

## **COPYRIGHT LAW AND ROLE OF COPYRIGHT SOCIETIES IN EXPLOITATION OF ECONOMIC RIGHTS**

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'Copyright' means the exclusive right, given to authors or creators of works, like books, films, computer programs, to control the copying or other exploitations of such works. Copyright begins automatically on the creations of work without the need for compliance with any formalities. The only prerequisites for protection which apply to all works are that the work must be of a type in which, copyright can subsist, and that either the author is 'qualifying person'<sup>1</sup>, or the work has been published or broad cast, in an appropriate manner. The work must also be original and it must be recorded in some form i.e. written or stored in computer memory. The author or the creator has the exclusive right to communicate the work to the public.

This exclusive right is granted in respect of all works under various sub-sections of section 14. Section 14(a) (iii) of the Act confers on the owner of the copyright in literary, dramatic or music work the exclusive right to communicate the work of the public. Under section 14(b) (i) read with 14 (a) (iii) the owner of the copyright in computer programmes has the exclusive right to communicate the work to public. Section 14 (c) (ii) provides in respect of artistic work the exclusive economic right to communicate the work to the public. Similarly, section 14 (d) (iii) provides in respect of cinematograph films the exclusive right to communicate the film to the public. Finally section 14 (c) (iii) provides in respect of sound recording the exclusive right to communicate the work to the public. Berne Convention reiterates this right at international level. Article 11 of the Berne Convention grants the author of literary and artistic work the right to enjoy, exclusive right of authorising the broadcasting of their work or communication thereof to the public by any means of wireless, diffusion of signs, sounds or images.

In certain cases, the author, director or creator of a work may be entitled to exercise certain right which may include the right to be identified with a work and to object to distortion or unjustified treatment of the work. Where any of the various exclusive rights which collectively make up copyright in a

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1 The drafting practice for amendments to the Copyright Act has been different from the amendments in other Acts in India. Normally in other laws the old provisions have been omitted by omitting those sections with numbers and instead new provisions have been inserted with new section numbers. In Copyright At the far reaching changes have been made in various provisions by totally deleting and adding completely a new section in its place. The progression of clauses is also different. Generally after clause (f) by amendment (fa) is inserted but in copyright law (ff) has been inserted. Similarly (xx) is inserted after (x). This is not to criticize the drafting but the persons trained in finding the law in a particular manner may have to look at least twice to confirm that they have not skipped definitions in some of the clauses and after (f) in this Act is (ff).

work have been exercised without permission, civil remedies may be available and in certain cases the criminal action may be brought up by such owner or author where the copyright is being infringed with a view to commercial gain.

In India, the first legislation in this regard was Indian Copyright Act, 1914 which was mainly based on the U.K. Copyright Act, 1911, with a view to fulfill International obligation in the field of copyright, the Copyright Act, 1957 was enacted. The new Copyright Act was put on the statute book by mid-1957 and was brought into force from 21 January 1958. The Act did not break away from the past, but had renovated and built upon the solid old foundation. This accounted for its affinity with the U.K. Copyright Act, 1956 (replaced by 1988 Act). It was no longer a replica of the British legislation and had acquired its own distinctive features.

For the first time it established a Copyright office under the immediate control of the Registrar of Copyright, a civil servant in charge of administrative matters pertaining to the Act, and provided for the maintenance of a Register of Copyrights. The Act also established a quasi-judicial Copyright Board under the Chairmanship of a sitting or retired judge of the Supreme Court of India or of a High Court, or a person qualified to be so appointed, and vested the Copyright Board with important powers. The Act gave recognition for the first time to Cinematograph films as a distinct class of work eligible for copyright protection and to a special right called 'broadcast reproduction right' in programme broadcast by radio and television. It is to be noted that present broadcast reproduction rights are completely different from those recognized in 1957. The Act also recognized for the first time the 'moral rights' of the author, which are described in the Act as 'special rights'.

The revision of both the Berne Convention and the Universal Copyright Convention (U.C.C.) at Paris in 1971 made available special provisions to developing countries enabling them to grant compulsory licences for translation and reproduction of works of foreign origin when required for educational purposes. In 1983 the Act was amended inter alia to avail the special concessions. This was soon followed in 1984 by another amending measure to protect the Cinematograph film industry from the rapidly growing menace of unauthorised video-reproduction of films, and the record<sup>2</sup> industry from the then-growing record piracy. Provision was made for more effective prosecution and deterrent punishment of offenders. In 1991 the Act was amended to extend the term of copyright to sixty years instead of fifty years<sup>3</sup>. The Copyright Act, 1957, as amended in 1983, 1984 and 1992 and major amendment in 1994 and again in 1999 which relates to information technologies and computer programmes.

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2 As it was referred at that time. Now they are protected as Sound recordings.

3 The term was extended by an Ordinance on 28.12.1991 and was made into Act 13 of 1992.

### Meaning of Copyright

To understand the meaning of copyright, it is essential to state the provisions of section 14 of the Act. The section provides:

For the purpose 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 reproduce 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 or 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 any of the acts specified in clause (a);
  - (ii) to sell or give on commercial rental of 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.

Thus , “copyright” means the exclusive right, subject to the provisions of the copyright Act 1957, to do or authorise the doing of any specified acts in respect of a work or any substantial part thereof, as elaborated under Clauses (a) to (e) of Section 14 of the Act. The Act lays special emphasis on the concept of “Ownership” and “rights” of the owner of the copyright. Though registration of a right with the Copyright Office is optional and not essential, however, the Act provides for compulsory registration of copyright (Section 14) in order to get legal protection under the Act. In the Register of Registration, the names or titles of works and the names and addresses of authors, publishers and owners of copyright and similar other related prescribed particulars are stated for future

record and legal protection of owner's interest. A copyright owner has five, exclusive rights in copyright work : Reproduction right, modification right or derivative works right, distribution right, public performance right and public display right or broadcast right Registration is the prima-facie evidence of ownership of the copyright. Anyone who violates any of the exclusive right of a copyright owner is known as infringe of copyright. Copyright owner is known as infringe of copyright. Copyright shall be deemed to be infringed (section 51) when any person having no such proprietary license, does anything or permits for the sake of profit, for which the exclusive right is conferred on the owner of the copyright. Similarly owner's copyright shall also be infringed when any person makes sale or hire or sells or lets for hire or distributes for trade etc. affecting the rights of the owner of the copyright. Explanation to Section 51 further clarifies that 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". Restrictions are also imposed on publishing a sound recording or a video film in respect of any work unless prescribed particulars are stated and procedure is followed (Section 52-A). In order to restrict such misuse and infringement of copyright of the owner, the Act prescribes certain civil remedies and declares offences to be' penally punished according to prescribed judicial process.

When any person produces a work in the context of Copyright Act, 1957 (herein after Act) there are two logical steps<sup>4</sup>. The author may make other copies of the work himself or he may communicate the work to other persons from the public, which can be done either by supplying a copy of the work or the work may be communicated without supplying a copy. For supplying a copy reproduction of the work is necessary. There can be various forms of communicating the work of public.

Communication of the work can take place when the work is heard, seen or otherwise enjoyed or the work may be performed as it is or it may be allowed to be incorporated in a sound recording or cinematograph or in a performance or broadcast. All such actions in relation to the work are in exclusive domain of the author or copyright holder. When an owner does one or the other of such actions, the work is said to be published. In other words the exercise of one or the other of the economic rights is the vindication of copyright. When the right is exercised the work is said to be published. Publication is important for determining the ownership and duration of rights in relation to work. In s 3 of the Act which defines publications of the work, the two yardsticks have been used for defining publication. Publication of a work is complete if the work has been made available to the public by issue of copies or if the work is

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4 Third is performance of the work, which is a bit on periphery of communication of work.

communicated to the public<sup>5</sup>. It is also clear by proviso to s 6 that if the issue of copies or communication to public is of insignificant nature then such making available of the work would not be treated as publication of the work. Thus after the 1994 amendment the expression “communication to public” has equal importance as “the issue of copies” which had been popular all these years in the definition of publication. It is so because of changing, modes of publication electronically. This changes reflects the recognition that now the works may be “made available” not by conventional means of issuing copies but they will be made available more and more by communication to public. The incorporation of the work in a sound recording and making it available to public would amount to publication. The possibility of making the work available by posting the work on Internet sites is going to be more common. It is submitted that once a work has been made available for viewing or hearing or otherwise enjoying in a computer resource with connectivity to Internet, it will be sufficient communication to the public, regardless of whether any member of the public actually sees, hears or enjoys such a work.

### **Economic Rights as Business Opportunities**

Section 14 of the Copyright Act confers economic rights on the copyright owner. The economic rights include such rights which have pecuniary value. Exploitation of the work by the exercise of these rights bring economic benefit to the owner of the copyright. The owner of the work may exploit the work himself or licence others to exploit any one or more of the rights for consideration.

These rights do not enable the owner to undertake anything in particular. They are negative rights that the owner has a right to prohibit others not to do any such action with the work of the owner. Exclusive rights include the following :

- the right to reproduce the work and making the copies available
- the right to communicate to the public by means of, for instance, public performance and broadcasting by cable, wireless, internet or mixed modes of convergence, which appear to be covered in the present words of the Act.
- The copyright confers on the owner of copyright the sole right to perform and any person does this without the consent of the owner he infringes his right.
- the right to make any translation, adaptation, re-arrangement and transformation of work.
- to right to reproduce the artistic work in any material form including depiction in three dimensions of a two dimensional work or in two-

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5 For certain purposes of the Act, the performance of the work is deemed to be publication.

- dimensions of a three-dimensional work;
- the right 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 occasions;
- the right to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme.

Thus section 14 grants a variety of rights to the owner of copyright. It is interesting or curious that when such a right is exercised excepting those things which amount to publication of the work, if any action (right) is undertaken, it produces a new work which is likely subject matter of copyright. However issue of copies produces a good in which the work is incorporated. A book should be comparable to a sound recording or a film, but it is not. Even the additional ingredients are much lesser in the book. As there is no separate right for the publishers the authors and publishers have to share the economic rights available to the author-owner. This also gives rise to a tense relationship between authors and book publishers. The publisher even though does not normally exercise any of the rights mentioned in s 14 except issue of copies, desires to obtain all (he rights. In the process the possibility of wealth generation by exploiting the same work through publication on other media is compromised. Transfer of those rights which for sure are not to be exercised is to kill the entrepreneurship of author-owner also. This is true even as the publisher might be justified in apprehending the exploitation of the work by other media as cutting into his sales.

The economic rights may thus be seen differently by authors. A person who is exposed to these rights may actively look for opportunities to exploit each and every medium mentioned in the rights. Thus these rights or media might give an insight to the owner for wealth generation or business opportunities emerging from the knowledge of copyright law.

Basic copyright means the right to copy or reproduction of work in which copyright subsists. The authors, composers and artists are to be protected from the public that it should not reproduce the original works of the authors resulting in financial loss to them. The objective of the Copyright is to encourage authors, composers and artists not only to create original works by rewarding them with the exclusive rights for a fixed period<sup>6</sup> but to encourage them to reproduce the works for the benefits of the public and indeed to exploit all the economic rights as far as possible. Necessarily there is required a large scale licensing activity on the part of the author as the multiple exclusive rights for different mediums need to be effectively exercised.

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6 In India after 1992 it is 60 years from the beginning of the calendar year next following the year in which author dies.

### **Need for Copyright Societies**

It is very difficult for an individual writer, composer or musician or other person to sell his original work in the country or abroad without any risk of shutting out the potential licensees or buyers or mis-use by such persons and getting the appropriate commercial benefit. It is also not practical for an individual to sell his work and fixing of the royalty and collecting of the fees and to keep track of the copies or frequency of display or use of the work. An individual is also not a technical and commercial person to evaluate the potential of the work. The selling of the products, getting the agreements signed, negotiations for royalty and collection of royalty fees are considered to a business. The business is supposed to be done through technical experts in the field of business. It is also not possible for an individual to check any infringement of his original work and getting the matter legally objected in the right forum. It was in this background the need of an agency, who can look after the interest of the whole community of right holders in a particular field to combinedly form a society to take a common interest and cause for their benefit.

### **The Berne Conventions and TRIPS**

The Berne Conventions in 1886 laid down rules for providing the protection to the original works in the member countries. Article 1 of the Convention laid down that the countries to which these convention applied constitute a union for protection of the right of the authors in their literary, artistic works. Article 2 defined the expression "Literary and Artistic Work". It includes every production in the literary, scientific, and artistic domain, whatever the mode or form in this expression, such as books pamphlets and other rights Lectures, address dramatic or musical work, choreographic work and cinematographic work.

The convention also laid down how a member country would treat, if there is an infringement of Copyright provisions. The provisions of the International Convention had been revised from time to time to include certain field or area for extending the copyright laws. The latest representation of the Berne convention was finalised in the Berne Convention of Promotion of Literary and Artistic Work (Paris Act) 1971.

India is one of the members of both international conventions, meaning thereby India has to grant protection to the works of the member countries in India and has a right for Copyright protection in those member countries. Now more prevasive than the Berne Convention is the TRIPS whereby the Berne convention has to be applied in a definite manner. TRIPS has introduced consequences for the nation-state if Berne or other IP conventions are not followed.

Copyright problems in some respects are international problems. International problem can travel from one country to another more easily and quickly than other kinds of property and amongst International problem it is cheapest and easiest for copyright materials to travel and now with Internet it is just a click away. Technological progress has made copying of copyright material easy and simple. Books, recorded tapes, or video cassettes of films or computer programmes can be taken from one country to another without any difficulty and thousands of copies made from it and distributed on the click of a mouse. Unauthorised home taping of radio and television programmes have become common all over the world. Photocopying has made unauthorised copying of copyright material simple and inexpensive. Consequently the control of copyright infringement has become very difficult and often impossible. It is submitted that the only possibility for controlling infringing copies is to make authorized copies available at reasonable prices and at all possible places. It is advisable to use all those methods and materials, which are used by pirators to make official copy available. Licensing out at reasonable price is the answer and it is the copyright societies, which can do it effectively.

### **Copyright Act- 1957 and Copyright Societies**

With a view to grant copyright protection the Government of India got enacted the Copyright Act 1957 in Parliament and up-dated it from time to time according to the requirements of the International Conventions. The Central Government of India passed the latest International Copyright Order 1981, as amended in March, 1997. Prior to Amendment Act of 1994 the provisions under sections 33 to 36 for setting up of Performing Rights Societies were concerned with forming societies which could only issue or grant licences for performances in India of any work in which copyright subsisted. These Societies had a limited field of operation viz. granting licences for the purposes of literary, dramatic or music work, which is of such a nature that it can be performed in public i.e. a stage play based on a novel etc.

By the Copyright Amendment Act 1994 the provisions under section 33 to 36 and has extended the operation of the legal provisions to all classes of work, in which copyright may subsist under the Act, Section 33 of the Act provides that no person or association of persons are allowed to carry on the business of issuing or granting licence in respect of any work in which copyright subsists. The Central Government has been empowered to register copyright societies in subsection (3). It shall have regard to

- (i) the interests of the authors and other owners or rights under this Act,
- (ii) the interest and convenience of the public and
- (iii) in particular of persons, who are most likely to seek licences (prospective licences) in respect of the relevant rights,
- (iv) the ability and professional competence of the applicants



(association), if satisfied as to above the central Government may register such associations of persons as copyright society, subject to such conditions as may be prescribed<sup>7</sup>.

The chapter, "copyright societies" (chapter VTI:ss 33-36A) has been inserted by 1994 amendment w.e.f. 10 May 1995. It provides for the registration of copyright societies by the Central Government<sup>8</sup>. From the above date no person or association of persons shall commence or carry on the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under sub-section (3) by the Central Government ....

Thus the copyright societies may not only deal in copyright but they may also be established for performers rights and broadcast reproduction rights. Any association of persons who fulfill such conditions as may be prescribed may apply to the Registrar of Copyright for permission to do such business. The Registrar is required to submit the above application for permission to the Central Government. Central Government may register such association of persons as a copyright society subject to such conditions as may be prescribed.

Ordinarily not more than one copyright society shall be registered by the Central Government to do business in respect of the same class of works<sup>9</sup>. Existing performance rights societies are to be deemed to be copyright societies and should get themselves registered within one year from the commencement of Amending Act of 1994. The Act has given the overriding power to the Central Government that if a copyright society is managed contrary or detrimental to the interest of the owners and is detrimental to the interest of the owners of the right concerned it may, after satisfying itself through an enquiry in the prescribed manner, cancel the registration of such society<sup>10</sup>. The Central Government has also got authority in the interest of the owners of rights to suspend the registration of such a society, pending enquiry for a period not exceeding one year. The government in such a case shall appoint an administration to discharge the functions of the copyright society under sub-clause (5) of section 33.

### **Powers and Procedures of Copyright Society**

Section 34 of the Act enacts various rights, powers and procedure of the copyright society as under Copyright Society may accept from an owner of rights exclusive authorization to administer any right in any work i) by issue of license or ii) collection of license fees or both.

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7 S 33(3).

8 S 2 (ffd) and 33(3).

9 Proviso to s 33(3).

10 S 33(4).

The owner of rights shall have the right to withdraw such authorisation without prejudice to the rights of the copyright society, under any contract. It shall be alright for a copyright society to enter into an agreement with any foreign society or organization administering the rights, corresponding to the rights under this Act. The agreement with such a foreign society may include administration of those rights which are being administered by the concerned Copyright Society in India in the foreign country and administration in India on behalf of the foreign society the rights being administered by such foreign society in relation to foreign works.

However, no such Society shall permit any discrimination in regard to the terms of the licence, disbursement of fees collected between Indian and other works<sup>11</sup>.

Copyright Society is entitled to issue licenses, or collect fees in pursuance of such licenses, and distribute such fees among the owners of the rights, after making deductions for its own expenses. There is a residuary power wherein the Society may perform any function which is not inconsistent with the basic norm that Copyright Society has to subserve the interests of owners of rights.

Copyright Society shall be subject to the collective control of the owners of the rights under the Act, whose rights it administers. The Society shall submit to the register of the copyright such returns, as may be prescribed by the Central Government. Section 36A, has made a clarification about the rights, or liabilities in any work in connection with the Performing Rights Society, which had accrued or were incurred before the commencement of the Copyright Amendment Act 1994 on 10 May 1995 or any legal proceedings in respect of such rights or liabilities pending on the day.

### **Procedure**

Copyright Rules (amendment 1995) laid down the conditions and procedures for submission of application for registration of Copyright Societies. There are available in Chapter V of the Rules. The conditions provide that any association or persons which may be incorporated or may not be incorporated and if it comprises 7 or more owners of granting licences in respect of any class of works in which copyright subsists or in respect of any other right, such an association may file an application in the prescribed form to the Registrar of Copyrights for submission to Central Government for the grant of permission to carry on such business and for its registration as a copyright society<sup>12</sup>. The Central Government within 60 days from the date of its receipt by Registrar may take decision, as such or reject the application after giving the applicant an opportunity of being heard.

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11 Proviso to s 33(2).

12 Rule 12 of Copyright Rules 1958.

The Central Government may be order suspend the registration of a Society for a period for a period of not exceeding one year and shall appoint an administrator to discharge the functions of Copyright Society. The Central Government has also authority to cancel the registration of a Copyright Society, after holding proper enquiry if the society had furnished incorrect and misleading particulars in the application for registration. Every society has to file returns and audited accounts to the Registrar within one month from the conclusion of every annual general meeting of the owners of the rights which are owners of the society<sup>13</sup>.

As mentioned above, the Copyright Amendment Act 1994 provides for setting up of separate Copyright Society for different categories of works. In India three Copyright Societies have been registered, one Indian performing Right Society Limited (I.P.R.S.) for Musical work, second is the requirements of Cinematograph Film Producers and third Producers and Phonographic Performance Limited (P.P.C.) in the field of sound recordings.

The Indian Performing Right Society Limited is a Company Limited by guarantee and is a registered company under the Companies Act, 1956. It is a non-profit making body and has been given carry on copyright business in musical works or any action during song, or performed with the music. The Society came into existence on 23<sup>rd</sup> August 1969. The Society administers and controls the performing rights in music work, musical rights in any musical works and synchronize rights in music work on behalf of its members and those of its sister societies with which it has reciprocal agreements. Nearly all composers, song writers and publishers of musical works are members of the Society. Its members control nearly 97 percent of Indian Music Society, as a direct reciprocal agreement with the similar societies in foreign countries, such as APRA, MACP, ACI, COMPASS and CASH, IPRS serves both as owner and user by acting as a bridge between the owner and the users.

The Society has become an indispensable mechanism for collecting royalties from various users of copyright works of their members and fixing the royalties for payment to such members after deducting 15% as its administrative expenses.

The copyright societies are proceeding in the right direction, serving and giving relief to the individual writers, composers, etc. and industries engaged in such fields all over the world. Copyright societies appear to be only saviors for authors and owners so that they are protected and are equipped to fight with global menace of piracy and counterfeiting through these new institutions which license out and also protect owners from infringement of their rights.

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13 Rule 14 P of the Rules.