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COPYRIGHT INFRINGEMENT FROM PRISM OF COMPARATIVE LAW: A JUDICIALPRECEDENT AND STATUTORY PERSPECTIVE

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ABSTRACT

Intellectual Property Rights is increasingly becoming the tool and the fulcrum for differentiating rights of the owner for asserting the 'bundle of Intangible rights' in the Intellectual property law landscape. Enforcement of Copyright rights is essential to ensure compliance and enforcement of the rights of the copyright holders. Judicial enforcement may be used to ensure compensation for damages or seizure of infringement goods. This article is an attempt to delve into the multiple facets of 'Copyright Infringement' from Comparative Law perspective with special emphasis to statutory provisions in light of catena of cases which has surfaced in various jurisdictions in Hon'ble Courts of Law. It is fait accompli that concepts of primary and secondary infringement in the domain of Copyright have been a subject matter of judicial interpretation based on facts and circumstances of the cases. The need of the hour is to address the issues from the prism of ratio from judicial judgments which is the base to place reliance for future decision making process. This is in line with the 'ratio decidendi' as derived and alluded from judicial precedents in catena of cases and to be aware of the legislative intent from the perspective of statutory provisions of law.

Keywords: Subconscious Copying, Extrinsic and Intrinsic Test, Copyright Suit, Contributory Infringement, Vicarious Infringement.

Introduction

The quintessential aspect in relation to the realm of Copyright, is that Copyright law infringement is of the nature of 'absolute liability'. In vital to note that the real rights related to the 'Property law' are of the nature of '*rights in rem'*, that is the 'rights against the world as a whole'. The same holds good for 'Law of Torts' which is also '*rights in rem'*. A vital aspect with reference to adjudication in Hon'ble Courts of Law in India, as catena of cases surfacing

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before the Hon'ble Courts of Law alludes to the fact that the 'Copyright' is hitherto being restricted to issues of 'copying' in Indian scenario. The question garners traction with respect to analysis with the view of 'Copying in fact' and the issues involved in proving it. It is vital to look at the issue from '*Comparative Law'* dimension. The business ecosystem is dynamic and harnesses the latent potential of Intellectual Property Rights for the upliftment of businesspotential and for long term sustainability in the value of growth and development.

Subconscious Copying

Prof. David Nimmer has two interpretation which are relevant includes, firstly, that of comprehensive non-literal copying/similarity and secondly, that of fragmented literal copying. Another area which warrants analysis is the two vital aspects of 'Reasonable Access' and 'Inverse Pr[3] oportion Ratio' w.r.t 'Access'. It is vital to look at 'Reasonable Access' vis-a-vis 'Bare' Access. In United States (US), the question of reasonable access is of standard v. Rule. It is also vital to note the school of thought process that Hon'ble Judge belong to have a bearing on the analysis. The Two School of Thought that of Critical Legal Studies and American Realism is pertinent in that endeavour of analysis. In this context, in India the debate between Generalised vis-a-vis Specialised judge, becomes important to see. In India, because of the generalised approach, there are no biases which creeps in because of lack of any specific specialised view with subject matter of Copyright Act. Another vital dimension in this analysis is that of 'Inverse Proportion Ratio' with respect to 'Access' where there exists an inverse relationship between the chance of access and that of substantial copying. In United Kingdom (UK), the British law analysis alluding to the Copinger and Skone James on Copyright,[4] hasto be seen from two dimension, *firstly*, Sufficient Objective Similarity between the Plaintiff and Defendant's work and *secondly*, Causal connection between the Plaintiff and Defendant's work. The 'primary infringement' is of the nature of 'direct infringement' and can be analysed from 'subconscious copying'.

It is also pertinent to note that 'Secondary infringement' is of the nature of following:

Contributory Copyright Infringement, where knowledge is required and is of the nature of 'fault liability'

1. Vicarious Copyright Infringement, where knowledge is immaterial and is of the nature of 'absolute liability'

[3] An American lawyer and author of "Copinger and Skone James on Copyright (1991)", "International Copyright Law and Practice (1989–1998)", "Cases and Materials on Copyright and Other Aspects of Entertainment Litigation (2002)"

[4] Nicholas Caddick QC, Gwilym Harbottle and Prof. Uma Suthersanen, "Copinger and Skone James on Copyright" (18 ed., 2021)

2. Induced Copyright Infringement, where not much of the jurisprudence has evolved where its exact nature is yet to be deciphered or interpreted.
3. Authorised Copyright Infringement is applicable in UK and takes the shape of secondary liability.

In sequitur, it is vital to note that 'Joint feasors Liability' is also there which is of the form of secondary liability. Judge Learned Hans had opined that copying of 'core portion' is deemed fit case of 'Copyright Infringement'.[5] In *Three Boys Music Corp. v Bolton,*[6] Hon'ble Court held that it was fit case of sub-conscious copying as memory plays the trick and as Copyright infringement results in liability is a 'absolute' in nature.

Extrinsic and Intrinsic Test

It is vital to understand the difference between the Question of 'Fact' and 'Law'. In US (America), the issues of fact are addressed by people by Jurists and the question of law is the subject matter in the realm of judges. It is pertinent to note that at many a times, where it involves question of fact, a legal mind may not be necessary. At this juncture, it is important to understand the difference between 'Generalised' and 'Specialised' judges. In India, the position is that of the 'Generalised' judge, which has the inherent advantage of being 'bias-neutral' and is not influenced by any complexities involved in adjudication. In contrast to Intrinsic test, the extrinsic test is taking the vital 'extraneous experts opinion', who has the knowledge and who can tell whether there is any similarity on core copyrightable expression, which helps in reaching finality of the judgment. In India, the evidence law provides the judge power to determine and refer to the expert evidence which as per Section 45[7] takes the shape of 'expert testimony'. Practically, to exemplify for instance, the analysis of two software involving expert opinion giving testimony by Copyright expert to the Court, where the court looks at the scope and interoperability of software with regard to techno-legal opinion.

Copyright Suit

Some vital questions and answers which are ascertained before instituting a case on Copyright are *firstly,* Whether the Copyright suit is a suit of 'Civil nature'? The answer is yes with the interpretation of Section 9. *Secondly,* whether plaintiff is proper party to the suit? Here, the

[5] Judge Learned Hans once in his interpretation of 'Subconscious Copying' has observed that, "If Memoryplays its tricks, there is subconscious mind at play where if the core portion if copied, then it is Copyright Infringement..."
[6] Three Boys Music Corp. v Bolton 212 F.3d 477 (9 th Cir. 2000)
[7] Section 45 of the Indian Evidence Act 1872.

person who is directly affected by the 'cause of action' in case of Copyright infringement becomes important. *Thirdly,* who can file a suit? As per Section 54 of the Copyright Act 1957, only the 'Owner' or 'exclusive licensee' can file a Copyright suit. It is vital to see who the 'proper' are and 'necessary' parties to the suit being instituted. Suppose, 'K' provides a copyright work as 'exclusive license' to 'R'. Here, 'R' has come to know and requesting to consider as 'A' is allegedly infringing Copyright. In matter involving title, it is of the nature of 'title dispute' for conclusive determination, whereby joinder of owner is impleaded. So, in the instant case, 'R' is plaintiff, whereas the 'A' is defendant number 1 and 'K' (the owner) is defendant number 2 as prayed to the Hon'ble Court. Section 54 of Copyright Act 1957, enables in anonymous work, where publisher can file a suit. Thus, three persons, namely, the owner, the exclusive licensee and the publisher can file the suit.

Copyright Infringement

There are three categories of 'Copyright infringement', that is, *firstly,* Primary infringement of the nature of direct infringement, *secondly,* Secondary infringement, which isaddressed by 'Case laws' in US, while in UK, by Section 22-26 of the Copyright, Designs andPatents Act 1988, whereas in India, by Section 51 of the statutory provision of Copyright Act 1957 and thirdly, Tertiary Infringement, which at present is 'academic' in nature. While analysing the 'Case Law Approach' of US, It is vital to note that in US, the case law based approach is of the following 3 models, that is *firstly,* Contributory Copyright Infringement, *secondly,* Vicarious Infringement and *thirdly,* Inducement Liability, as pertinent to social media and service providers bringing in its ambit the third paradigm.

Secondary Infringement

It is quintessential to note that it brings in its ambit 'who does not infringe, however helps primary infringer to infringe' is qualified to be 'secondary infringer'. The 'secondary infringer' supplies accessory and means and hence is liable. It is vital to study in that context, two important Copyright infringement categories as, *firstly,* Contributory Infringement: In this category, the alleged secondary infringer is having knowledge of the infringing activity and substantially participates in infringing activity. *Secondly*, Vicarious Infringement: This category of Secondary Liability, involves the secondary infringer with two prong test, namely 'Right and ability to control' and 'Direct and Financial benefit' accruing to the infringer. Few more Observations become vital in this context. It is quintessential to note that in the first case, that is 'Contributory Copyright Infringement', profit is not necessary to establish the infringement. In 'Contributory Copyright Infringement', knowledge is required and hence is

of the nature of 'fault liability'. In the second case, that is 'Vicarious Infringement', knowledge is not necessary as it is not fault based and hence, similar to 'absolute liability'. In sequitur, it is apt to mention that reliance is being placed on Case based approach in US. Secondary liability in US is case law based and hence the analysis has to be multidimensional where the 1st Generation 'Napster Case' and with P2P sharing models have to be analysed pertaining to 3rd Generation cases to make out the essential differences.

In US paradigm, it is pertinent to note that there has been no explicit statutory provisionand the secondary liability law is developed through case laws. In most cases, it is based on the common law of torts. To understand the Contributory Infringement, which is fault based and where knowledge is necessary has a jurisprudence on its own, in contrast to 'Enterprise Liability' is based on 'Absolute Liability', which has to be analysed as Prof. Nimmer puts forth with the Ingredients as, *firstly,* Existence of a prior Direct Infringement, *secondly*, Secondary Infringer's prior knowledge, which can be 'Actual' or 'Constructive' (includes wilful blindness) of violation. *Thirdly*, Support, Participation and of the nature of Material contribution among other have a bearing. In this endeavour, to analyse the case of Gershwin Publishing Corporation v Columbia Artist Management Inc.,[8] where it says, *"[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer...*" Section 271 of US Patent Code talks about Contributory liability with two vital tests that is *firstly*, 'If the product/article has substantial non-infringing use' and *secondly,* whether the article is a staple article of commerce. The 'dual use of the staple articles of commerce' as imported from the Patent law in copyright paradigm as seen in *Sony Corporation of America v Universal City Studios, Inc*.[9], with regards to 'Contributory Liability', it says, "*[T]he sale of copying equipment, like the sale of other article of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. It need merely be capable of substantial non-infringing use..."* However, in case of vicarious secondary liability or the 'Vicarious Infringement' the economic analysis, involves creating a priori risk and the vital question is there any making of profit out of it? If the answer is yes, the alleged infringer has to be 'beware'.Seen with reference to 'Napster' case, where the 'Napster Protocol' worked on the 'Napster control index server' Model with Central Server with array of user computers, directing the request of the users to multiple connected user computers, making it challenging to apply the 'Vicarious Secondary Liability' with perfection. The aforementioned scenario became more complex and with application of 'Technology', the dichotomy

[8] Gershwin Publishing Corporation v Columbia Artist Management Inc., 443 F. 2d 1159 at 1161 (2d Cir.1971)
[9] Sony Corporation of America v Universal City Studios, Inc., 464 U.S. 417 at 435 (1984)

of Law and Technology was conspicuous with the application of 'without dynamic directory'. *This led to P2P sharing community jumping in joy*. It has been seen in perspective of 'dynamic directory file'. The economic dimension of the analysis is another vital area which has to be studied in the contextwith respect to creation of '*a priori risk allocation'* and '*wilful blindness theory'* where the 'actual' or 'constructive knowledge' becomes quintessential in analysis.

Doctrine of Fair Use and Fair Dealing

Fair Use/Fair Dealing comes under 'Exceptions' to Copyright and is of the nature of 'Limitations and Exceptions to the exclusive rights'. It is pertinent to note that broader exceptions provide the mechanism or the provision where it is legally permissible under the law for 'copying' and which is 'not actionable'. *At the outset it is vital to understand, an infringement happens when someone without the permission of the Copyright owner 'copies' a copyrighted work as that right to make exclusive copies belongs to the copyright owner.* To understand the wider ambit and scope of the exceptions, it is quintessential to look at it from the perspective of exceptions in line with Article 13 of TRIPS and Article 9 of the Berne Convention. The 'Limitations and Exceptions to the exclusive rights' involves, firstly, Involuntary Licenses which are of two types Compulsory Licensing and Statutory Licensing. *Secondly,* Limited Protection for specific number of years, that is Lifetime plus 60 years for Copyright owner. *Thirdly*, First Sale/Exhaustion and *fourthly*, Fair Use/Fair Dealing. It is pertinent to note that Newton said, "*I am Newton because I could stand on the shoulders of the predecessors...*" It is quintessential to mention that society does not believe in wasteful repetition of the society's resources. The broader justifications for 'Fair Use' is based on following 'limbs of arguments', *firstly,* To strike a delicate balance for author's economic rights and the right of the public at large. *Secondly,* Fair Use as a vital tool to help maintain the delicate balance, *thirdly,* It is vital to understand that 'Standing on the shoulders of giants'- reliance of the current artistic and scientific developments are incremental in nature and rely on pre-existing understanding and *fourthly,* the most vital analysis from the realm of Intellectual property rights that provides the situation to look from the prism of re-inventing the wheels resulting for 'wasteful repetition of society's resources', which the Society does notencourage. In *CCH Canadian Ltd. v Law Society of Upper Canada*,[10] it was deliberated as whether 'Fair Use' is an exception like other exceptions in Copyright Act and acquires the contours of user's right? The case mentioned that in order to maintain that delicate balance, therights of the copyright owner and users interests, must not be interpreted restrictively.

[10] CCH Canadian Ltd. v Law Society of Upper Canada, 2004 SCC 13

Fair use/Fair Dealing is one of the categories of exception to Copyright owner's exclusive economic rights. This is normally advanced as a defence in a Copyright Infringement scenario for protecting the public domain. Section 52(1)(a) of Copyright Act 1957 mentions 'Fair Dealing' as a 'standard' and this has to be tested with the touchstone of '4 factor test', it is also equally important that all the tests has to be given equally weightage and never, over-emphasise or under-emphasise each test. The 'Four Factor Tests' are *firstly*, Purpose and Character of use, *secondly*, Nature of Copyright work, *thirdly,* Amount and Substantial portion of the use and *fourthly*, Effect of the potential market.

1. **Purpose and Character of Use** as the first factor test in the context involves the vital aspect to understand that 'focus is on defendant's work' and the Central Question is to satisfy the following ingredients which are tested further, firstly, whether it was 'Originally envisaged'? Secondly, whether the work is 'Sufficiently transformative' enough? Thirdly, whether the work is of the nature of furthering some new purpose/expression/message? Looking from the perspective of Judicial Precedents with Comparative law Perspective, the leading case in US was *Salinger v. Colting Inc,*[11] involving famed writer Mr J.D. Salinger where the question which surfaced was of 'substantial striking similarity' with protagonists of the novel written by Mr. Salinger 'The Catcher in the Rye' and Colting decided not to publish or distribute the book in US or Canada until falls in public domain. The similar case, which surfaced before the Indian Courts was that in the case before Hon'ble Delhi High Court of *Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors,*[12] where it was a case of 'Fair Dealing'.

   Nature of Copyrightable work is a vital aspect to understand that the nature of Plaintiff's work can be of varied types, namely, Work of friction, which is highly 'creative' when it comes to 'likelihood for infringement', as to whether it is Published work, Unpublished work, Fact/Pamphlet and Law or Maths book. The above analysis warrants reviewing it from the prism of events/factual book where the scope of likelihood of Copyright protection is high. It also depends whether the original factual work is for dissemination of information as encouraged for larger public benefit, then

[11] Salinger v. Colting, Inc., 641 F. Supp. 2d 250 (S.D N.Y 2009)

[12] Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors, 2008 (38). PTC 385 (Del)

chance for establishing 'fair use' is high. For unpublished one and that of 'creative work', the Hon'ble Courts have looked into the infringement of Copyright, even if it has not exploited the market. It is vital to note that 'Manuscripts' may be protected by 'Copyright', for instance, a piece of poem of the nature of 'unpublished work'. So, the chance of finding 'fair use' in published work is much higher than that of unpublished work. Looking from the prism of Judicial Precedents with Comparative law Perspective, In *Time Inc. v Bernard Geis Associates*,[13] video footage of former President of US by amateur photographer one named Mr Zapruder, where Time Inc suing the book publisher was not sustained as the Hon'ble Court opined that use of stills was fair in part because it assumes the character of factual and historical event.

2. **Amount and Substantial Portion taken** has to be analysed from two dimensions after comparing the plaintiff's work and the defendant's work that is *firstly*, whether the amount or the percentage of copying from Original Copyrighted work, has been incorporated in the new work and to what extent? To answer, such question, it depends less the use, the more the chances of 'Fair Use' and *secondly*, whether what is 'substantially taken' forms part of the core or heart of the 'original work' is another question which warrants analysis. In *Harper & Row v. Nation Enterprises*,[14] where it was delved on understand whether it was 'sufficient and core nature of copying' for the defence of 'Fair use' and it was held by Hon'ble United States Supreme Court to be infringement.

3. **Potential Effect on Market** has two dimensions in analysis, firstly, that of Right to exploit immediate primary market and secondly, that of Right to exploit all possible secondary markets. This is exemplified as, say the 'Chota Bhim market' has umpteen number of markets available of the types of Toys, Serials and Comics. A vital question, which is addressed by the 4th test 'Potential effect of market' is whether it comes in theambit of 'fair use' which a moviemaker wants to exploit derivative market, where the market does include Primary visible market as well as Potential 'invisible market' which the Copyright owner may have not exploited yet, it is held by Courts in catena of judgments that 'it is infringement by 3rd party', whereby the protection on the grounds of 'Fair Use' may not be sustained. Leading cases in this perspective is that of*Rogers v Koons*,[15] where the issue which surfaced was whether an artist making woodsculpture of Copyright work without his/owner's consent, that is consent of photographer. The defence of the artist was 'Fair Use' and

[13] Time Inc. v Bernard Geis Associates, 293 F. Supp 130 (S.D.N.Y 1968)
[14] Harper & Row v. Nation Enterprises, 471 U.S. 539
[15] Rogers v Koons, 960F.2d 301 (2d Cir. 1992)

contended for the owner's non-exploited secondary market for sculptures. The Hon'ble Court held that it was found to be infringement as it was 'immaterial' whether the photographer considered the sculpture market, but the important thing was there existed a 'potential market' for sculptures of the 'original copyrighted work', which cannot be disregarded. In *Hubbard v Vosper,*[16] which is cited by Indian Courts, while dealing with Copyright Infringementallegation by Church of Scientology against former member Vosper, who criticised Scientology in book 'Mind Benders', Lord Denning observed amount of long extract with small comment might be construed as 'unfair' in the realm of Copyright.[17] In *Authors Guild v. Google*,[18] the Google Inc. defence was 'how come it is infringement' when it is 'promotional activity rather than infringement' and defence was contended of the nature of 'promotion' of e-Commerce and resulting in reduction of 'Transaction Cost' for the buyers and for key promotional aspects, such 'mass digitization' was held not bean infringement.

Secondary Liability of Internet Service Providers

From the prism of Statutory provisions, in Copyright Act 1957, Section 52(1)(c) specifies categorically that compliance to 'due diligence' is absolute must for the service provider, where the three components to access, linked and integrated, whereby have to be analysed. If any data change happens, Copyright owner could very well send a 'notice' which has to be responded in the stipulated timeframe and Hon'ble Court could provide 'temporary injunction' if not complied with statutory provision. Another vital aspect is that of 'transient, incidental storage of the work' which has to be seen for electronic links, access and integration and this has to be read with another statutory Act in Section 79 and Section 81(2) of the Information Technology Act, 2000, where the intermediary for 'secondary infringement' is liable.[19] In *Super Cassettes Industries Ltd. v. Myspace Inc.& Another (2011) 47 PTC 49 (Del.)*[20] where the Hon'ble Delhi High Court considered three provisions of law including that of Section 79 and Section 81 of Information Technology Act, 2000 which was read and interpreted conjointly with Section 51(a)(ii) of the Copyright Act, 1957.

[16] Hubbard v Vosper (1972) 2 Q.B 84

[17] Lord Denning observes, "where first the number and extent of quotations and extracts are considered and whether they convey the same meaning as that of the author's, where 'proportion plays a vital part, a long extract with small comment may be 'unfair', while a short extract with long comment may be 'fair', tribunal offact may play a material role in deciding whether it is fit case of fair use or not..."

[18] Authors Guild v. Google 721 F.3d 132

[19] Section 51(a)(ii) of the Copyright Act, 1957 has to be read with Section 18 and 29 of the Information Technology Act, 2000. Sec. 29 of IT Act, 2000 provides for, "power to access computers and their data on a reasonable cause to suspect contravention of Chapter VI of the Act"

[20] Super Cassettes Industries Ltd. vs Myspace Inc. & Another (2011) 47 PTC 49 (Del.)

Conclusion

To conclude, there is economic dimension in line with the aforesaid analysis. First Dimension and perspective is that of there is always a 'Social Cost' of Copyright and because of 'monopoly pricing due to publisher's decision', whereby by the essence of such pricing, the individuals are 'barred' from the accessibility and where the rightful owner has the 'right' over the literal expression and underlying ideas. The second dimension is "Dead weight loss" in Economics. For the aforesaid dimensions of analysis which comes imperative in this context. It is vital to note that 'Infringement' of the nature of 'direct copying' can be construed as 'fragmented literal copying as infringer' or 'sufficient or substantial copying of copyrightable material'; however, the exception of Fair Use or Fair Dealing provides that permissible copying. Two different studies or Jurisprudence which are intrinsically related are as follows, which has to be analysed, as firstly, 'Critical Legal Studies' to essentially understand the difference between 'Fair Use' (applicable in US as embodied in Section 107 of the Copyright Act 1976 in US) and 'Fair Dealing' (applicable in India and as mentioned in Section 52(1) of Copyright Act 1957) and secondly that of the facet related to jurisprudential Hohfeldian Matrix Analysis with respect to 'Rights and Liabilities' via. Jural correlatives. The vital question which emerges as to how Fair Use/Fair Dealing provisos are incorporated in statutory enactment of Copyright? This has to be answered from two perspectives. *Firstly*, One of 'Standard based approach'- which is in the form of broad-based standards where it is the discretion of the Court to decide whether the use is of the nature of 'Fair Use' as in US. *Secondly*, another is of 'Rule based approach'- which lays down the well-defined bright-line rules indicating the precise situation when it constitutes 'fair use'. Normally, it requires a meticulous and detailed analysis of the circumstances posited that may qualify it be a candidate to be deemed fit for 'Fair Use' or for instance, 'Fair dealing' as in India. It is quintessential to note that 'Fair Use' is ex-post determination by Court and no one knows the consequences and it's always a better strategy or decision to 'negotiate' as a precaution as devoid of any concrete determination by the Court as it is not known, it is better to 'negotiate' to avoid infringing issues. Another vital aspect which warrants attention is of 'Rational choice making' by individuals, where 'Fair Use/Fair Dealing' could be seen from two perspectives, firstly, assertion of rights by Copyright consumer and secondly, also a defence in such situations

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