

INDIA INTELLECTUAL PROPERTY & INFORMATION TECHNOLOGY LAWS News Letter

VA VAISH
ASSOCIATES
ADVOCATES
Delhi • Mumbai • Gurgaon • Bengaluru
Celebrating 40 years of professional excellence

Vol. VI, Issue III, September-October, 2011

From the Editor's Desk...



Dear Readers,

In continuation of our earlier IP & IT laws news letter, we have dedicated this issue to Indian Copyright laws which are in the process of overhaul by the Copyright (Amendment) Bill, 2010, generating a massive heated debate in India. The proposed amendments once in place will change the Indian Copyright scenario and bring it to in terms with the International Treaties. We are please to put forth the present Copyright Edition covering a wide spectrum of Indian Copyright laws.

"Latest Copyright Decisions", analyses the latest developments in the field of IPR connected to Copyright laws and the entertainment industry as interpreted by Indian courts. Movies, books and music in the field of entertainment and education constitute a plethora of copyrights at every step. While fair use of copyrighted works is allowed, piracy is frowned upon and judgments throw light on the way forward.

Another interesting development is the use of the concept of "Ashok Kumar" order which is equivalent to John Doe, which has been followed in various countries with common law jurisdiction like Canada, United States, Australia and UK, against unknown anonymous persons by the film industry in India.

In light of the pending Copyright Amendment Bill in India these decisions may soon be redundant with respect to literary, dramatic and musical composition copyrights in India. We also analyse changes that the Bill will bring about in the future under our "knowledge update" section.

The Indian Copyright Office and the Copyright Board must pull up their socks so as to deal with changing scenario.

We welcome, as always, your views, comments and input.

With Regards,

Vijay Pal Dalmia
Head IP & IT Division
vpdalmia@vaishlaw.com



THE COPYRIGHT EDITION

Inside: -

Latest Copyright Decisions

No Royalty to be paid by FM stations to IPRS for song broadcasts!

(Music Broadcast Pvt. Ltd. Vs. Indian Performing Rights Society - MANU/MH/0923/2011)

IPRS Royalties for Public Performances!

(Indian Performing Rights Society Vs. Mr. Aditya pandey and Anr. (Synergy media))

and

(Phonographic Performance Limited Vs. CRI Events Private Limited & Ors - MANU/DE/2834/2011)

Fair Use : Guide Books!

(The Chancellor Masters and Scholars of the University of Oxford Vs. Narendra Publishing House and Ors.- MANU/DE/1377/2008)

Court Supported Anti Privacy Drive!

Injunction Against Unknown Persons John Doe / Ashok Kumar Order

(Reliance Big Entertainment Pvt. Ltd. vs. Jyoti Cable Network & Ors.)

Knowledge Update:

Copyright Law in India-Guide

Copyright Amendment Bill-

India Embraces the International Regime

For Private Circulation

Vaish Associates Advocates ... Distinct. By Experience.

LATEST COPYRIGHT DECISIONS

No Royalty to be paid by FM stations to IPRS for song broadcasts!!

Music Broadcast Pvt. Ltd. Vs. Indian Performing Rights Society (IPRS)

(MANU/MH/0923/2011)

Justice Vazifdar's judgement dated July 25, 2011 of the Bombay High Court declared that IPRS administrating the rights of lyricists and composers was not entitled to collect royalty or license fee from FM radio stations for broadcasting songs.



The plaintiff had entered into a licence agreement with the Defendant under which it had been paying royalties to the Defendant in respect of broadcast of sound recordings at its FM radio stations. Although the Defendant initially granted the Plaintiff an infancy discount on its royalty/ licence fees, a dispute arose when the same was withdrawn and breach of the terms of the agreement was alleged against the Plaintiff.

Judgement

It was decided by the court that the Defendant is not entitled to interfere with the Plaintiff's broadcast of sound recordings at its FM radio stations in India for non-payment of royalty or licence fees or otherwise, as the works of the lyricists and music composers are incorporated in a sound recording made by music companies, and such music companies exclusively own the copyright in such sound recordings.

Once such lyrics and music are incorporated in the sound recordings, a new copyrightable work comes into existence i.e. the sound recordings. The producer or sound recorder is the author and owner of the entire copyright in the sound recording with an exclusive right under Section 14(1) (e) of the Copyright Act, 1957 to communicate the sound recording to the public. Phonographic Performance Ltd. (PPL) members are owners of such sound recordings and thus entitled under the provisions of the Act to grant a license to do the things mentioned in Section 14(1) (e). The Plaintiff had obtained a license from PPL and there were no dispute in this regard.



works.

The right of a copyright holder in a sound recording includes the right to make the work available to the public by other modes of communication as also by broadcast. The Defendant's right is restricted only in respect of public performance of any musical work or literary work.

Thus, the Defendant was not entitled to receive the said royalty/ licence fees as there was no consideration for the same to the Plaintiff.

IPRS Royalties for Public Performances!

Indian Performing Rights Society Vs Mr. Aditya pandey and Anr. (Synergy media)

(MANU/DE/2834/2011)



This Delhi High Court judgment by Hon'ble judge Justice R. Ravindra Bhat dated 28th July 2011, deals with IPRS' rights towards copyright content in respect of public performances, which include the right of performing the work in public, right of enacting work to the public by making it available for visual or audio enjoyment, indirectly or directly to the public, including by diffusion etc.

Synergy Media is a company involved in broadcasting business and was granted licenses under the FM-Office-2 Stage by the Central Government. Synergy challenged IPRS's right to claim and collect royalty.

Judgement

The composer of the musical work, or its author do not possess any rights in the works once those rights are assigned in favour of the producer of a cinematograph film and as a consequence, IPRS cannot claim or legitimately secure any license or authorization fee.

The producer transfers the right in the sound recording to recording companies, such as HMV, which in turn, assigns the right of communication to the public, including the broadcast of sound recording to Phonographic Performance Limited. It is submitted that the PPL issues licenses to concerned broadcasters, including SYNERGY. It was therefore stated, that no further authorization or license has to be secured from anyone, much less the IPRS.



The Court's ruling was categorical, because it was held that if the author of any musical work parts with a portion of his copyright, authorizing a film producer to make a cinematograph film in respect of his work and have his work incorporated or recorded on

the sound track of a cinematograph film, the copyright owner of the film acquires (due to section 14(c)), upon completion of the film, a copyright which gives him the exclusive right of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyrics or musical work for the performance of the work in public.

Phonographic Performance Limited Vs. CRI Events Private Limited & Ors

(MANU/DE/2834/2011)

A connected Delhi High Court judgment by Hon'ble judge Justice R. Ravindra Bhat dated 28th July 2011 is with regard to a suit filed by both IPRS and PPL together against CRI events (Defendant no.1) and a banquet hall located at Delhi (Defendant no.2) that hosts events and functions at its premises for customers such as CRI Events.



The Plaintiffs alleged that the second defendant permitted CRI Events to use its premises and organize an event where works comprising their (plaintiff) repertoire were communicated to the public, amounting to infringement of the copyrights.

In defence the CRI Events stated that it does not reproduce or perform or publish any work in which copyright subsists, merely acting as a coordinator.

Judgment

The court held that CRI Events' contentions that the performance is not for consideration as guests do not pay for entry, is inaccurate. The performers are paid some amount, and according to CRI, they have to ensure that if copyrighted works are exhibited, performed or played, the appropriate authorizations are to be secured. The commercial element is clearly discernable, and CRI does not involve itself in the specifics of this form of entertainment as it is an overall event organizer, which charges fee from its client, i.e. the company or individual, which wishes to get the event, performed. Although the event sponsor does not directly have any relationship with the performer, its object in holding a dealer's meet, or some other corporate event is clear, i.e. to increase efficiency. The performance of the work or the sound recording is not "domestic". The event sponsor, who is the client of CRI Events, pays for these services, which include the performance of the work/ sound recording. Having regard to these facts, and the objects of the Copyright Act, it has been held that such performance is "public", and requires to be licensed. In case the performance involves playing the sound recording, authorization of the PPL is necessary. In case the performance is of the work without the sound recording, authorization of the IPRS is necessary. If both kinds of works are performed, the licenses from both societies have to be obtained. In the case of CRI Events, no such authorization was obtained, or given to it.

Fair Use Guide Books!

The Chancellor Masters and Scholars of the University of Oxford Vs. Narendra Publishing House and Ors.

(MANU/DE/1377/2008)



This 3rd August 2011 judgment of the Delhi High Court by Hon'ble judges Justice A.K.Sikri and Justice Suresh Kait determined an appeal filed by the Oxford University Press against

Narendra Publishing House concerning two mathematics books of the appellant titled “Oxford Mathematics Part A” and “Oxford Mathematics Part B”. Authored by Dr. A.K. Roy, and prescribed by the Jammu and Kashmir Board Of Education for class XI, the Appellant claims the copyright in the books vide agreements and claims copyright infringement by the Respondent.

The Respondent published two books Teach Yourself Mathematics (Fully Solved) Part A and – Teach Yourself Mathematics (Fully Solved) Part B, and the Plaintiffs claimed that the contents of the same were blindly copied, reproduced and incorporated from the appellant's books, resulting in loss of sales profits to the Appellants.

Judgement



The appeal was dismissed as the learned Court held that the test of creativity in the work of appellant had not been satisfied and no copyright could be claimed therein.

Besides asserting the work put in by Dr. Roy, and the effort in arranging mathematical questions at appropriate stages, chapters or units in the textbooks, the plaintiff do not show how such effort is original to conform to the minimum degree of creativity mandated by Indian law, post Eastern Book Company. The court held that this is not to suggest that there can be no creativity in such schematic arrangement, the court merely inferred, that there is no material in support of it.

On the fair use issue the Judge held that the step-by-step manner of solving the problems given in the appellant's 'works', is not available in the said appellant's work, although it has been given in the respondents 'works'. It was further held that the revisiting of the questions and assisting the students to solve them amounted to review, which is fair use of subject works.

It was held that a guide book dealing with the subject matter which is contained in the original book, with a purpose to help, assist and support the students with the problems given in the text book, then it would be a work different from the original work and not a derivative work at all.

Therefore, the task would be to ascertain as to whether the purpose served by the guide book is substantially different from the purpose served by the textbook. If the guide book is different in character and not a mere substitute of the original work/textbook, it would be treated as transformative. If this

directive work in the guidebook has assumed different character, it would not amount to infringement of the original work, though it would have been drawn, to certain extent, from the original work. And, in that sense, it would amount to fair use.

Court Supported Anti Piracy Drive!



Reliance Big Entertainment Pvt. Ltd. Vs. Jyoti Cable Network & Ors.

(http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=135357&yr=2011)

Justice A.K Pathak of the Delhi High Court passed a John Doe/ Ashok Kumar order dated 20th July 2011 in favour of the Plaintiff with respect to their Hindi movie “Singham” stating that-



“defendants and other unnamed and undisclosed persons, are restrained from communicating or making available or distributing, or duplicating, or displaying, or releasing, or showing, or uploading, or downloading, or exhibiting, or

playing, and/or defraying the movie 'Singham' in any manner without proper license from the plaintiff or in any other manner which would violate/infringe the plaintiff's copyright in the said cinematograph film 'Singham' through different mediums like CD, DVD, Blue-ray, VCD, Cable TV, DTH, Internet, MMS, Tapes, Conditional Access System or in any other like manner.”

When injunctions are granted by courts in cases where one or more anonymous persons may be committing a breach of the rights of the Plaintiff and cannot be identified by the Plaintiff, it is popularly termed as a John Doe / Ashok Kumar order, in India, against unknown persons.

The order is obtained against all those who might be infringing, or inclined to infringe the Plaintiff's rights, even though their identities are not yet known and upon knowledge of infringement the Plaintiff is entitled to serve notice of this order to the infringing party for immediate restraint.

This concept has been followed in various countries with common law jurisdiction like Canada, United States, Australia and UK.

The first John Doe order in India was the case of Tej Television v. Rajan Mandal in an order dated 14th June 2002 by Justice Dalveer Bhandari. In this landmark decision, the court recognized the exigency in which no other remedies could provide effective relief to a TV channel to protect its investment in a valuable live broadcast.

Reliance Big Entertainment has recently obtained another John Doe order against unknown persons with respect to their latest movie venture “Bodyguard” restraining websites, cable operators, Internet Service Providers (ISPs) and other organisations and individuals, from infringing upon the movie's copyright by illegally streaming or copying the same.



KNOWLEDGE UPDATE

GUIDE TO

COPYRIGHT LAW IN INDIA

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

“Work” protected in India

Under the Copyright Act, 1957 the term “work” includes an artistic work comprising of a painting, a sculpture, a drawing (including a diagram, a map, a chart or plan), an engraving, a photograph, a work of architecture or artistic craftsmanship, dramatic work, literary work (including computer programmes, tables, compilations and computer databases), musical work (including music as well as graphical notations), sound recording and cinematographic film.

In order to keep pace with the global requirement of harmonization, the Copyright Act, 1957 has brought the copyright law in India in line with the developments in the information technology industry, whether it is in the field of

satellite broadcasting or computer software or digital technology. The amended law has also made provisions to protect performer's rights as envisaged in the Rome Convention.

Registration of Copyright

In India, the registration of copyright is not mandatory as the registration is treated as mere recordal of a fact. The registration does not create or confer any new right and is not a prerequisite for initiating action against infringement. The view has been upheld by the Indian courts in a catena of judgments.

Need for Registration of Copyright

The awareness of Intellectual Property (IP) Laws is considerably low among the enforcement authorities in India, and most of the IP litigation is confined to metropolitan cities. Despite the fact that the registration of copyright is not mandatory in India and is protectable through the International Copyright Order, 1999, it is advisable to register the copyright as the copyright registration certificate is accepted as a “proof of ownership” in courts and by Police authorities, and acted upon smoothly by them.

Enforcement of Copyright in India

The law of copyright in India not only provides for civil remedies in the form of permanent injunction, damages or accounts of profits, delivery of the infringing material for destruction and cost of the legal proceedings. etc. but also makes instances of infringement of copyright, a cognizable offence punishable with for a term which shall not be less than six months but which may extend to three years with a fine which shall not be less than INR 50,000 but may extend to INR 2,00,000. For the second and subsequent offences, there are provisions for enhanced fine and punishment under the Copyright Act. The (Indian) Copyright Act, 1957 gives power to the police authorities to register the Complaint (First Information Report, i.e., FIR) and act on its own to arrest the accused, search the premises of the accused and seize the infringing material without any intervention of the court.

Protection to Foreign Works in India

Copyright of “works” of foreign nationals, whose countries are member of Convention Countries to which India is a signatory, are protected against any infringement of their “works” in India through the International Copyright Order, 1999. The Indian Courts have also been pro-active for the protection of Copyright of foreign authors/owners, which includes software, motion pictures including screen play of motion pictures and database.

The Government of India is also taking initiative to combat piracy in the software industry, motion pictures and the music industry along with players in the industry through their associations and organizations like NASSCOM (National Association of Software and Service Companies), NIAPC (National Initiative Against Piracy and Counterfeiting) etc.

Licensing and Assignment of Copyright

Copyright in any work, present or future, can only be assigned or licensed in writing by the copyright owner or his duly authorized agent.

Copyright Amendment Bill India Embraces the International Regime

The Copyright (Amendment) Bill, 2010 was approved by the Union Cabinet on December 24, 2009, and introduced in the Rajya Sabha on April 19, 2010 so as to amend the Copyright Act, 1957 (India).

<http://copyright.gov.in/Documents/CopyrightAmendmentBill2010.pdf>

Another Bill for further amendments to the Copyright (Amendment) Bill, 2010 have been moved by Minister Kapil Sibal before the Rajya Sabha.

The proposed amendments are in conformity with World Intellectual Property Organization's WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) and to ensure protection to the copyright holders against circumvention of effective technological measures applied for the purpose of protection of their rights and circumvention of rights management information.

Points To Ponder:

- Copyright in photographs will last for 60 years post the death of the photographer (currently 60 years from date of publication).
- 'Moral' rights of authors and performers will persist forever, wherein damages may be claimed when use of their copyrighted work by others adversely affects the author's reputation, in conformity with International treaties such as the WIPO Performances and Phonograms Treaty (WPPT);



- **Version Recordings:** The Bill prescribes a statutory licensing procedure to cover versions of existing sound recordings:

- five years post the original recording, with
- royalty payable on a minimum of 50,000 copies a year,
- at rates fixed by the board.

A separate statutory licensing procedure has also been prescribed for broadcasters.

- If a person intentionally circumvents technological measures put in place to safeguard rights protected by the Act, he may be punishable with imprisonment of up to 2 years and a fine.
- Authors including authors of the songs included in the cinematograph films or sound recordings will have rights in the 'commercial exploitation' and rental of works. However, rental, storage and limited copying of copyrighted works by non-commercial public libraries are permitted.
- The Copyright Board can also issue interim orders in cases of disputes over assignment of copyright, or disputes over the tariffs announced by copyright societies. However, the collection of fees due to such societies cannot be stayed.
- A person, who stores a work while it is transmitted electronically, does not infringe copyright unless he knows that the work infringes copyright. The Bill also gives such persons the right to ask for a court order from a complainant.
- The Bill also proposed for allowing parallel imports of copyrighted work published outside India so as to import the same without infringing copyrights.

However this is being vehemently opposed by the publishing industry as it would drop the prices of books in India. This amendment is proposed to be deleted as a result.

Copyright in Films



The Copyright Act, 1957 currently specifies that the 'author' of a film is the producer, who owns copyright for 60 years.

The Amendment Bill extends copyright to a director as well, but for 70 years. In case of films produced before the Bill, directors can enjoy copyright for additional ten years, if an agreement to this effect is signed with the rights owner (e.g. producer) during the term of copyright.

Rights of Scriptwriters, Lyricists and Music Composers-



The Bill strengthens authors' rights over the copyright in their work giving them equal rights as that of the producer and director of a film, irrespective of such work being done under employment or

commission.

The Bill specifies that when work such as lyrics, musical compositions etc. are used in a media outside of a film or sound recording, the rights, including the right to royalties, will rest with the creator (i.e. lyricist, music composer). These rights can be assigned by creators to their legal heirs or a copyright society which represents their interests.

Further, rights can only be assigned for use of work in media which is in current commercial use, or when such media are specifically covered in the assignment of rights (applies to all categories of works). *This particular clause has been proposed to safeguard interests of the copyright owners in case of new developments in media storage and distribution technology, which may open up new venue of revenue for them.

Copyright Societies

The Bill introduced a clause* stating that such societies shall be 'associations of authors' and shall be subject to their collective control, rather than to the control of rights holders.



The above clause* has been proposed to be deleted, by further proposed amendments. It has been proposed to create the existence of Copyright Societies representing the rights of authors as well as rights holders, for

granting licenses for literary, dramatic, musical and artistic works incorporated in a cinematograph films or sound recordings, thus combining the purposes served by IPRS and PPL into one society alone.



Mandatory renewal of registration for the copyright society every five years has also been proposed, and such registration may also be revoked on lack of transparency in the copyright society under the new proposed Section 33A.

In the proposed amendments authors are further restrained from assigning copyright to anyone on terms different from that as assigned to the Copyright society.

Fair Use Exceptions

The current Copyright Act, fair use exceptions for the use of a literary, dramatic, musical or artistic work for personal use, research, criticism, or reporting of current events has been extended by the Bill to films and sound recordings as well.



Special provision for "Differently-abled"

The Bill permits copying and distribution of copyrighted works in special formats designed for use by persons with disability (e.g. Braille).

Registered organisations who work with such persons can apply to the Board for a licence to publish any work in a general format (e.g. audio books) for use by disabled persons.

However further lobbying in support of a wider exception than the one provided, favours extending the amendment to electronic formats etc. rather than just "special formats" such as Braille, which cater to a minuscule portion of the total community of those that we chose to label as the "disabled" or the "differently-abled" and limit the disable friendly exception. Further the scope of those applying for compulsory licenses is recommended to be expanded as well.

We may be contacted at:

Vaish Associates Advocates

1st Floor, Mohan Dev Building, 13, Tolstoy Marg, New Delhi - 110001, India
Phone: +91-11-4249 2525 Fax: +91-11-23320484 e-mail : ipitlaws@vaishlaw.com

DELHI

Flat Nos. 5-7
10, Hailey Road
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-2332 0484
delhi@vaishlaw.com

GURGAON

803, Tower A, Signature Towers
South City-I, NH-8
Gurgaon - 122001, India
Phone: +91-124-454 1000
Fax: +91-124-454 1010
gurgaon@vaishlaw.com

1105, 11th Floor
Tolstoy House
Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4925 2525
Fax: +91-11-4925 2500

www.vaishlaw.com

MUMBAI

106, Peninsula Centre
Dr. S. S. Rao Road, Parel
Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

BENGALURU

Royal Arcade No. 6, 80 Ft. Road
Koramangala Industrial Area
Bengaluru - 560 095, India
Phone: +91-80-4228 8501-02
Fax: +91-80-4228 8503
bangalore@vaishlaw.com

UNSUBSCRIBE

Note : - If you do not wish to receive this News Letter in future , kindly send us an email with the word “unsubscribe” in the Subject of e-mail , else just reply this mail with the word Unsubscribe in the subject of the mail

Editor: Vijay Pal Dalmia Editorial Team: Christine Chiramel, Vikas Mishra & Pavit Singh Katoch

Disclaimer:

While every care has been taken in the preparation of this News Letter to ensure its accuracy at the time of publication, Vaish Associates assumes no responsibility for any errors which despite all precautions, may be found herein. Neither this news letter nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/substitute professional advice that may be required before acting on any matter.

No Copyright or any other right is claimed on any of the images, pictures, logos or trademarks, and all rights in the same belongs to their respective owners.

* **COPYRIGHT NOTICE:** - © 2011, India. All Rights reserved with Vaish Associates Advocates,
1st Floor, Mohan Dev Building, 13, Tolstoy Marg, New Delhi - 110001, India