

Economic Rights of Authors under Copyright Law: Some Emerging Judicial Trends

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This paper deals with various economic rights of authors and how these rights have been interpreted and appreciated by the courts with special emphasis on the interpretation of these rights in the digital context. It further deals with issues like transitory copying and conversion of the work from two dimensional to three dimensional and how the same has been looked into by various courts.

Keywords: Reproduction right, exhaustion, communication to public, on-demand availability right

Copyright is a protection given to creators of certain type of works as a tribute and an acknowledgement to their creative intellectual input and labour applied.¹ The objective of copyright has always been protection of the interest of the creators coupled with dissemination of knowledge and information. Though this protection started with the recognition of the rights of authors in their books, but the modern technology has changed substantially the nature of works and its mode of exploitation.

It must be borne in mind that protection of copyright for works had always been the creation of Statutes, though in the beginning it was through Charters issued by the appropriate authority.² History of evolution of copyright also teaches that over a period of time recognition of the creative intellectual labour of the author by the State and consequential granting of limited proprietary rights to the author became major objective of protection. This property right though it creates a monopoly is not absolute; it has always been subject to public interest. In short, the Statute that confers monopoly, itself has, at all points of time, provided limitations for use of it too.

The Copyright Act, 1957 has also recognized creative labour of the author by identifying certain works as worth protecting and granting rights to these authors over their works. For a work to qualify for copyright protection it has to fulfill criteria provided by the Act. As per Section 13 of the Act, the works that will qualify for protection are original literary,

musical, dramatic and artistic works and also sound recording and cinematograph film. The purpose of recognizing these works is to attribute certain rights to its authors. This paper analyses rights guaranteed to authors for different types of works and the attitude and approach of the Indian Judiciary in interpreting these rights.

Rights of Authors

The Copyright Act, 1957 provides both economic and moral rights to authors. Economic rights are those rights which help the author to commercially exploit his creation while moral rights are those rights which relate to protection of personality of the author and integrity of this work, and similar matters.³ These rights have been recognized by the Berne Convention, 1886, the TRIPS and various domestic laws. A notable difference brought under the TRIPS is that the Member States do not have any obligation to protect moral rights of authors; the obligation is confined to economic rights as per Article 9 of TRIPS. The economic rights of the author are enumerated in Section 14, mainly, and the moral rights are provided via Section 57 of the Copyright Act, 1957.

Economic Rights

Economic rights are those rights which help the author reap economic benefits. These rights have been recognized in one form or the other since fifteenth century.³ As per Section 14 of the Copyright Act, 1957, different rights are recognized for the works considering its nature. The section provides that it is the exclusive right of the author to do or authorize the

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doing of the acts provided there under. The important rights generally recognized by all types of works under the Indian statute that attracted much judicial interpretation includes reproduction rights, right of distribution and right to communicate work to the public.

Right of Reproduction

In all types of work, i.e., literary, dramatic, musical, artistic, cinematograph film and sound recording, the exclusive right to reproduce the work is with the author.⁴ The exclusive right to prevent copying and reproduction of the work is the most fundamental, and historically the oldest, right of a copyright owner.⁵ Though the Copyright Act has recognized this right in all types of work, the terminology used is different and so is the ambit of the right. The Act has neither defined the term 'reproduction' nor the term 'copying' nor has it laid down the difference between these two.

The terms 'reproduction' and 'copying' have been used simultaneously though reproduction encompasses a wider range of acts. It was held by the House of Lords in *Ladbroke Ltd v William Hill Ltd*⁶ that reproduction means copying, and does not include cases where an author or compiler produces a substantially similar result by independent work without copying. It must also be noted that to constitute reproduction, copying need not be *in toto*; even substantial reproduction will amount to reproduction. Reproduction also means making a copy in a different form, even if such copy is not easily perceptible.

Under the Act, the right to reproduction of literary work also includes storing it in electronic form. This essentially means that storing into a computer or compact disk will amount to reproduction, even though the copy is in a different form when compared with the original. It is important to note that the law is silent on the nature and duration of storage to constitute reproduction. In *MAI Systems Corp v Peak Computers Inc*⁷ the question before the US Court of Appeals was whether copying of a copyrighted computer software into the temporary memory of a computer will amount to 'copy' under the United States Copyright Act. It was held that 'the loading of copyrighted computer software from a storage medium (hard disk, floppy disk, or read only memory) into the memory of the central processing unit (CPU) causes a copy to be made'. It was further held that copying into RAM is sufficiently permanent

and stable to permit it to be perceived, reproduced or otherwise communicated for a period more than a transitory duration. From this case it is clear that even making a temporary copy would be violation of the right of the copyright owner as per the US law.

It is important to note that the US statute defines copies as 'material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.'⁸ The explanation further says that a work is 'fixed' in a tangible medium of expression when it is embodied in a copy or phonorecords, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period more than the transitory duration. It appears that the terms 'sufficiently permanent or stable' used in the definition resulted in the judicial interpretation to include even temporary storing in the computer within the scope of reproduction right. What period of time will constitute transitory duration is an interesting question and will depend on each jurisdiction.

The duration for which a copy should be retained in order to constitute a violation of the rights of the lawful owner has yet not been decided at the international level. The Lieder Draft for the WIPO Copyright Treaty in 1996 via draft Article 7(1) provided that authors of literary and artistic work shall enjoy all rights guaranteed under Article 9 (1) of the Berne Convention, irrespective of whether such work is temporary or permanent and in any form or manner. Article 7(2) contained proposals permitting Contracting Parties to limit the right of reproduction in cases of certain temporary, transient or incidental reproduction, subject to certain conditions.³ Later this Article was completely dropped when the WCT was finalized and the reason for leaving this provision open seems to be the fact that no consensus was reached among the parties as to what period should constitute a transitory duration. In short, it simply means that the States are free to decide the time duration of retaining of copyrighted work that will qualify as reproduction so as to constitute a violation. On the closing of the Conference, US proposed inclusion of a statement which suggested that the reproduction right guaranteed under Article 9 of the Berne Convention along with its exceptions shall apply in the digital context too.⁹ The Statement just

says that the member parties have an obligation to recognize reproduction in the electronic medium as coming within other class of reproduction under the Berne Convention. It must be noted that India is not a party to WIPO Copyright Treaty. At the same time, the Copyright Act, 1957 includes storing of any information in the electronic medium without defining the term 'copy'. In short, what duration of time will constitute 'copying' under the Indian Act is not clear from the statute. It is expected that the judiciary will keep in mind the pros and cons of recognizing copying for a short span of time.

In *New York Times Co Inc, et.al. v Tasini et. al.*¹⁰ the question before the US Court of Appeal was whether creating a computerized database or a database in a compact disk of printed work will amount to reproduction and could be considered as a separate right. It was held that when a right is given to reproduce the work in newspaper and magazine alone, all other rights of reproduction vest with the author itself and consequently all other type of reproduction is his exclusive right and hence creating database, computerized or otherwise, will amount to reproduction and also violation. The defense taken by the defendants was that they were the authors of the collected work and that it was this collected work that was reproduced in databases. Rejecting this, the Court held that the author of collected works holds the copyright only to those parts of the collection which is his creation. The base material which forms part of the collection, even after it has become part of such collection, remains the work of its original owner and not the person who has collected and compiled it. This seems to be the correct logic for the reason that if it is not so, the author of the collected work will make undue benefit from the work of the actual author. In *UMG Recording Inc v MP3.COM Inc*¹¹, it was held by the US District Court that recording from the compact disk and uploading its compressed version on website is also reproduction. In India though there are, to date, no cases dealing with database reproduction and uploading matters in the Internet there is no reason to think that the judiciary will follow a line that will jeopardize the rights of the author.

The author of an artistic work has the exclusive right to reproduce the work and it includes its conversion from two dimensional to three dimensional and vice-versa.¹² This right has been elaborately dealt by the Delhi High Court in *Escorts*

*Construction Equipment Ltd & Anr v Action Construction Equipment Pvt Ltd & Anr.*¹³ The claim of the plaintiffs was that the defendants' Pick-N-Carry Hydraulic Self Mobile Cranes is the three dimensional reproduction of the drawings for which the plaintiffs have copyright protection. The Court after referring to Section 14(c) observed thus

'Needless to say industrial drawings are produced by skilled draughtsman. Some of the drawings incorporate standard parts such as engine or a gear box in common use, but even in those drawings there is ample knowledge, labour, judgment and skill. The drawings used in the design of the crane were reproduction of the original artistic work. Those copies of drawings were, in turn, used to manufacture parts of the crane. Those parts manufactured are again reproduction of the original artistic works. A reproduction of an artistic work includes a version produced by converting the work into three dimensional forms. Such drawings are capable of being infringed by copying of a three dimensional article.'¹³

Based on the above reasoning, the Court held that the defendants have violated copyright of the plaintiffs in their industrial drawings and granted an injunction in favour of the plaintiff.

The point of interest is that through this judgment, the Delhi High Court has, with the help of the Copyright Act, prevented manufacture of machinery. The object of copyright protection is to protect creativity of the author and to ensure that no one other than the author commercially exploited this creativity. It was never within the ambit of copyright law to prevent manufacture of any commodity. This confusion probably arose due to the literal interpretation followed by the Court without considering either the intention of the Legislature or the consequences of the decision, in practical terms.

It is true that designs are artistic works. But designs are of different types¹⁴ and which of these has to be protected under the copyright regime is a thought provoking issue. The Act has also not made any difference between the drawings that have an aesthetic value and that are purely functional in nature. But there exists a separate legislation for the protection of designs, the Design Act, 2000. It has defined the term 'design' and those which come within that definition ought to be protected under that legislation and all drawings other than those that can be classified as 'fine arts' will come within the

purview of this legislation. Section 2(c)¹⁵ of the Copyright Act gives the impression that drawings that are functional in nature are beyond the purview of the Act. It is true that there is a confusion regarding certain artistic works in which the element of functionality is minimal yet is capable of being attached to an article. This is precisely dealt via Section 15¹⁶ which puts a restriction of reproduction of that article bearing that artistic work to 50 times by an industrial process. In spite of the sections expressly providing like this, the interpretation of the court seems absurd.

The proposed draft of the Copyright Amendment Bill, 2006¹⁷ suggested the inclusion of storage in electronic form also to be covered within the right of reproduction of artistic work. The author is of the view that provision also needs clarification with the conversion from two dimensional into three dimensional and vice-versa. The same confusion was present in the English copyright system too. This was clarified by the Copyright, Patent and Design Act, 1988 by recognizing a 'Design Right' under the copyright regime to deal with those designs that are capable of being applied on articles. The proposed Amendment Bill has also tried to bring out a clarification by suggesting to include a new Section 52 (z)¹⁸ which says that making of three dimensional objects from two dimensional artistic works for the purpose of industrial application shall not be considered as infringement of copyright. This seems to be a positive step to bring out a clear distinction between the operating platform of the Copyright Act and the Design Act as far as artistic work capable of industrial application is concerned.

Similar rights are also conferred with authors of cinematograph films. They are vested with the exclusive right to make copy of the film as per Section 14(d) (i) Copyright Act, 1957. What all acts will amount to making a copy of the cinematograph film has been dealt by the Bombay High Court in the case *Star India Private Limited v Leo Burnett (India) Private Limited*.¹⁹ Here the plaintiff was the owner of the cinematograph film titled 'Kyun Ki Saas Bhi Kabhi Bahu Thi'. The defendants made a commercial film under the title 'Kyun Ki Bahu Bhi Kabhi Saas Banegi' with similar characters being played by the same artists. The question which came for the consideration before the court was whether the commercial film made by the defendants is a copy of work of the plaintiff.

The Court here pointed out that the rights guaranteed under Section 14 (a) (b) and (c) and that under Section 14 (d) and (e) are of different degree. The exclusive right in the former is to reproduce the work in any material form while the exclusive right conferred in the latter is to 'make a copy' of the respective subject matter.¹⁹ It is this difference in the wordings of the provisions that resulted in the differential interpretation of the provision. Consequently production by another person of even the same cinematograph film will not constitute an infringement of copyright of the first film. The term 'to make a copy' of a film would mean to mean a physical copy of the film itself and not another film which merely resembles it. If the second film has been filmed or shot separately and even if it resembles the first film, it is not the copy of the first film and therefore does not amount to infringement. The Court relied on *Norowzian v Arks Limited and other*²⁰ where it was held that for a second film to infringe copyright in the first film, it has to be an actual copy of the first film. Reliance was also placed on *CBS Australian Limited and others v Telemak Teleproducts (Aust.) Pty Ltd*²¹, where it was held that reshoot of the film cannot be said to be the copy of the film for the purpose of infringement.

Right of Distribution

Apart from the right to reproduce the work, the author is also vested with the right to distribute the work. It is the right to put copies of the copyrighted work into the commercial market²² i.e. it relates to the control over dissemination of actual physical copies of the work. The scope and extend of this right is not uniform i.e. it differs with the work. Once copies are in circulation the right no longer exists i.e. the right gets exhausted.

The principle of exhaustion is dealt in Article 6 of the TRIPS²³, under General Provisions and Basic Principles. According to the exhaustion principle, once the intellectual property rights holder has sold a product to which its IPRs are attached, he cannot prohibit the subsequent resale of that product, as his intellectual rights in that product are said to have been 'exhausted' by such sale.²⁴ This is also known as the 'First Sale Doctrine', especially in the United States. Exhaustion can be of three types:

1 National exhaustion- where the author loses the right to control the re-sale of the product in that particular nation.

2 Regional exhaustion- where the author loses the right to control re-sale of the product over a specified region but can exercise such right beyond such region.

3 International exhaustion- where the author loses the right to control re-sale of the product anywhere in the world after the first authorized sale.

International exhaustion is the most widely accepted principle; regional exhaustion is mostly accepted in the European Community while national exhaustion is generally recognized by national laws.

The exhaustion principle gives rise to what is commonly called as 'parallel imports'. This is applicable in respect of all types of goods, which include copyrighted works. This raises the interesting question as to whether there is a right to importation under the Copyright Act, 1957. The Copyright Act expressly provides that no person shall be conferred with any rights under copyright than the rights specifically guaranteed under Section 16 of the Act and Section 14, which provides the rights; there is no right as the right of importation.

But the question is whether such a right can be inferred from reading other provisions of the Act. This is exactly what the Delhi High Court did in *Penguin Books Limited v India Book Distributors and others*.²⁵ Here the plaintiffs had the exclusive right and license for printing, publishing and marketing of 23 copyrighted works in India. The defendants imported lawful copies of these books from America and sold it in India. The plaintiffs sought to prevent this. The question was whether the copies imported by the defendants are infringing copies as per the Copyright Act and whether they are violating any right exclusively conferred on the plaintiff by virtue of the Act. The Court here held that if any person without the license of the copyright owner, imports into India for the purpose of trades any literary work, the copyright over the same is infringed. Any importation of infringing copies is therefore an infringement unless it is for the importers own use.²⁵ The Court came to this conclusion on the basis of a combined reading of the then Sections 2(m)²⁶, 51²⁷ and 53.²⁸ The Court moreover held that 'the exclusive right to import into India would extend to the exclusive right to import copies into India for the purpose of selling or by way of trade offering or exposing sale of the books in question.'²⁹ The conclusion, therefore, was that the defendants are 'publishing' the works, which is also the exclusive right of the plaintiff³⁰, by issuing copies for public

distribution. On the bases of this rationale, the Court held that the defendants were infringing the copyright of the plaintiff and granted an injunction in their favour. To reach this conclusion the Court took help from *Time-Life International (Netherlands) v Interstate Parcel Express Co Pvt Ltd*³¹ and also *Polydor Ltd v Harlequin Record Shop*.³²

From this case it is implied that the Court has held that when goods lawfully produced in one country come to the market of another country it becomes illegal merely for the reason that some other person has the exclusive right to publish the product in such other country. This logic followed by the court seems to be wrong in the opinion of the author. To reach to this conclusion, the Court has placed reliance on an English and an Australian case. Those decisions are based specifically on the English³³ and Australian³⁴ provisions, respectively, which say importation of copies will amount to infringement only if making of the copies in the importer country would be infringement. This position has been over looked by our court. Here the rationale followed by the Court is that the importer was 'publishing' the work through such importation which is the exclusive right granted to the owner of the work. But rights of the owner of copyright are specifically enumerated in the Act. Any addition by way of judicial interpretation must be with due care and caution. Recognizing such an importation right would prevent others from importing legally made copies at a cheaper rate and this will be at the cost of the public. Hence recognizing a right like importation is more of a policy matter and not for the courts to decide.³⁵ Hence the author is of the view that this judgment, which recognizes an importation right which is not provided by the Act, does not require any appreciation.

Section 14 of the Copyright Act, 1956 was amended in 1994 and rephrased to include right to issue copies to the public not the copies already in circulation as per Section 14(a) (ii), which simply means that when a copy of the work is available in the market the author loses the right over such copy. In short, The Copyright Act, 1957 has not guaranteed any right of importation though the Delhi High Court has recognized via *Penguin Books Limited*³⁶ case. But with amendments, the decision of the *Penguin* case is no more the law. Like most other nations, we have also accepted the principle of international exhaustion. This seems to be after taking into view the public interest angle. For the same reason it would be better to make it clear by

amending Section 2(m) to the effect that importation of legal copies will come outside purview of infringing copies and a corresponding amendment to Section 14 (a) (ii) to include copies already in circulation anywhere in the world.

Right to Communicate Work to the Public

Another important right conferred on the author of a work is the right to communicate his work to the public.³⁷ The exclusive right to do this vest with the author, irrespective of the nature of the work.³⁸ Change in technology has brought change to the nature of communication and also to the notion of 'public'. This has enabled basically three kinds of communication, such being public performance, being carried on in the presence of an audience, transmission through cable network and also wireless broad casting. And the right to communicate the work through all these means vests exclusively with the author.

To understand the ambit of this right it is necessary to understand the meaning of the words 'communication' and 'public'. The Section 2 (ff) of the Copyright Act, 1957 has defined the term 'Communication to Public' to mean making the work available to the public for their enjoyment, irrespective of whether they actually enjoy it. This it appears is intended to cover transmission over computer network. The Act has specifically provided that communication through satellite and other cable means will also come within the purview of communication to public.

The Bombay High Court through its judgment in *Garware Plastics and Polyester Ltd, and others v M/s Telelink and others*³⁹ tried to bring out the meaning of the term 'communication to public'. In this case the plaintiffs were producers of cinematograph films and the defendants were cable operators who telecasted those films, for a prescribed fee, without authorization of the plaintiff which was challenged by them as violating their right under Section 14 of the Copyright Act, 1957. The question before the Court was whether the act of the defendants would amount to communicating the plaintiffs work to public.

The Court brought out a test to find out what would amount to 'communication to public' and held that the criteria to decide it are:

- Character of the audience and whether it can be described as public or private,

- The audience is private or public in relation to the owner of the work,

- Whether permitting such performance will cause monetary loss to the owner of the work which he ought to gain out of the exploitation of his intellectual property.

Interpreting the term 'Public', the Court held that though the people who receive broadcast are either residents of apartments in a building which has the network or residents of the locality, they cannot be treated as members of the same household or family and consequently their relation with the owner of the work is of public nature. Moreover, the defendants were collecting certain amounts as fees which the plaintiff ought to have got and thereby causing loss to him of what he is lawfully entitled to. Considering all these, the Court held that the defendant violated the plaintiff's right to communicate his work to the public guaranteed under Section 14 of the Copyright Act.⁴⁰

The question which arose before the High Court of Australia in *Telstra Corporation Limited v Australian Performing Rights Association Ltd*⁴¹ was whether providing music to telephone users while they are put 'on hold' will amount to public communication. The Court held that though the conversation over the phone can be treated as private, the act of playing the song cannot be treated in the like manner. The Court further stated that a person 'on hold' hears the music because it is intended that any member of the public who calls the engaged number will hear the music. A caller hearing the music on hold must, therefore, be part of the 'public' which the owner of the copyright in the music contemplates to be part of its audience.

In *National Football League v Primetime 24 Joint Venture*⁴¹, the plaintiff owned copyright in simultaneous video tape recording of its weekly football games. The defendants uplinked US broadcast of the games to its satellite for transmission to and viewing by subscribers with the satellite dishes in Canada. The claim of the plaintiffs was that this act of the defendants violates their right of public communication. Accepting this argument, the US Court of Appeals held that up-linking or down-linking of a work via satellite for distribution to subscribers will amount to public performance or public communication.

With the coming into of Internet, the notion of communication and public has changed considerably. It has provided facility for public at different parts of the world. A person can enjoy the work not only at the same time but any time when he wishes to enjoy such work. This has led to the recognition of this right in the Internet context, specifically, through the WIPO

Copyright Treaty (WCT) 1996. As per Article 8 of WCT, the authors of literary and artistic work will have the exclusive right to authorize communication of the work to the public 'in such a way that the members of the public may access these works from a place and at a time individually chosen by them.' This is also called 'on-demand availability right.'³

In *Playboy Enterprises Inc v Frena*⁴² a subscriber of the defendants Bulletin Board Service (BBS) had uploaded files containing digitized pictures copied from the plaintiff's copyrighted magazine, which remained on the BBS for other subscribers to download. The Court here held that the BBS provider was violating plaintiff's right to display copies of its work. In *Religious Technology Center v Netcom on-line Communication Services, Inc.*⁴³ the defendants who are BBS providers permitted the display of certain copyrighted literary work belonging to the plaintiff. Here it was held by the US District Court that the defendants are not liable for the reason that they had no means of knowing whether materials posted by some third person is infringed copies of somebody's works. Similarly in *Perfect 10 Inc v Amazon.com Inc and others*⁴⁴ the defendant provided thumb-nail size images of certain photograph for which the copyright vested with the plaintiff. The question raised before the US Court of Appeals was whether display of the image in a reduced size will amount to violation of their right to communicate the work to public. The Court here held that a computer owner that stores an image as electronic information and serves that electronic information directly to the user is displaying the electronic information in violation of the copyright holders exclusive display right. The Court stated that as there was no dispute that Google's computers store thumbnail versions of Perfect 10's copyrighted images and communicate copies of those thumbnails to Google users, they are infringing Perfect 10's copyright.

All these decisions are from US Courts based on their statute.⁴⁵ A similar case has neither, to date, come before the Indian Courts nor has the Copyright Act specifically dealt with the issue of on-demand availability right. But when looked into the definition of 'communication to public' which uses the terms 'making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available as per Section 2 (ff) of the Copyright Act, 1957.' The author is of the view that on-demand availability can

be interpreted to come within it because it satisfies the conditions laid down in the section. It will be interesting to see how the Courts will interpret the provision regarding this particular aspect.

Conclusion

In order to ensure a full and effective participation in public life and to lead a better life access to information and knowledge is a must. In a welfare State it is the duty of the State to ensure that there is dissemination of knowledge and information to such an extent that it benefits all. At the same time it is the duty of the State to protect those intellectual labours which is the root cause of this information. This balance is being ensured with the help of copyright law. But we can see that the current Copyright Act is not adequate to deal with the needs of the changing society. The influence of Internet is rampant and so are the problems it creates, relating with copyright. The current Act is incompetent to deal with this scenario. Just because to date no such issue has come before any Indian Court it would be foolish to believe that it will never come or wait till the date when such issues actually come. Internet should not be looked upon as a problem creator, instead it must be seen as the most preferred means for the dissemination of information and rules must be drafted in such a manner so as not to prejudicially affect free access.

From the cases discussed it can be inferred that the courts have always taken a pro-author attitude. The courts have in most situations widened the ambit of the rights guaranteed by the Act and in most cases have gone much beyond the philosophy of copyright protection and intention of the legislature to grant protection to authors of the work. In certain cases it seems to be just though in most cases it is not so. The courts while giving most judgments in favour of authors seems to forget the social implications such judgments can have. The court which is supposed to strike a balance between the rights of authors and public interest can be seen, in certain cases, as the cause for upset of the existing balance.

The reason for this fluctuating stand by the judiciary is, for sure, the gaps in the law. It is high time for the legislature to act and bring in changes to the existing law, especially in the situation of changing technology. The amendments proposed in 2006 seem to be a positive step but it is not adequate to deal with the change.

References

- 1 This is known as the 'Doctrine of Sweat of the Brow', whereby a work is given copyright protection if the author has applied 'labour, skill or judgment' in creating the work irrespective of the level of originality in the work. Evolved from the decision in *Ladbroke v William Hill*, [1964] 1 All E.R. 465.
- 2 At first it was by the King and later by the Stationers' Company.
- 3 Sterling J A L, *World Copyright Law* (Sweet & Maxwell, 100 Avenue Road, London NW3 3PF), 1998, p.279.
- 4 Article 9, 14 and 14bis of the TRIPS also recognize these rights.
- 5 Kevin Garnett, Jonathan Rayner James & Gillian Davies, *Copinger and Skone James on Copyright*, 14th edn, (Sweet & Maxwell, 100 Avenue Road, London NW3 3PF), 1999, p.392.
- 6 [1964] 1 All ER 465, 469.
- 7 991 F.2d 511, 26 USPQ2d 1458 (US Court of Appeal, Ninth Circuit, 1993).
- 8 17 U.S.C. Section 101.
- 9 Agreed statements concerning Article 1(4) of WIPO Copyright Treaty, 1996.
- 10 533 U.S. 483, 121 S.Ct.2381, 150 L. Ed. 2d 500 (2001).
- 11 54 USPQ 2d 1668 (U.S.: District Court, New York, 2000). Appeal was denied.
- 12 Section14(c) (i), Copyright Act, 1957.
- 13 1999 PTC 36 (Del.), p.48,49.
- 14 They are: (i) Designs which are dictated solely by functions and with little aesthetic element (For eg. machine parts); (ii) Designs which mix functionality with aesthetic element (For eg. design of a chair); (iii) Designs where aesthetic element is curtail and functionality is minimal (For eg. fabrics); (iv) designs which are purely of a fine arts nature and not intended to be applied onto any other article but that has an independent standing of its own.
- 15 Section 2(c) reads 'artistic work' means – (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work posses an artistic quality; (ii) a work of architecture; and (iii) any other work of artistic craftsmanship.
- 16 Special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 1911.- (1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 1911. (2) Copyright in any design, which is capable of being registered under the Designs Act, 1911, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his license, by any other person.
- 17 Was published in the official website of the Copyright Office, copyright.gov.in, for the purpose of collecting public opinions regarding the amendments. The proposed provision reads as follows: Section 52 (1) – the following acts shall not constitute an infringement of copyright namely: (z) *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.*
- 18 Proposed Section 52 (1) (z) reads:-'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.'
- 19 2003(27) PTC 81 (Bom.), p.94.
- 20 1996 FSR 394.
- 21 1987 (9) IPR 440.
- 22 Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, YMCA Library Building, Jai Singh Road, New Delhi 110 001), 2003, p.130.
- 23 Article 6- Exhaustion- 'For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights'.
- 24 Ganguli Prabuddha, *Intellectual Property Rights- Unleashing the Knowledge Economy* (Tata McGraw-Hill Publishing Company Limited, 7 West Patel Road, New Delhi 110 008), 2001, reprint 2003, p.254.
- 25 1984 (4)PTC 285 (Del.),p.296.
- 26 Section 2 (m) defines 'infringing copy' means a copy 'imported in contravention of the provisions of the Act'.
- 27 Section 51 reads:- 'Copyright in a work shall be deemed to be infringed- (a).....(b) when any person-(i) makes for sale or hire, or sells or lets for hire or by way of trade or display or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extend as to affect prejudicially the owner of the Copyright, or (iii) by way of trade exhibits in public, or (iv) imports (except for private and domestic use of the importer) into India any infringing copies of the work. Explanation – For the purpose of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of cinematograph film shall be deemed to be an infringing copy.'
- 28 Section 53 empowers the Registrar of Copyright to 'order that copies made out of India of the work which if made in India would infringe copyright shall not be imported.'
- 29 1984 (4) PTC 285 (Del.), p.300.
- 30 Section 14(1)(a) says that copyright means the exclusive right in the case of a literary work to do or authorise the doing of the following among others: (i)to reproduce the work in any material form; (ii)to publish the work.
- 31 (1978) FSR 251 (High Court of Australia).
- 32 (1980) FSR 362.
- 33 Section 5 of the English Act, 1956 deals with infringement by importation and reads: [W]ho without the licence of the owner of the copyright, imports an article (otherwise than for his private or domestic use) into the United Kingdom if to his knowledge the making of that article constituted an infringement of that article or would have constituted such an infringement if the article has been made in the place into which it has been imported.'
- 34 Section 102 of the Australian Act, 1968 reads: [W]ho, without the licence of the owner of copyright, imports an article into Australia where to his knowledge, the making of the article, if the article has been made in Australia by the importer, have constituted an infringement of copyright.'
- 35 Ponnuswami K, *Law of Intellectual Property*, Annual Survey of Indian Laws, 21, 1985, 349-335.
- 36 Section 51 reads:- 'Copyright in a work shall be deemed to be infringed- (a)..... (b) when any person-(i) makes for sale or hire, or sells or lets for hire or by way of trade or display or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extend as to

affect prejudicially the owner of the Copyright, or (iii) by way of trade exhibits in public, or (iv) imports (except for private and domestic use of the importer) into India any infringing copies of the work. Explanation – For the purpose of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of cinematograph film shall be deemed to be an infringing copy.’

- 37 As per Section 2(ff) ‘communication to the public’ means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.
- 38 Articles 11, 11bis, 11ter, 14 and 14bis of the Berne Convention, 1886.
- 39 AIR 1989 Bombay 331.
- 40 The Court formulated this test by a combined reading of many cases including *Harms (Incorporated) Limited v Martans Club Limited* (1927) 1 Ch.526, where it was held that the purpose of this right was to protect the author from injury or loss of profit by reason of any representation of his composition in public which would have ordinarily fetched him financial gain, *Jennings v Stephens* (1936) 1

Ch. 469, where it was held that the true criterion was the character of the audience. if the audience considered in relation to the owner of the copyright mat properly be described as the owner’s public or part of his public, then in performing the work before that audience, he would be exercising the statutory right conferred upon him and *Ernest Turner Electrical Instruments v Performing Rights Society* (1943) 1 Ch.167, where the Court applied a test which took into consideration the character of the audience, their relationship between the owner of the copyright and the impact of the performance on the value of copyright or the loss of profit which would otherwise have accrued on the owner.

- 41 (1997) 38 I.P.R. 294 (Australian High Court).
- 42 839 F. Supp. 1552 (M.D.Fla. 1993).
- 43 907 F. Supp. 1361 (N.D.Cal. 1995). Appeal to the Court of Appeal was denied.
- 44 508 F.3d 1146 (US Court of Appeal, 9th Circuit, 2007).
- 45 Section 106(5) provides that the copyright owner has the exclusive right ‘to display the copyrighted work publicly’. The Act explains that ‘display’ means ‘to show a copy of it, either directly or by means of a film, slide, television image or any other device or process...’