either wholly or partially, of the said copyright in the work.

To protect these rights, action can be taken by moving the court for restraint and /or damages.

Threat of Legal Proceedings :

Threat of legal proceedings also serves the purpose at times. On coming to know of violation of copyright, the owner of copyright may send a notice to the infringer requiring him to discontinue forthwith the act which amounts to infringement. The infringer may comply with the request and agree to pay compensation settled by mutual agreement. However , the threat of legal proceeding is an efficacious remedy only when the nature of infringement is such that further infringement is neither profitable for the defendant nor is it likely to be repeated, for instance, the performance in public of a dramatic or musical work. In case where infringement is in the form of reproduction of the copyright work in large numbers and is a profitable venture such a threat generally fails to stop further infringement. In such case court action becomes necessary.

CONCLUSION:

Copyright can be enforced through court of law and the copyright Act is now fully in conformity with the TRIPs obligations. Indian enforcement agencies are now working very effectively. In addition to intensifying raids against copyright infringers, the government has taken a number of measures to strengthen the enforcement of copyright law. It include setting up of Copyright Enforcement Advisory Council, organization of seminars/workshops to create greater awareness about copyright law among the enforcement personnel and the general public, setting up of collective administrative societies and creation of separate cells in state police headquarters. As a result there has been notable decline in the levels of copyright Infringement (Piracy).

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