

Samrat Bandopadhyay\*

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**ABSTRACT**

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*With the advancement in technology and multiple mode of doing business in the commercial space, the varied facets of Intellectual Property Rights including that of 'Copyright' has undergone a tremendous change. The plethora of statutory provisions and its applicability from the perspective of judicial precedents have witnessed a sea of opportunities in its scope and ambit in the commercial jurisprudence. A perspective from an economic and financial implication becomes imperative and a quintessential one. The arena of economic standpoint and intersections from inter-disciplinary dimensions have lend support to the fact that Copyright as 'Intellectual Property Portfolio Management' has been a contemporary area which warrants a relook from a legal continuum perspective. The catena of cases which has surfaced before the Hon'ble Court of the Land has been telling instances of the significance which has garnered traction in recent times. The stakeholders in the value chain of Intellectual Property realm have to weigh out the pros and cons, taking the facts and circumstances of the cases to arrive at a 'Win-Win situation' where the bundle of rights pertaining to Copyright domain as a viable 'Intellectual Property Right' has to be seen in unison with changing dynamism of the legal developments. The instant paper is an attempt to reconcile and to review the entire jurisprudence from the prism of economics and management concepts, which are ever changing with the passage of time. The viability and sustainability of any aspects relating to Copyright have to be seen from the perspective and touchstone of statutory provisions along with jurisprudence evolving via judicial precedents.*

**Keywords:** *Copyright; Intellectual Property Rights; Portfolio Management; First Sale Doctrine; Exhaustion of Rights.*

\* Joint Director, Central Government Civil Services Officer, Group A, Government of India, BE (Information Science and Engineering), MBA (IIT Kharagpur) and presently pursuing LL.B at RGSOIPL, IIT Kharagpur.

## **Introduction**

The management of 'Intellectual Property Rights' has the dimensions of Political, Social, Economic and Technological facets. It has to be a constant endeavour to benchmark against the best practices across the world with 'due credence' to international norms and conformance to established guidelines and statutory principles and doctrines which act as guiding light in the space of intangible and incorporeal rights of the Copyright holders, as a vital cog in the wheels of Techno-Legal and Management studies. The objective of Copyright is three-fold, which is economics at play as it enables incentive to invest, incentive to create and incentive to disclose. The purpose of Copyright is to utilise the inherent commercial and economic interest via the incentives which comes with the statutory provisions of the Copyright Act 1957. It becomes vital to read the provisions of the law with the Copyright (Amendment) Rules, 2021 vide the Gazette notification issued last year on 30<sup>th</sup> March 2021. The provisions enable transparency and accountability to the Copyright society when it comes to conformance to statutory norms. Any economic development in the realm of Copyright has to be seen in the perspective of policy decisions of the legislative for the betterment of economic growth and development of the fraternity, including the positive effects reinforced by the Start-ups and entrepreneurial endeavours, which has an add-on cumulative effect for the growth of the economy and nation as a whole.

## **Incentive of Invest**

Copyright bestows an economic right. The economic dimension of copyright is based on the fulcrum of zeal and enthusiasm for creativity. To analyse this, it is vital to analyse it from short term and long-term perspective. The short sighted and parochial view could stymie the incentive of invest which finally would affect the society and commoners stifling the motivation to create, invest and also disclose with repercussion felt on a long term. To exemplify it, say suppose the copyright involves myriads of activities by various stakeholders in the value chain of development as depicted in the equation (below) in the case of a literary work as:

Final Cost of a Literary Copyrightable piece in a book is sum total of Cost of production (which includes cost of purchase of raw materials, processing cost and printing of papers), Cost of Royalty (which applies in Copyright material), Cost of promotion (in the form of advertising and cross-publicity), Cost of distribution of literary compendium in the relevant market and Profit margin for the publisher.

Now suppose, if the society does not have any form of Copyright, then though apparently it may look that the members of the society could get the non-copyrightable material at a cheaper rate, may even breakeven with cost of non-copyrightable book decreasing to marginal cost of production, but it has a serious issue. In this context, the economic dimension comes into play, the disincentive of non-copyright work would have a ‘trickle down’ effect on downstream or secondary markets along with jeopardising the primary markets. For example, in an information driven industry, various stakeholders in the value chain of growth including information reporters, content aggregators, cross-information publicity channels, Content producers and publishers and OTT (Over the top or streaming channel partners) adversely getting affected. The ‘bandwagon effect’ and the ‘trickle-down effect’ would be seen across the supply chain of information industry. It would set in motion a chain reaction in the content producing sectors along with issues of unemployment. This issue has the potential to spread faster with ‘word of mouth’ and have a decelerating effect (negative accelerating effect) in technology savvy internet driven market. The multiplier effect along with consequent accelerative effect at play could potentially set in motion a ‘depression’ in the economy.

### **Incentive to create and disclose**

The incentive to create, has to be seen from the prism of author’s motivation to Copyright, a subjective matter which would provide him/her the ability to get that property alike statutory benefit which runs with Copyright. It is vital to understand without disclosure of the copyrightable material, the author cannot claim for the ‘Copyright’ in the first place. The positives of Copyright could be reaped by the author once he/she offers it in the market.

### **Copyright and Externalities**

Problem of Exclusivity is a vital one in the studies of Copyright as it does involve disclosure in the first place and follow the pattern of ‘Non-exclusivity’ and ‘Non-excludable’. These two aforesaid externalities have to be seen in conjunction with ‘Non-rivalrous’ nature of Copyright. In property rights, where utilisation or consumption of immovable and movable property results in exclusion for others of physical property limitations/space; in contrast, Copyright does not have any limitation of that nature. It has enabled one to create innumerable number of copies, where the right of enjoyment of that intangible property, bestowed with Copyright, does not hamper numerous users to enjoy the underlying essence of Copyrightable material at the same time, irrespective of the number of users’ utilisation or enjoying its utility and fruits at the very same instance.

### **‘First Sale Doctrine’ and Exhaustion of the Rights**

The right of circulation as embodied in the Section 14(a)(ii)<sup>1</sup> has many facets. In India, for an owner of copyright, all the rights as enumerated in Section 14(a) are intact except ‘the right of circulation’ which is ‘exhausted’ at the time of purchase by a buyer. In this context, it is vital to note that the application of aforementioned provision varies as follows:

1. In India, its scope of application is restricted to ‘local applicability’ when it comes to Section 14(a)(ii) of Copyright Act 1957
2. In US, with the application of Section 109 of US Copyright Code, it is much wider with exhaustion applicability as ‘global’
3. Whereas, in European Union (EU), the exhaustion is limited to ‘communities of that object’, that is within countries of European Union as per the EU Info-Soc Directives<sup>2</sup>.

In India, the ‘Exhaustion principle’ with the ‘first sale doctrine’ in Copyright surfaced in the case, *John Wiley & Sons Inc. & Ors. vs Prabhat Chander Kumar Jain & Ors.*<sup>3</sup>. It was held by the Hon’ble Court that, in India the ‘local’ exhaustion would work in sharp contrast to the foreign countries such as US where ‘exhaustion principle’ is applicable on ‘global level’. In the case, *Kirtsaeng v. John Wiley & Sons, Inc.*<sup>4</sup>, the contention was a student Supap Kirtsaeng infringed on the American Copyright. In the instant case, the Hon’ble Court observed that the ‘First Sale Doctrine’ applies to the copies which are subject to Copyright and it does conform to ‘global’ exhaustion principle.

### **Concept of Resale (‘to sell’)**

Concept of Resale as embodied in Section 14(b)(ii)<sup>5</sup> and its difference with Section 14(a)(ii)<sup>6</sup> becomes imperative to study in the context of the analysis of this instant paper. While looking at the concept of ‘Resale’ in the parlance of Copyright as enunciated in Section 14(b)(ii), it is pertinent to specify that it is applicable ‘to sell’ or ‘for rental’. To drive home the point, for example, if a CD containing a song is being rented, it is vital that the license is received from the owner of the ‘Copyright’ by sending a letter or communication for that permission. Whereas, for the ‘sell’, it would seem that this aforesaid Section 14(b)(ii) is in dichotomy to

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<sup>1</sup> Copyright Act, 1957.

<sup>2</sup> European Information Societies Directives

<sup>3</sup> *John Wiley & Sons Inc. & Ors. vs Prabhat Chander Kumar Jain & Ors.* CS (OS) No.1960/2008.

<sup>4</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

<sup>5</sup> Copyright Act, 1957.

<sup>6</sup> *Ibid.*

Section 14(a)(ii), which is the exhaustion clause with respect to 'First Sale Doctrine', that is for 'local application' for India as enunciated in Copyright Act 1957. It pertains to the right to issue copies when it is already in public domain via circulation. It is vital to understand that Copyright is '*right in rem*' whereas Contract is '*right in personam*'. There are some vital aspects when it comes to application of Section 14(a)(ii) when read along with Section 14(b)(ii) as enumerated:

1. When there is specific provision in the form of Section 14(b)(ii), it will assume 'pre-eminence' over the general provision which is Section 14(a)(ii).
2. Computer Programmes/Cinematograph films and sound recording are governed by the 'resale' provision. For other non-computer works, such as literary work, dramatic work and musical work resale does not apply. Even for artistic work resale, does not apply but 'exhaustion principles apply'; however, these are taken with a 'pinch of salt' which is as per Section 53A of the Copyright Act 1957.
3. Applicability has to be seen considering that India has ratified and has been signatories to the 'International Treaty', so India being a member is mandated by the applicability of those treaty when it comes to 'resale'.

So, the observation can be enumerated as:

1. With the traditional literary work, dramatic and musical work, Copyright 'First Sale doctrine applies' and the 'exhaustion principle' applies. However, there is a benefit sharing mechanism conferred by Section 53A of the Copyright Act 1957.
2. In case of computer programme, resale right is controlled by Copyright owner.
3. In case of Cinematographic film also, the resale and rental right is controlled by Copyright owner.
4. In case of sound recording, the resale right is controlled by Sound recording Copyright owner.

Interestingly, seeing from the perspective of economics, where  $MC=MR=TC$  (where the marginal cost is equal to 'Marginal Revenue' which is also equal to 'Total Cost')<sup>7</sup>. And say, if there is only one copy of the Copyright work, then Section 53A of the Copyright Act 1957, comes into play as such then the '*benefit sharing mechanism*' becomes the vital aspect. The Section 53A pertains to 'Resale share right in original copies', for resale more than ten thousand

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<sup>7</sup> 'MC' denotes Marginal Cost; 'MR' denotes Marginal Revenue; while 'TC' denotes Total Cost.

copies of original work of painting, sculpture and drawing, not more than ten percent of the share would go to Copyright owner<sup>8</sup>.

### **Copyright in Lyric and Music work/Composition**

It is vital to understand that any song that two components that is firstly the 'lyrics part' and secondly the 'underlying tones and musical score', which is the embodied in the 'Sheet Music'. If both these components are provide in the license by the licensor, which is quintessential as per statutory provisions, then it is not construed as 'Infringement of the Copyright' by the licensee. As such, Section 2(p) of Copyright Act 1957 which defines 'Musical work' as music and notations, but does not include the words or the actions which are intended to be utilised during performance of the music or song. In this context, the license from the Indian Performing Rights Society<sup>9</sup> (IPRS) becomes vital in such cases.

### **Copyright in Sound Recording**

However, for the sound recording, the license which in US is called the *Mechanical License*<sup>10</sup>, where a separate Copyright is available for the sound recording in underlying works, that is specifically the musical and lyric works. As per Section 13(3)(b) of the Copyright Act 1957, it provides for that right conferring at sound recording level. By the application of Section 13(4) it is implied that there is a separate standalone Copyright subsisting in underlying work with respect to 'Sound recording'. It becomes imperative that the 'venue owner' provides the 'royalty to all concerned stakeholders including the lyricist, music composer and the second recording entities. As the aforesaid stakeholders would be eligible for that privilege by the rights conferred and what has been the global trend as reflected in the jurisprudence of Copyright. In the Indian case, *Indian Performing Right Society vs Aditya Pandey & Ors.*<sup>11</sup>, the case delved into 'Copyright issues' including that of sound recording. Music Owner (Music Composer) and Lyric (as literary work) by virtue of Section 14(a)(iv) are makers of the sound recording and provides the license by complying to the Section 13(3)(b) and Section 13(4), the sound recording Copyright would subsist as per the Section 14(e) of the Copyright Act. The

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<sup>8</sup> Section 53A, sub-section (2) of the Copyright Act 1957 specifies, "...Copyright Board may fix and the decision of the Copyright Board in this behalf shall be final: Provided that the Copyright Board may fix different shares for different classes of work: Provided further that in no case shall the share exceed ten percent, of the resale price..."

<sup>9</sup> Indian Performing Right Society (IPRS) enables a music user to use copyrighted work and whereby, the IPRS gets royalties from copyright users on behalf of its members.

<sup>10</sup> Commonly called as the 'Mech License'.

<sup>11</sup> *Indian Performing Right Society vs Aditya Pandey & Ors.* FAO(OS) No.423-424/2011

rights which are available to the Sound Recording company include that of right to communicate, right to make physical copy or part thereof of it, right to sale or rent.

### **Right for Cinematograph Film Producer and other Stakeholders**

The starting point of any Cinematograph film involves script writing where there are 'Script writing associations' which are functioning by private arrangement as per the industry practice. Novel writer is entitled to set of rights mentioned in Section 14(a). The novel has to be dramatized so it is adaption of the work resulting in Dramatized work. The following becomes pertinent to analysis from the perspective of rights of all the stakeholders involved in the making of the Cinematograph Film:

1. The Novel Copyright owner provides the license to the script writer. The Script Writer is generally in direct contractual employment as employee of the Movie Company). In the course of employment, the services rendered where Producer of the film is the owner. The script writer works for consideration and there also the contractual obligation details are spelt out with clarity as per a *quid pro quo* arrangement.
2. The Actor or Actresses are entitled to 'Performers Rights' as per Section 38 of Copyrights Act 1957.
3. The Costumer Designers are entitled to license depending on the number of copies that the artistic work which are capable of industrial process application. Though it is for a limited number as such extending 50 copies would not entitle them Copyright. This is governed by Section 15 of the Copyright Act 1957.
4. The background setup or 'set makers license' is being provided
5. Dance and Choreographer works is also Copyright protected for the dramatics
6. The lyrics as literary work is protected by Copyright
7. The tune and the music mix regarding the music composition (music score and moving images) are protected by 'Synchronization (Sync) License'.

The Cinematograph Film, generally involves two entities for all practical purpose:

1. Film Private Ltd.
2. Sound Recording Pvt Ltd.- It has the provision of 'licensable license' by which it can further issue licenses, which provides it the privilege to provide licenses; as such it provides license to the Film Pvt Ltd. (as mentioned in aforesaid point numbered 1 above).

Both the aforesaid companies have to seek license from the lyricist and the music composer individually. Pertinently, for Cinematograph Film, the 'exhaustion principle' and the 'First sale doctrine' does not apply.

### **Conclusion**

To conclude, all the aforesaid the provisions and the Sections of the Copyright Act 1957 has to be analysed in tandem and has to be harmoniously construed, being read with Section 16 of Copyright Act 1957. Section 16 of Copyright Act 1957 provides for 'no copyright except as provided in the Act' and provides the unmistakable understanding that, *firstly*, the interpretation of Section 16 as the 'right conferring section' not only for the plaintiff/appellant but also for the defendant/respondent. *Secondly*, there is a mention of the term 'of any other law for time being in force', as such it may include the Common Law, Natural Law, Tort Laws and even laws of equity and its interpretation was the main issue as to what constitutes that 'law for the time being in force' as delved by Hon'ble Supreme Court in *Tekla Corporation v. Survo Ghosh*<sup>12</sup>. In the perspective of 'Contractual obligation', Section 23 of Indian Contract Act 1872, becomes quintessential to study. It becomes vital to analyse the provisions of Indian Contract Act 1872 being read with extant statutory provisions of the Copyright Act, 1957. It is also pertinent to note that Indian Courts are not only 'Courts of law' but also 'Courts of Equity'. It is totally the discretion of the Court, in which they decide the finality of a case for meeting the ends of justice. Thus, considering that Second provision in Sec. 18 of the Copyright Act 1957 pertains to "Right to equitable remuneration" for 'non-cinema exploitation' which cannot be waived considering that there are many stakeholders or underlying copyright work. All the aforesaid mentioned points have to be seen in entirety and has to be considered along with the 'Contract of Service', which defines the nature of employer and employee relationship and harmoniously construed with the applicability of Section 17(c) of the Copyright Act 1957.

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<sup>12</sup> *Tekla Corporation v. Survo Ghosh* (2014) 210 DLT. 666.