

Copyright Ownership and Rights Management of Literary Works under the Copyright Amendment Act 2012

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Abstract

Product of mind in the form of expression, like literature, music, artistic works etc. are considered as property. As these are the outcome of human intellect these are recognized as intellectual property. This property though intangible in nature, entitles its owner with rights similar to those enjoyed by the owners of any other property. Intellectual property is protected through various laws. Copyright law is one among them that protects authors of literary, dramatic, musical works, works of cinematograph films and sound recordings with respect to the works¹ they have created. Briefly, the statute confers upon the authors a bundle of exclusive rights to make various uses of their creations. For instance, a story written may be reproduced, copies of it may be issued to the public, may be translated, adapted, performed, may be cinematized or may be communicated through broadcasting.² These acts which otherwise confers rights to the author and similar other rights as specified under the Act is designated as the 'copyright' of the author. Briefly, copyright means a right of author to reproduce his work in any material form. Along with the rights the owner of work has legal recourse to take action for the violation of his rights by a third person.³ Rights and remedies are conferred to the owner but the question is who the owner is? Is it only the creator of a literary work or a person other than a creator also has a claim of ownership? If so, whether an ownership by other person is absolute or subject to any limitations? What provisions are introduced under the new amendment that inter-alia confers upon the authors with a right that deals with the digital management of works? In this brief paper an attempt is made to deal with these issues and matters related thereto.

Owner of literary works

¹ Copyright Act, 1957, No. 14, §. 2 (y).

² Copyright Act, 1957, No. 14, §. 14.

³ Copyright Act, 1957, No. 14, §. 51.

As a rule, it is specified that the author⁴ is the first owner of a work⁵. He enjoys the copyright in the work, so long he is alive and thereafter his successors are entitled for a period of sixty years⁶. Like any property, copyright can be transferred to any person by the author or it may be acquired by any person.⁷ In either of the cases the acquisition of ownership is strictly guarded by statutory conditions and limitations. Hereunder is given an account of the various circumstances where the ownership in a literary work shifts to other persons. Broadly it can be divided into two categories:

- I. Ownership acquired in course of employment and
- II. Ownership transferred to third person

Ownership acquired by third person

Under this category ownership acquired by an employer and works created for a consideration is specifically discussed. Employer's copyright ownership in literary works has two facets. One is the ownership in general and the second is an ownership with limited scope. In either of the cases following conditions shall be satisfied: - (i) work must be created in course of employment i.e. there must be a employer and employee relation between the employer and the employee author, (ii) such work is to be created in course of employment and (iii) there should not be an agreement whereby the author employee reserves copyright in his favor. All the three conditions must be fulfilled. For instance, a work may be created by an employee but if it is created in his spare time the employer cannot exercise his rights because the work though is created in course of employment but it is not created under a contract of service. Under 'contract of service' the employer is specifically appointed by the employer for the purpose and the employer will have an authority to control and direct the employee in the creation of the work. This situation may be compared with 'contract for service' where by the employee is free to work he pleases. Thus an examination paper set by a teacher does not become the property of the university or the government. It is held by courts that though the teacher is an employee but the work the teacher has done is not under 'a contract of service'⁸. The teacher spends his own skill and talent to set the

⁴ Copyright Act, 1957, No. 14, §. 2 (d).

⁵ Copyright Act, 1957, No. 14, §. 17(1).

⁶ Copyright Act, 1957, No. 14, §. 21-29.

⁷ Copyright Act, 1957, No. 14, §. 18-21.

⁸ Agawal Publishing House v. Board of Higher Education and Intermediate Education., A.I.R 1967 All 191.

paper and it is as original as any other work⁹. Similarly, a work may be created under a contract of service and in course of employment but if the employee author prefers and reserves his copyright in such work, the employer cannot claim any ownership.

The other situation i.e. ownership with limited scope is available to the proprietor of newspapers, magazine or similar other periodicals. The ownership in literary works created by an employee under above stated situations belongs to the proprietor of the newspaper, magazine etc. but he will not have absolute rights in all respects. His rights are limited to the publication of the work in newspapers, magazines etc.¹⁰ He can prevent any other proprietor from reproducing the same work in their newspaper or periodical. Beyond this he has no right to restrain for making other uses of the work. For instance, if an employee author in course of employment and under contract of service writes a series of articles for its publication in a newspaper the employer cannot restrain the employee author if he decides to compile all articles and get it published in a book form.

Ownership in literary works for consideration

This is also called as commissioned work or payment of fixed price for the works created. A publisher may ask an author to write a book for Rs. 10,000/-. The question is would the publisher become the owner of such work and thereby would be enabled to make copies of the work? The publisher in this case would become the owner of the book as such but he will not have any copyright ownership in the work. There is no provision under which copyright in a 'literary work' can be owned by a third person in this manner. The Act has limited this mode of acquiring ownership only with regard to certain artistic works and cinematograph films¹¹. For acquiring copyright ownership in any literary, dramatic, musical work the publisher or any other person has to strictly follow the assignment/ transfer or licensing procedure as provided under the Act¹². Such rules are created purely in order to protect the interest of authors against the mighty publishers who may try to underpay the author or include unreasonable terms in agreement. It is held by Kerala High Court that mere engaging an author by a publisher to write the book for a fixed

⁹ Rupendra Kashyap v. Jiwan Publishing House., 1996 PTC 439 Del.

¹⁰ Copyright Act, 1957, No. 14, §. 17(a).

¹¹ Copyright Act, 1957, No. 14, §. 17(b).

¹² Copyright Act, 1957, No. 14, §. 18-21 .

remuneration does not warrant any legal presumption that the intention of the parties was that the copyright in the book should belong to the publisher¹³.

There are certain other legal entities that are allowed to claim ownership in literary works. These include, ownership by public undertakings, by government, by the international organizations provided there is no contrary agreement by the author in his favor¹⁴.

Where the ownership in literary work is transferred to third person

Such transfer under the Act is called assignment of copyright. It is like an outright sale of ownership in favor of third person. But the owner always has a right to decide various aspects of ownership rights. The agreement must always be in writing and signed by the parties. The statute allows author/owner to transfer the whole or part of the work, either for full time or for limited duration¹⁵.

Relevant Changes under 2012 amendments

It is provided under the amendment that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode.¹⁶ This amendment strengthens the position of the author if new modes of exploitation of the work come to exist.

It is further provided that the author of the literary or musical work included in a cinematograph film or sound recording shall not assign the right to receive royalties from the utilization of such work in any other form other than as part of cinematograph film or sound recording except to the legal heirs or to a copyright society for collection and distribution and any agreement to the contrary shall be void.¹⁷

In additions to above two provisos included under the 2012 amendment another proviso is added. It specifies that “the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except

¹³ Thamakappan v. Vidyarambhan., 1968 Ker.L. J. 440.

¹⁴ Copyright Act, 1957, No. 14, §. 17 (d).

¹⁵ Copyright Act, 1957, No. 14, §. 18(1).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void." ¹⁸

It is also mandatory for the parties to clearly include in the transfer or assignment agreement, the amount of royalty, the right to revise and right to terminate the rights. Further, if the assignee does not make use of the rights within one year, without any sufficient reason, the copyright in such work will revert back to the author¹⁹. Sub-section (3) is substituted to provide that the assignment shall specify the other considerations besides the royalty, if any, payable. Three New sub-sections are added. Sub-Section (8) to Section 19 to provide that any assignment of copyright in any work contrary to that of the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member, shall be deemed to be void. It is further provided that no assignment of copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties in case of utilization of the work in any form other than as part of cinematograph film or sound recording and that "no assignment of the copyright in any work to make a sound recording which does not form part of any cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable for any utilisation of such work in any form".²⁰

Registration of copyright ownership and Advantages

Unlike registration of immovable property copyright ownership in literary property is not mandatory. The author has an option to register his work.²¹ But registration of work has its own advantage. In case of any dispute with regard to title the author with registration will have better chances to prove his title. Register of Copyrights are *prima facie* evidence of particulars entered therein.²² Hence, it is advisable that works should be registered. Another benefit is concerned with the commercial transaction. It will be easy for the third parties to know the real owner of the copyright.

¹⁸ *Ibid.*

¹⁹ Copyright Act, 1957, No. 14, §. 19(1-7).

²⁰ Copyright Act, 1957, No. 14, §. 19(9).

²¹ Copyright Act, 1957, No. 14, §. 45.

²² Copyright Act, 1957, No. 14, §. 48.

Special cases of ownership

Ownership in joint works- In cases where the work is a product of joint authorship, all the authors will enjoy equal ownership. A work of joint authorship means, a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.²³ It differs from a work of co-authorship, where each author's contribution can be easily demarcated. For instance, the different chapters of a book may be written by various authors. In such case all the authors of book will be called as co – authors. Each author has his own copyright and without joining or taking permission from other author, the work may be transferred or a license may be granted by each author/owner of the work.

Derivative works- These are works that are based on an original work, for instance, translation or an adaptation of a story. Such works, though derived are treated as original works and the the translator or adaptor will be treated as author will be the owner, provided the translation or adaptation is made with the consent/permission of the original author.

An interesting case with reference to academia needs special focus. Teaching community basically is involved in three kinds of assignments. Teaching, taking up examination work that includes paper setting and guidance to students and paper setting Rights in paper setting is already discussed above. With regard to lectures that are generally oral in nature whether in classrooms or else, the ownership in such oral works belongs to the person delivering or addressing the lecture, irrespective of the fact that the person is employed by any other person who arranges such address or speech or on whose behalf or on whose premises such address or speech is delivered²⁴. Hence, without the authority of the author no person can record nor reproduce such work. The guidance imparted especially to the PG students includes corrections, deletions, and additions in appropriate manner and many times it requires writing a paragraph with regard to dissertation and thesis writing. Nonetheless, it is the scholar who is treated as the author of the work. The work of the guide in regarded is treated as 'copy-editing'.

²³ *Najma Heptulla v. Orient Longman.*, A.I.R Del. 63.

²⁴ Copyright Act, 1957, No. 14, §. 17(cc).

Enforcement of ownership rights

Copyright ensures a bundle of rights to the author and two rights; *inter-alia* is considered as very vital to the authors. One is the reproduction right and another is the publication right. Both the rights enable the authors to acquire financial gain. Traditionally, the Act provided sufficient protection to authors against third person for making unauthorized use but with the advanced technologies mode of publication and reproduction has changed from simple hard copies to electronic copies. Similarly, publication has also transformed from distribution of tangible copies to communication in intangible form through cyberspace. Enforcement of copyright over the cyberspace has become very difficult because of the varied location of different players involved therein. The author or the content provider belongs to one country the web owner is from another country, the communication is made through a third country and its user or abuser may belong to a fourth country. National laws of any country are applicable within the boundaries of that country and hence it is very difficult to take action against the person residing beyond the jurisdiction of country. The Government has set up on November 6, 1991 a Copyright Enforcement Advisory Council (CEAC) to review the progress of enforcement of Copyright Act periodically and to advise the Government regarding measures for improving the enforcement of the Act.

Digitization of Works and Management of Author's Rights through 'Rights Management System' and Role of Copyright Societies

Whenever a work is digitized and electronically made available through cyberspace, two remedies may be suggested in this regard to protect the works. One is the 'Management of Rights' through Copyright Societies and another is the use of 'Technological Measures'. "Rights Management Information", which means the title or other information identifying the work or performance, the name of the author or performer, the name and address of the owner of rights, terms and conditions regarding the use of the rights and the number or code that represents the above information but does not include any device or procedure intended to identify the user.²⁵

The new Section 65A under the amended Act deals with protection of technological measures. Sub-Section (1) of the said Section seeks to provide that any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Act, with the intention of infringing such rights, shall be punishable with imprisonment which may

²⁵ Copyright Act, 1957, No. 14, §. 2 (xa).

extend to two years and shall also be liable to fine. Sub-Section (2) seeks to provide that nothing in sub-Section (1) shall prevent any person from doing anything referred to therein for a purpose not expressly prohibited by the Act. It also seeks to provide that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been facilitated or doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy or conducting any lawful investigation or doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator or doing anything necessary to circumvent technological measures intended for identification or surveillance of a user or taking measures necessary in the interest of national security

It is not easy for authors to manage these rights in individual capacity. Their involvement in commercial dealings may impair with the quality of their creations. Hence, assignment or providing a license to copyright society by the author/owner of the copyright is advisable. Copyright societies are professional bodies created according to the provisions of the Act²⁶. The primary object of these societies is to grant licenses to various persons intending to use copyright work collect fee and distribute it among authors. They also undertake to monitor the misuse of works by others. Newly added Section 65B in the Act deals with protection of rights management information.²⁷ The proposed Section seeks to provide that any person, who knowingly removes or alters any rights management information without authority, or distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. It also provides that if the rights management information has been tampered with in any work, the owner of copyright in such work may also avail of civil remedies provided under Chapter XII of the Act against the persons indulging in such acts described above.

²⁶ Copyright Act, 1957, No. 14, §. 33.

²⁷ WIPO Copyright Treaty, Dec 20,1996, Article 12.

Management of rights in works over Cyberspace

This requires new technologies that enable the author to restrain the third person from making an unauthorized access and use of protected works. This is generally materialized by using techniques such as passwords, encryption, watermarking etc. but it is not uncommon to find that protected technological cover used by the authors is quite often broken by the unscrupulous technocrats. It is high time to take measures to regulate the unlawful acts of techno-thieves. US is the first country that has enacted laws in this regard under Digital Millennium Copyright Act, 2000. At the international level World Intellectual Property Organization (WIPO) took the initiative and convened two treaties – the WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT). These treaties inter-alia, obliges member countries to take steps against persons who use circumventing technologies to get an access to protected work and thereby exploit the work at their will, without having any concern for the original author. Attempt to check such illegal practice is required to be undertaken by all the countries. In India rights of authors are well recognized and the Act also exhaustively deals with various aspects of enforcement. The Copyright (Amendment) Act, 2012 made certain amendments to the Copyright Act, 1957 with certain changes for clarity, to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the Internet. The new provisions of the Copyright Act, 1957 are in conformity with the two World Intellectual Property Organization (WIPO) Internet Treaties, namely, WIPO Copyright Treaty (WCT), 1996 and WIPO Performances and Phonograms Treaty (WPPT), 1996 to the extent considered necessary and desirable.

Conclusion

Unlike ownership in tangible property ownership and management of intellectual -property have different dimensions to be taken care of. The IP ownership is enjoyed more by the third person than the creator himself. Digitization of works and cyberspace no doubt have availed new opportunities for the authors/owners of copyright but at the same time it has also engendered new challenges. It may be expected that provisions to regulate cyber- theft of protected works under the amended Copyright Act and membership to WCT will provide wider protection to our authors/owners of copyright at national and international level as well. At the same time, it is essential for every author/owner to be aware of his rights to understand the potential value of his work.

