

**JOINT AUTHORSHIP IN CYBERSPACE UNDER THE INDIAN COPYRIGHT
LAW: A CRITICAL ANALYSIS**

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ABSTRACT

With the advent of computer technology and internet, the magnitude of published creative works in cyberspace has also increased. There are various websites that promote innovative works of art and literature and also provide sufficient protection against copyright infringement. One major example is YouTube. However, the protection of copyright work in cyberspace in the Indian IPR regime is relatively new. The author has attempted to focus on the protection of collaborative works in cyberspace, where the joint authors are geographically separated within India.

Keywords: Copyright, Performer's Rights, Joint Authorship, Cyberspace, Online Entertainment,

1. INTRODUCTION

The advancement of information technology and the dawn of the information society, intellectual property law has to be adapted to fit the new way of life.¹ By sophisticated copying methods and with the help of internet, if one's work is disseminated over the Internet; it becomes almost impossible for the copyright owner to control further dissemination without adequate protection.²

**2. JOINT AUTHORSHIP IN CYBERSPACE: CONTEMPORARY ISSUES
UNDER THE LIGHT OF THE INDIAN COPYRIGHT REGIME**

The concept of joint authorship has been dealt with in the Indian Copyright Act, 1957. Section 2(z) of the Act mentions that: "*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.

Post the Copyright (Amendment) Act, 2012, number of improvements have been made in the existing regime to afford more comprehensive protection to authors. However, some

¹ Akdeniz, Y., Walker, C. and Wall, D. (2000) *The Internet: Law and Society*, London: Pearsons Longman p.45

² Green Paper on Copyright and Related Rights in the Information Society, available at <http://europa.eu.int/scadplus/leg/en/lvb/l24152.htm>

specific issues need to be looked closely in this regard. Protection of works created out of joint authorship need a clear outlook as far as the protection of such works in cyberspace is concerned.

A work jointly authored by two or more persons published on cyberspace requires similar protection as any other creative work. There are certain issues relating to work of joint authorship which need deliberation when looked in the light of protection of such works on cyberspace, namely:

- (i) What would be the status collaborative artistic, literary, dramatic, musical works and cinematographic films published exclusively on the internet?
- (ii) Could the collaborative work come under the definition of “performance” as provided in the Copyright Act, 1957?
- (iii) Whether the provisions related to performer’s right would apply?
- (iv) How would registrations, licenses, assignments, etc. be regulated?
- (v) Which court would have jurisdiction in case of infringement?
- (vi) What would be the mechanism to resolve disputes, if any, where the authors reside in different parts of India and collaborate only through the internet?

2.1.Collaborative Works Published on the Internet

The Indian Copyright Act is silent as to the protection of works which though come under the definition of artistic³, literary⁴, dramatic⁵, musical works⁶, and cinematographic films⁷, but are published in the cyberspace exclusively.

Similarly, the Act talks about the rights of joint authors of such works but doesn’t provide any provisions dealing with the situation where the ground of collaboration for such authors is cyberspace. It raises a question on the security of the creative works published in collaboration on the internet.

Just like there is a possibility of wrongful commercial exploitation of a work in which copyrights subsists in the real world, things in cyberspace are no different. Internet is a comprehensive mode of communication which transcends all national and international boundaries. In the modern era where intellectual property rights are accorded so much value,

³ Section 2(c)

⁴ Section 2(o)

⁵ Section 2(h)

⁶ Section 2(p)

⁷ Section 2(f)

their protection in cyberspace becomes a paramount issue especially when authors are using internet to publish their works.

India has taken numerous steps to regulate various spheres of life on the internet. It has formulated a legislation⁸ to protect the soft-world.

Locke's labour theory holds true that every person must receive fruit of his labour. Creativity is worthy of recognition and protection.⁹ Utilitarian's have advocated for the protection of innovative works on the ground that it promotes social utility.¹⁰ The IPR jurisprudence is a progressive one, because the creativity of man, while the medium of communication may change, never ends. Thus, in the contemporary cyber-era, protecting creativity both in physical world and virtual world is the need of the hour.

2.2.Performance in Cyberspace

The word performance "in relation to performer's right, means any visual or acoustic performance made live by one or more performers."¹¹

The word performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.¹²

It is necessary here to appreciate the fact that in a world of modernization where cyber technology is booming, internet becomes a crucial medium sharing of information. Similarly, authors can share their innovative works and performers may share their performance on the internet. It is necessary to expand the meaning of the word "live" used in Section 2(q) of the Act. The performer's rights were itself granted protection under the Act at a very later stage. Performances recorded and shared on the internet should be included in the definition of performance and should be granted the same level of protection as provided under Section 39 of the Copyright Act, 1957.

The concept of co-performers in cyberspace also needs to be introduced. There are many performers in India who collaborate and work jointly exclusively on the internet for the audience. Their performances gets acclaims on the internet but absence of a legal remedy in case of infringement makes it unjust for such performers.

⁸ Information Technology Act, 2000.

⁹ Menell, Peter S., *Intellectual Property: General Theories*, Berkeley Center for Law and Technology, University of California at Berkeley.

¹⁰ Ibid.

¹¹ Sectionn 2(q) of the Copyright Act, 1957.

¹² Section 2(qq) of the Copyright Act, 1957.

The courts, if and when such cases come to them, should interpret the provisions liberally and should recognize the fact that performance published on the internet, though not live, deserve similar protection. The word performance should not be limited to mean only live performances.

Internet as a medium of audience connectivity must be recognized in all its glory. Performers though geographically separated must be united in right because art and culture were always meant to transcend physical boundaries. Internet should be appreciated as a major facilitator and works in cyberspace should be protected effectively.

2.3.Registrations, Licensing & Assignments

Mode of registering, licensing and assigning creative works available exclusively on the internet is also a contentious issue. In case of joint authorship, following issues have to be dealt with:

- a. Process of registration.¹³ As the register of copyright is a *prima facie* evidence¹⁴, a separate register for works that are published exclusively on cyberspace may be maintained. The issue as to the registration of collaborative works of intra-national authors has also to be considered;
- b. Licensing by one author to use the work in real world *i.e.* altering the medium of communication, as in every such case the original medium is the internet. Since, license to use a collaborative work can't be granted any of the co-authors without the consent of other co-author(s), mode of receiving consent and its legality¹⁵. Also, the mode of licensing on cyberspace has to be formulated as the Act provides that only a license in writing by the owner or his duly authorised agent is valid.¹⁶ A prospective work that is lined up to be published in cyberspace has to be dealt with in this regard.
- c. Mode of assignment and the process of transfer of the copyright work from the assignor to assignee on cyberspace. Similar to licensing, the concept of existing and future work in this regard has to be examined.¹⁷

2.4.Jurisdiction in case of Infringement

¹³ Section 44

¹⁴ Section 48

¹⁵ Section 30

¹⁶ Ibid.

¹⁷ Section 18

Creative works are available for download on the internet. Infringement may take place in any form. A work published on the internet may get infringed on the internet itself or the medium can be changed and the work can be converted into a form whereby it can be used unfairly in a tangible market outside the cyberspace. Therefore, it is imperative to ascertain the jurisdictional issue in case of the infringement of a copyrighted work which is exclusively published on the internet. As far as Section 62 is concerned, the jurisdiction is conferred upon a district court within whose jurisdiction the infringement takes place or the infringing copy is found. But, as mentioned earlier, where the entire process of infringement took place on the internet, ascertaining the jurisdiction might become a little tricky.

It may be advised to establish a separate forum like a “Cyber IP Tribunal” to entertain suits pertaining to the infringement of copyright on cyberspace. It may be possible that an infringing copy of a work published in cyberspace is found in the real world. In that case, for the convenience of the owner, or in case of a collaborative work, of any of the joint owners, provisions of Section 62 may hold good. The bottom-line being that there should be no ambiguity as far as the protection of copyrighted work in cyberspace is concerned.

Before conferring a jurisdiction on an authority to try an offence, it should be made sure that the act in question is actually an offence. As far as the chapter¹⁸ relating to “Offences” is concerned, there is obviously no provision that makes the infringement of a copyrighted work an offence when the work in question is available only on the internet. An established standard of protection of cyber-works coupled with the right to invoke the jurisdiction of an appropriate forum in case of infringement is what authors operating in cyberspace need.

*.....When an infringing act occurs on a website that is hosted in one jurisdiction, but can be accessed all over the world, the question of where that infringement is said to occur can be controversial. Is the fact that a website is accessible from a particular country enough to fix jurisdiction in that country, or does the website need to be specifically targeted to that country in order to fix it with jurisdiction?*¹⁹

In the light of the above statement, India should also formulate an effective mechanism to deal with a situation where any creative work published in cyberspace (collaborative or otherwise) is infringed by a person who is not a citizen of India. It is advised that a database is managed by appropriate authorities and all the published works are properly monitored.

¹⁸ Chapter XIII

¹⁹ Matheson, Julia Anne, *Take Three: Why Cyberspace Still Matters in the Post Dot Com World*, Trademark World, September, 2003

More than anything, creativity is at stake on cyberspace, because it is very easy to intrude and steal someone else's work on the internet.

Dispute Resolution

Connecting with general audience as a joint entity on cyberspace is a very popular thing in the contemporary world. Authors collaborate, create and publish works on websites with a mutual understanding. But there is always a possibility that interest of any one individual might get affected due to any reason whatsoever.

For example, the Act provides that no joint owner can assign, transfer, license or sub-license or in any other manner use the copyright without the concurrence of the other joint owners. Where such act has taken place, appropriate forum exercising jurisdiction and a suitable mechanism should be in place to address such dispute since the only platform on which the author(s) collaborate is the internet. The crossover between cyberspace and real world has to be regulated carefully.

3. FAIR-USE UNDER THE INDIAN COPYRIGHT LAW: POST 2012

An important insertion that protects internet service providers under fair dealing exceptions is explained in Section 52(1)(b), that is, the transient or incidental storage of a work or performance purely in technical process of electronic transmission or communication to the public. It is pertinent to note that Section 52(1) (c) provides transient or incidental storage of a work or performance for purpose of providing electronic links, access or integration where such links, access or integration is not been expressly prohibited by the right holder, is also fair use unless the person was aware or had reasonable ground to believe such storage is of an infringing copy. The Section has a proviso whereby when a person storing copy receives a complaint from copyright owner complaining such incidental or transient storage is an infringement, such person ought to deactivate access for a period of 21 days or till such time as competent court orders.²⁰

Further, in order to protect technological measures employed by authors to protect their rights, Section 65A has been introduced by copyright Amendment Act 2012 which provides that if any person circumvents such technological method with intention to infringing rights, he shall be punished with imprisonment which may extend to two years and shall also be liable to fine. There are certain exclusions in this Section such as conducting lawful

²⁰ Seth, Karnika, *Protecting Copyright in Cyberspace*, available at <http://www.karnikaseth.com/protecting-copyright-in-the-cyberspace.html>

investigation, security check with authorization from owner, operator, for encryption research using lawful copy, for identification or surveillance of a user, and for acts done to protect national security. Section 65B introduced by Copyright amendment Act 2012 further provides that any person who knowingly removes or alters any rights management information without authority or distributes, imports for distribution, broadcasts or communicates to 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. Civil remedies are also available in case rights management information has been tampered with. These provisions are of immense value to electronic publishing industry, gaming industry where authors are using DRMs to protect reverse engineering or circumvention of technological measures they opt to protect their copyrights from infringement. Some known techniques in use are namely, encryption, electronic signature, or digital watermarking or pay per view system, electronic software distribution.

In *Syed Asifuddin and ors v The State of Andhra Pradesh & Anr*²¹, the Tata Indicom employees were arrested on charges of hacking a computer source code under Section 65 of the IT Act, 2000 for altering the electronic 32 bit number (ESN) programmed into cellphones that were to be exclusively used only on Reliance Infocomm's service network. The court observed that such tampering of code is punishable offence under Section 65 of IT Act. The court observed that in view of Section 2(o), Sections 13 and 14 computer programme is a literary work protected by copyright and as per Section 63 any infringement of computer programme is punishable. However, the court observed that this issue will be decided by the trial court after evidence is led before trial court. I am of the view that such tampering will not be considered fair use under Section 52 of copyright Act 1957 as it was not reverse engineered for any of exceptions mentioned in Section 65A of the Copyright Amendment Act, 2012.

An overview of the existing regime shows that the Govt. of India has taken extensive steps to extend the level of protection of intellectual property in cyberspace. However, online infringement of copyrightable works still remains an issue, and where the said works are collaborative in nature the joint authors face difficulty.

²¹ 2005 CRLJ 4314

4. COPYRIGHT PROTECTION IN CYBERSPACE: RECENT JUDICIAL TRENDS

One of the most cited lawsuits worldwide for digital copyright infringements is of the *Napster Case*²², whereby the plaintiff was sued by the defendants, for P2P file sharing. In this case, Napster provided software, whereby the user can share media files (MP3 Files) stored in his computer to other user of Napster. Since the filing of the Napster Inc case, the music companies have been seeking USD 1, 00,000 for each copyright-protected song downloaded using Napster. There was a settlement between the parties, whereby Napster had to give a third of all future profits to the settling parties, and Napster Inc. was shut down in 2000.

In *Kelly v Arriba SoftCorp*,²³ Leslie Kelly's copyrighted pictures were displayed by a search engine that not only produced thumbnails but also large size pictures in its search results. This was held by the court to be an unauthorized reproduction of plaintiff's pictures that directly infringed copyright of the plaintiff. While creating only thumbnails could be justified as fair use, but downloading from search engine result full size image amounted to an infringement.

Recent example of infringement in electronic publishing industry is that of the class action lawsuit against Google and its online library feature, wherein Google settled royalty dispute with authors and publishers of books available in its online library for free access which allowed free downloading which directly infringed their copyrights.²⁴

In *Microsoft corporation v Yogesh Popat*²⁵, the Delhi High Court dealt with a copyright infringement case and awarded compensation of Rs 23.62 lacs to Microsoft Corporation against M/s Compton Computers Private Ltd and its directors for uploading pirated software of Microsoft in computers the company sold after assembling parts.

In the light of the above judgments it can be said that the Courts have begun appreciating the value of creativity on the internet. Effective regulatory laws coupled

²² A&M Records; Inc. v. Napster; Inc. 2000 WL 573136, I (N.D. cal 2000)

²³ 280 F 3d 934(9th Cir 2002)

²⁴ "Authors, Publishers and Google Reach landmark settlement", available at http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html

²⁵ 2005 (118)DLT 580, followed in Adobe Systems inc v. K. Khanna 2009 (5) AS (Delhi) 954.

with judicial diligence can be the bedrock for the protection of copyright works which are joint authored and where the collaboration takes place exclusively in cyberspace.

5. CONCLUSION

While strengthening the protection of innovative works on cyberspace appears to be a major issue in India, safeguarding the interests of joint authors collaborating on internet and promotion of creativity on cyberspace also needs equal attention. We have a pretty strong Copyright Legislation in place that deals extensively with the protection and conservation of creativity and art. With several amendments in the Copyright Act, protection of creative works has reached new dimensions in India. But the specific issue of protection of copyrightable works published exclusively on the internet still seeks due deliberation.

Indian courts, in their earlier judgments, have talked about protection of domain names and have also deliberated upon the protection of trade marks on cyberspace. But the Indian IP jurisprudence particularly relating to the protection of copyright on cyberspace is still in need of wings. India needs tread along the lines of US and EU who have taken extensive measures to protect copyright in a technologically advanced world in the form DMCA (Digital Millennium Copyright Act) and EUCD (European Union Copyright Directive) respectively.

In a world where high standard of IP protection is advocated, and in a world where the internet has become a hub of sharing creative works, whether for profit or entertainment, authors of such works deserve recognition and due protection. Treading along the lines of YouTube and other such websites that promote and protect creative works, India should also afford adequate protection to the author(s) who choose internet as the better medium to connect with the audience. Protection of a work on both platforms (real world and cyberspace) should be the clear mandate of the contemporary copyright regime of India.

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