Leveraging the 'Assignment' and 'Licensing' Provisions of Copyright, Act 1957 for Value Chain of Business

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Abstract

Anything that is constant in the business is 'Change'. Change is the only constant variable which requires its management in the realm of business and its sustainability in market environment. The plethora of opportunities in the sphere of 'Intellectual Property Rights' including that of Copyright has opened vistas of opportunities for business stakeholders. The value chain of growth and development of business and the country requires a robust, nimble and supple infrastructure and framework, which has to be time-tested and based on sound legal principles and doctrines. The buzz on leveraging the provisos for the absolute and competitive advantage in the business landscape with respect to 'Assignment' and 'Licensing' is becoming a game changer in the domain of 'Copyright'. The statutory provisions as enacted in the Copyright Act 1957 has to be seen in tandem with the judicial precedents and judicial rulings from the Hon'ble Courts of Law in the ethos of the vibrant democracy of India. The instant paper is an attempt to review and analyse the multi-faceted dimensions pertinent to the know-how and the knowledge domain of 'Intellectual Property Rights' from the prism of multiple stakeholders, inter alia 'lyricists', 'music composers', 'sound recording companies', 'cinematograph/film industry stakeholders', 'costume designers'.

Keywords: *Copyright; Comparative Law; Assignment; Licensing; Moral Rights; Commissioned works; Authorship; Ownership; Exclusive Licensing; Open Source Licensing; Comprehensive Intellectual Property Rights Policy; General Public Licensing system; Privity of Contract; Copyleft Doctrine of Copyright Law.*

Introduction

It is a fact accompli that the dynamic changes in the domain of 'Copyright' warrants a close analysis of the multiple facets and based on 'facts and circumstances' of the cases surfacing before the Hon'ble Court of Law, the interpretation of statutory provisions is also playing a vital part in rendering finality of judgment. As could be averred in catena of cases, which has surfaced in Hon'ble Court of Law, that the 'mode of licensing' has a quintessential and seminal impact on the rights of the assignor and assignee in the domain of Copyright. The growing upward trend in the 'Infringement of Copyright' has substantiated the vital need to reanalyse and relook at the basis principle and doctrine in the touchstone of statutory provisions and the essence and ethos of law in its entirety. Section 14 of the Copyright Act 1957 specifies the meaning of Copyright. Thus, it can be averred that Copyright is bestowing a 'private property alike structure', whereby there is an incentive to invest, create and disclose. It is vital to understand that Section 14 confers upon the 'Owner' a set or rather a bundle of rights enumerated in the said section; whereas the 'Author' is entitled to 'Moral Rights' (specified in Section 57 of the Copyright Act, 1957).

Moral Rights of performers

Moral rights pertains to the author's specific rights and has two component, firstly, authorship claim of the work of the author and secondly, the claim related to distortion, mutilation, modification or anything prejudicial to author's honour or reputation. Thus, a distinction is been made with respect to 'Moral Rights' which are non-economical rights available to author vis-a-vis the economic rights which are there with owner.

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There are two aspects to the work in question, either it can be emanating from the employee and employer relationship existing in the course of employment where the employee does something for the employer, or it pertains to 'Commissioned Work'.

The employment contract provides that right of the author to the owner by the virtue of that contract of service to be the owner where the contract overrides the default provision as enunciated in Section 17(a) [which is the default provision], whereby the 'contract' would be provided that prominence overriding the Section 17(a) of the Copyright Act.

Section 17(a) pertains to the newspaper and journalists work. For example, a person going to a photo studio and asking with a 'valuable consideration' certain rights whereby as per Section 17(b) the right would be assigned to the owner. It is vital to note that Section 17(b) pertains to only specific Categories of work including that of

1. Photograph
2. Painting
3. Portrait or Engraving or Cinematographic Films

And this Section 17(b) does not apply to literary, musical, dramatic or sound recording work.

The distinction is vital when considering the 'Contract of Service' of the nature of employer and employee relationship with applicability of Section 17(a) and Section 17(c) of the Copyright Act; Whereas, 'Contract for Service' pertains to Section 17(b) of the aforesaid Act.

US Supreme Court case Community for Creative Non-Violence v. Reid[2], laid down the eight point guidelines for Contract of Service and is a guiding light for determining 'ownership' in Copyright works.

For Joint authorship, the copyright subsists from the lifetime of the last surviving author plus 60 years post his demise. If it is anonymous, then the copyright subsists from the date of publication and then 60 years and if the identity of the author is known during that subsistence, then it would calculated for that lifetime of the author plus the 60 years.

The case Eastern India Motion Pictures vs Performing Right Society Ltd.[3], a judgment of the Hon'ble Supreme Court while interpretation the Section 17(b) of the Copyright Act 1957, the observation was that the whole of right pertaining to the 'underlying individual copyrights which subsists with lyricists and music composer' along with the cinematograph film went to the Film Producer. It had far reaching consequences where the disincentive to the 'underlying individual copyrights owners of literary, music composers' was their copyright went to the Producers and it was total and complete plenary control to the 'Film producers' and this was corrected in amendment to the Copyright Act 1957 in the year 2012, that was inserted as "Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13. " Section 17(b) and Section 17(c) did not talk about copyright of literary and musical work, so the question is about the applicability in that sense to another distinct area or category of 'Cinematograph work'.

In Neetu Singh vs. Rajiv Saumitra and Ors.[4] surfacing before the Hon'ble High Court of Delhi, the Court observed that the 'Director' is not an employee of the company, but rather agent of the company.

Sec 2(d) of Copyright defines the 'Author', with respect to sound recording and Cinematograph works, the author can be the producer. Author with respect to literary, dramatic, musical or artistic work which is computer generated, it the person who has created the work.

In the case Neetu Singh v. Rajeev Saumitra[5] case, the issue other than matrimonial strain between husband and wife it was about authorship of the books. The case is pertaining to determining the 'first owner of Copyright' as per Section 17 of Copyright Act 1957, in which the Hon'ble Court observed that Director is not employee in the course of employment. The Director is 'only an agent' of the company and the authorship cannot be construed to be in the course of employment.

Comprehensive Intellectual Property Policy

It is vital to note that that a 'Comprehensive Intellectual Property Policy' defines the relationship of the student and the faculty when it comes to Copyright and its issues related to consent where the consent to the policy and would be of binding character to the parties entering into that contract. The publication houses asks for the assignment of the copyright via a contract with the author generally. The difficult part is to distinguish between what form part of 'course of employment' and 'not in course of employment'.

So, while purchasing of the CD and playing it in public gathering say, in a stadium involves the following stakeholders rights:

1. 'Royalty' for the Singer with the applicability of Section 38A with respect to 'Right of the performer'
2. 'Royalty' for the Literary work of the Lyricist
3. 'Royalty' for the music work of the music composer or the music director
4. 'Royalty' for the 'Sound Recording'

It is pertinent to mention that the Copyright in India subsists for lifetime of the author and 60 years from the death of the author. This is valid for literary, dramatic, music and artistic work which is published. The 60 year period is calculated from the 1st of January of 'next calendar year' which follows the year when the author has died. The 'Copyright' is in basis purpose provides that statutory backing as enunciated in Section 13(1) of the Copyright Act 1957 and helps in providing the clarity from statutory perspective.

A conjoint reading of Section 15, 16 and 52(1)(u) of Copyright Act 1957 becomes imperative to analyse. Section 52(1)(u) of Copyright Act 1957 is coming in the domain of 'Fair dealing doctrine' for any sculpture in public place or premises for which 'royalty' need not be paid and provides for that scope of exemption if the same is shown in cinematograph films.

Another provision which warrants a relook is Section 15 of Copyright Act 1957, which embodies the special provision related to the Copyright in design and which is capable of application of Industrial process for reproduction. For example, a sculpture which is artistic in nature has both the functional and artistic work as such Copyright would subsist for limited copies. As such if the number of copies exceed fifty in number, then the Copyright ceases. This can be further exemplifies with special sarees, for example, for special occasions for royal family of Bhutan, which if the exclusive nature has to be protected, then Copyright is best method. However, it is put to utility for common public or for mass production, then neither Copyright nor Industrial design can protect it.

Authorship and Ownership in Copyright Act 1957

Authorship in Copyright is embodied in Section 17 of the Copyright Act, 1957, where the Section 17 talks about the exceptions to the general rule that 'Author is the first owner of the Copyright'.

A look at Section 20 which embodies the principle of 'Transmission of copyright in manuscript by testamentary disposition' via. the 'unpublished work' by which Copyright subsists for 60 years for posthumous work. As per the Copyright Act 1957, the person who gets the work, say a 'manuscript', can be entitled to the 'physical script' and to publish it. At the same time, being the sole owner of the underlying Copyright.

Section 21 embodies the concept of 'Relinquishment of copyright by the author'. Giving up of the 'Copyright' implies that the rights can be 'relinquished' but not the intrinsic value, which can never be destroyed.

Significant feature of Copyright Act in this aspect in line with Section 21 involves:

1. By specifying the intent of relinquishing by writing.
2. By addressing to Registrar of Copyright or by way of public notice in national dailies
3. By not affecting any pre-existing license if it exists or subsists in favour of any person on the date of the notice.

Varied Facets of 'Assignment of Copyright'

At a basic level, it is important to note that Section 18 of the Copyright Act 1957 specifies 'Assignment of Copyright'.

From IPR Management perspective, distinction between License and Assignment becomes pertinent in this context:

1. License is the permission to do something, as such without license it would be non-permissible or even illegal; where the 'Assignment' pertains to transfer of ownership.
2. License is mere right to exercise those rights which when done would not be infringement.

The idea and the object of Sec. 18(1) is to undo the new mode of exploitation which may be unjust and inequitable for the underlying Copyright stakeholders such as music composers and lyricists when making a Cinematograph work.

The interpretation of the provision – first provision pertains to 'Saving the underprivileged' for example music composer as such assignment would not include:

1. New technology which take the character of exploitation via new modes (excluding which is via apriori mention or mention with specific technology)
2. Unforeseeable future technology or technology which is not in general use: Any interpretation which should be specific nature of the new technology.

It is vital to note that the first proviso of Sec. 18 has to be in written and explicit format and after the death then there is provision to consider it by 'Legal representative'.

Second provision in Sec. 18 pertains to "Right to equitable remuneration" pertaining to 'Non-cinema exploitation' which cannot be waived considering that there are many stakeholders or underlying copyright work

Third provision in Sec. 18 pertains to "Beyond normal pertaining to Sound recording" Example is that of 'mobile ring tone' which after the advent of internet and mobile technology and has seen huge progress.

There are criticisms of the aforesaid provisos explicated:

1. How about the 'Rights of the Script writer'? Why there rights are not considered? The script writer comes in the realm of dramatic work.
2. There are times when the producers of the cinematograph work are not rich and producers functions as both producer and director and they represent as 'middle class' with underprivileged as they also seek help of bank for payment and financing of their projects.
3. From the perspective of Constitution of India, the logic of 'intelligible differentia'- Is such a distinction does not create classes and sub-classes within classes?

A reading of Section 19 of aforesaid Act, makes it interesting that the 'oral or verbal assignment of Copyright' would not be valid, it has to be 'registered'. 'Assignment' is 'transfer of ownership'.

From the perspective of Section 30 of the Copyright Act, 1957 which talks about 'License'- Same modalities as that of Section 19 of Copyright Act 1957 would apply. Mere right of use is transferred, ownership remains with owner in licensing. This is 'not' transfer of ownership.

Section 19 does not talk about the fallout of the technology after-effects or the effect of technology in future when it comes to 'new technology' which has an impact over the Copyright of underlying sound recording or cinematograph film or movie. The only way to surmount or to avoid the contravention of Section 18 (2nd proviso) is to go for 'license'; whereby just to surmount the applicability of Section 18, it is important to take 'license' instead of 'assignment'.

Exclusive licensing

Section 19 of the Copyright Act 1957 has another vital aspect with respect to 'Exclusive licensing'

It is vital to look into the definition of 'exclusive licensing' as per Section 2(j) of Copyright Act 1957 which tells that, when there is 'exclusive licensing happening', even the owner after licensing can be brought in the ambit of infringer of Copyright.

The three vital characteristics of 'exclusive licensing' involve:

1. When there is licensing happening based on 'exclusive licensing' between the licensor and the licensee. The 'ownership right' remains with the owner (that is the licensor)
2. All other rights, except the ownership right, goes to the licensee. In this licensor provides all the permission that is exclusive, non-alienable, non-revocable right to the licensee.
3. The 'de jure' right remains with the licensor, while the 'de facto' right or control is transferred where the 'licensee' having the full plenary control as embodied in Section 19 of the Copyright Act 1957. It is vital to note that reading this together with Section 54 of the Copyright Act 1957, provides seemingly 'exclusive right' where the licensee could be considered as the 'owner' with the restriction that the 'licensee' has to be made a party to the litigation to put him in the bracket of 'owner'.

Open Source Licensing

The concept of 'Open source licensing' could be understood from the basic tenet of 'privity of contract' between the owner of the contract (licensor) and the users of the software in internet while downloading the same and then providing the same "Share Alike" concept as they would have received it. The open source licensing in that context follows the principle of 'horizontal passing of privity of contract'.

This can be understood as a chain where the owner 'allows' for use by the 'users' of the software by open source licensing, including that of 'user 1' , 'user 2', 'user 3'. , 'user n', whereby these users can provide the permission to 'sub-users' including 'sub-user1', 'sub-user2', 'sub-user3' and likewise to 'sub-user' (number 'n'), leading to a 'Community of Open Source licensing ' called as 'Open source community'.

The terms of the usage is such that it remains the same and the user has to put the same while further licensing as if it was just like the 'original' copyright provided it follows the broader governing rules which govern Copyright with respect to 'Copyleft Doctrine of Copyright Law', which implies that the practice where a piece of work is freely distributed amongst the public with the right to modify or amend it, provided that once amended or modified it is put back in the same form as it existed prior to such licensing.

The positives of the entire process or by resorting to 'Open Source licensing' leads to more robust, supple and nimble and much better software development with more programmers working on it compared to the efficacy by say a 'proprietary software licensing'.

Two stalwarts include that of computer scientist, Mr Richard Matthews Stallman who pioneered the concept of 'Open source licensing' of software and the other name includes that of Law Professor of Harvard School, Mr Lawrence Lessig as founder of 'Creative Comments', who helped the concept to get the traction leading to host of licensing including that of:

1. Copyleft license, which was based on the restriction of put it to use as if it was the same format as one gets it
2. GNU - General Public Licensing system
3. Creative Common Formats Licence
4. Berkley School Development License (BSD License)

The 'Open Source Licensing' was strengthened by OSI (Open Source Initiative) and IoT (Internet of Things).

There is a US based private open source initiative which tags the 'open source templates' on a 10 point criteria, as such that 'private ordering' which labels the private companies standing templates by a 'OSI market contract' and which is used for commercial purpose. The 'Open source contract' is based on the relation between the user and who made it.

Conclusion

The final decision on varied aspects of licensing and assignment in the realm of Copyright is based on multiple criterias. The fruits of future benefits warrants licensing from all the underlying Copyright holders including 'Lyricists and Music Composer', but the contract between the parties with 'Notwithstanding clause' has the 'overriding effect' applicable to the parties in 'the course of employment' which has to be provided 'due cognizance' in the instant case for its sustainability in the eyes of law. So, Negotiation between the parties and stakeholders becomes pertinent that which provide the opportunity to negotiate on the best practices of the industry also, leading to a 'WIN-WIN situation for all the underlying Copyright holders along with Sound recording and the Cinematograph entities/organisations. It is also important to understand that the mode of licensing including the cases of Open source licensing has a bearing on the impact of Copyright on the underlying copyright holders including the lyricists, music composer and the sound recording companies.

Endnotes

[1] Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
[2] Eastern India Motion Pictures vs. Performing Right Society Ltd. AIR 1977 SC 1443
[3] Neetu Singh vs. Rajiv Saumitra and Ors. CS(Comm.) 935/2016
[4] Ibid