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Toils and Turmoil of Media and Entertainment Sector

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edia and Entertainment companies, in the current scenario face several roadblocks and hardships with respect to their content. The hardships span several genres. However, for the sake of maintaining brevity, we shall be dealing with:

- a. Copyright Infringement
- b. Copyright Piracy
- c. Ban on exhibition

A. COPYRIGHT INFRINGEMENT

Man is a creative being who is capable of producing original works. This ability endows its creator with the exclusive right to do or

authorize others to do certain acts and /or deeds with respect to the original work. However, the ability to create original work also exposes the creator to certain risks.

The copyright law confers upon the creator of the work, exclusive rights with respect to reproduction of the work and other acts, which enable the creator to benefit financially with due exercise of such rights.

Indian Courts have laid down certain tests to determine what and which works can be protected under the current regime of copyright law, and hence, only for these works can an author or owner claim protection against infringement.



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A.1 DEFINING COPYRIGHT INFRINGEMENT

In the celebrated case of *R.G. Anand v. M/s Deluxe films*,¹ the Hon'ble Supreme Court opined the following in relation to copyright infringement:

(a) There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

(b) Where the same idea is developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In order to be actionable, the copy must be a substantial and material one, which at once leads to the conclusion that the defendant is guilty of an act of piracy.

(c) Where the reader or the viewer pursuant to having read or seen both the works is undoubtedly of the opinion and

gets an unmistakable impression that the subsequent work appears to be a copy of the original.

(d) Where the theme is the same but is expressed differently so that the ensuing work becomes a new work, no question of infringement of copyright arises.

(e) Where there are material dissimilarities which negate the intention to copy the original and the coincidences appearing in the two works are clearly circumstantial, no infringement of the copyright is deemed to exist.

As a violation of copyright amounts to an act of piracy, it must be proved by clear and cogent evidence. The Bombay High Court in *Zee Telefilms Limited vs. Sundial Communications Private Limited*² laid down the following two tests to determine copyright infringement:

i. Average viewer test: The impression created in the mind of a viewer is vital to this test, if it can be inferred by virtue of the said impression that the subsequent act is a copy of the original act then it is copyright infringement. This test was initially laid down in the *R.G. Anand Case*. However, the court in *Zee Telefilms case* reiterated and affirmed the position in *R.G. Anand Case*.

ii. The substance/kernel assessment test: This test involves assessing the significance of the copied portion on the rest of the work. If the said work in its totality can sustain without the copied portion, then no copyright infringement can be deemed to have occurred but if the plagiarized portion is so integral to the whole work that if it were censored the rest of the work would lose its meaning then copyright infringement has definitely occurred.

A.2 REMEDIES IN CASES OF COPYRIGHT INFRINGEMENT

Once the copyright owner establishes that a subsequent work is an infringement of his copyright in an original work, the remedies available to him for such cases in law are:

A. CIVIL REMEDIES

- 1) Interlocutory Injunction
- 2) Pecuniary Remedies

B. CRIMINAL REMEDIES

- 3) Imprisonment upto 3 years but not less than 6 months.
- 4) Fine not less than fifty thousand but may extend upto Rs.2 lakhs.
- 5) Search and Seizure of the Infringing goods

Though all the above-mentioned remedies are available to an owner of the copyright under the Copyright Act, the most extensively sought-after remedy is of interlocutory/interim injunctions and in some cases pecuniary remedies. Therefore, this article elaborates on these two kinds of remedies.

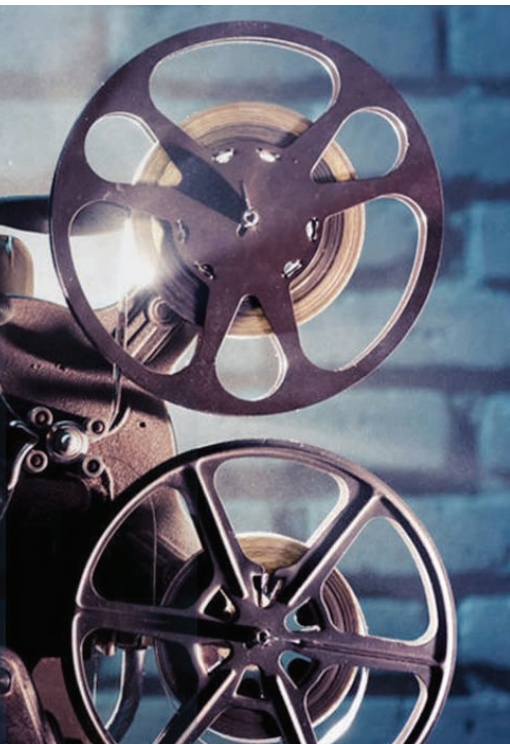
The following section will be dealing with the Interlocutory Injunctions:

Interlocutory Injunction may be divided into two categories:

- (a) Where the infringer is known and
- (b) Where the infringer is unknown (*Ex Parte/ John Doe/ Ashok Kumar Orders*)

a) Where the Infringer is Known

The interlocutory injunction is sought for against a party whose identity is known and is infringing upon the owner's copyrighted works established before a competent court. Generally, the usage of



¹*R.G. Anand vs. M/s. Delux Films & Ors.*, [1978 AIR SC 1613].

²2003 (5) BomCR 404.

³*Notice Of Motion (L) NO.515 OF 2017 in Commercial Suit (L) NO.459 OF 2017 (Bombay High Court).*

⁴*SUIT (L) NO. 162 OF 2017 (Bombay High Court).*

⁵*JanukiKumariJ.B.Rana&Ors vs Ashok Kumar And Ors* on 28 February, 2017, p. 10.

⁶https://en.oxforddictionaries.com/definition/john_doe.

this injunction arises in cases where usage of a popular film, song, clip, background score, musical work etc. in another work without the consent of the original owner takes place. In such cases, it is generally the producer of the film, or composer of the musical work respectively in cases of infringing films and musical work, who are identified as the infringer and injunction.

The following are some of the famous cases where injunction was granted against identified infringers:

1. Trimurti Films Private Limited vs. Super Cassettes Industries Private Limited³

The Plaintiff had produced and released a film named “Deewar” in 1975 and engaged the services of a composer and lyricist for the purposes of composing the lyrics and musical works for the songs of the film “Deewar” which included the song titled “Keh Doon Tumhe”. Pursuant to the execution of separate contracts of service with both the lyricist and the music composer, Trimurti Films (producer) became the exclusive owner of the copyrights of the underlying original copyrighted works i.e., the musical composition and lyrics of the song “Keh Doon Tumhe”. In January 1974, Plaintiff entered into an agreement with Polydor India Limited (now Universal Music India Pvt. Ltd.) under which the Plaintiff granted Polydor, the right to make and sell gramophone records of the songs of the film Deewar and the mechanical reproduction rights for the limited purpose of making and selling gramophone records.

On one of the days in August 2017, the

Plaintiff came to know through an article published in “Mumbai Mirror” that the cast of “Baadshaho” was reviving the yesteryear song “Keh Doon Tumhe”.

Reading this, the Plaintiff approached the Bombay High Court for an injunction restraining the Defendants from releasing the film “Baadshaho” with the infringing song, “Keh Doon Tumhe”. The Defendant contended that it was not an infringement as it has procured the right to use the sound recording from Polydor. After hearing the submissions of both the parties, the Hon’ble Bombay High Court passed the following order:

a. “Defendants are restrained from releasing the film “Baadshaho” containing the song “Keh Doon Tumhe”. It is clarified that defendants may release the film “Baadshaho” by removing the infringing song from the film;

b. Defendants are also restrained by an injunction from selling or otherwise distributing copies of CDs, cassettes or any other media containing the infringing song “Keh Doon Tumhe” through any physical or non physical medium including without limitation in cinema halls, the internet, satellites, DVDs, blue ray discs, removable or embedded drives, ring tones, MP3, CDs, caller tunes or any soft/digital method of defraying the said infringing material either on visual medium or an audio medium.”

The Hon’ble Court stated: The rights in the infringed song were sold only for the purposes of making and selling gramophone records. That is the rights in sound recordings were granted for the purposes of making, selling, reproducing etc. However, as sound recording, literary

and musical works are different works entitled to separate copyright protection, selling the rights in sound recording do not by any stretch of imagination include rights in literary or musical works.

2. Kross Television India Pvt Ltd & Ors. v. VikhyatChitra Production & Ors.⁴

A petition was filed before the Hon’ble Bombay High Court against the makers of ‘Pushpaka Vimana’, a Kannada film; from exhibiting, making available for viewing and / or in any manner showing the Kannada Film on any medium, including but not restricted to, cinema theatres, television, internet, making and releasing CDs/DVDs or granting of any satellite rights. It was alleged that the Kannada film is a copy of the original Korean film titled ‘Miracle In Cell No. 7’ the rights to which are owned by Kross Pictures India. The Hon’ble Court while concurring with the plaintiff’s arguments granted An ad interim injunction in favour of the plaintiffs.

b) Where the Infringer is unknown:

There are cases of infringement where the identity of the infringer may not be known or is anonymous. Such circumstances generally arise in instances of piracy, torrent streaming, unauthorized broadcasts etc. An injunction sought against the person or persons whose identity is not known at the time of issuance of the order is known as seeking a “John Doe” order.

John Doe has its origin under the reign of England’s King Edward III when the orders were used to refer to unidentifiable defendants.⁵ The Oxford Dictionary defines John Doe as an “Anonymous Party”.⁶

³CS (OS) 2243/2014.

⁴SUIT (L) NO. 633 OF 2016 (Bombay High Court).

⁵Oxford Dictionary, “piracy”, available at <https://en.oxforddictionaries.com/definition/piracy>.

⁶SUIT (L) NO. 993 OF 2014 (Bombay High Court).

⁷I.A. No. 11242/2011 in CS(OS) No. 1724/2011.

⁸Writ Petition (criminal) No. 191 OF 2017 (Supreme Court).

⁹Writ Petition (Civil) No.129/2018.

Generally, a relief of temporary injunction is sought under Order 39 R1 & 2 read with Section 151 of the Code of Civil Procedure, 1908. In terms of these provisions, a John Doe order presupposes (a) an imminent possibility of leakage of the copyrighted material (b) causing huge financial or irreparable losses (c) and hence, an injunction against John Doe to restore balance of convenience. The inference that may be drawn is that there has to be a strong presumption that the unnamed person would cause irreparable injury unless an injunction against such person is granted.

1. Star India Pvt. Ltd. & Anr. Vs. Haneeth Ujwal & Ors.⁷

The Plaintiff prayed that over a hundred websites and other similar websites broadcasting content owned by Star India Private Limited be blocked by the Internet Service Providers (ISPs). They contended that blocking individual

URLs which contain infringing content will not suffice as the websites can always broadcast the infringing content by merely changing one character in URL setting. It was contended that the defendants owned, operated and managed the various websites identified in the memo of parties and were located all across the world. Many of these websites being anonymous in nature, it was virtually impossible to locate the owners of such websites. The Hon'ble Delhi High Court, owing to the difficulty of identifying all the Defendants passed a John Doe order, wherein it restrained the Defendants from, in any manner, hosting, streaming, broadcasting, rebroadcasting, retransmitting, exhibiting, making available for viewing and downloading, providing access to and / or communicating to the public (including its subscribers and users), through the internet, in any manner whatsoever, the plaintiffs' broadcast.

2. Balaji Motion Picture Limited & Anr. v. Bharat Sanchar Nigam Ltd. & 49 Ors.⁸

The Plaintiff requested for a 'hybrid relief'; combining the principles of Ashok Kumar orders, and Order I, Rule 8 and Section 151 of the Civil Procedure Code, 1908.

The Plaintiff prayed that a number of websites, some of which they identified, be completely blocked by the ISPs that hosted links for viewing and downloading the movie "Udta Punjab". However, pursuant to applying the principles of intermediary liability, the Hon'ble Court held that it was unreasonable to block entire websites as there were unsupported claims of these websites hosting only illegitimate content and nothing else. Hence, the court passed John Doe orders and directed the defendants to remove the torrent links or render them inaccessible. However, the court found it unreasonable to block



entire websites, especially those which were “secure” or subscription-based as the same would function as a “gag” order or pre-censorship and would not be feasible.

B. COPYRIGHT PIRACY

Copyright Piracy in the simplest of terms can be explained as the unsanctioned and unauthorized reproduction and/or distribution of either the whole or substantial part of works protected by the copyright.⁹ Copyright piracy is simply the theft of an owner’s property which results in damage and loss.

Online piracy is the term to identify the illegal act of duplication of licensed or copyright material from the internet. There are three main piracy context-music, movie and software.

The remedies available for Copyright Piracy are the same as the remedies available for Copyright Infringement and the same have been discussed above.

1. Happy New Year- Red Chilies Entertainments Private Limited vs. Hathway Cable & Datacom Ltd. & Ors.¹⁰

The Plaintiff acting on its fear that pirated copies of the film might be circulated in the market or that the film might be transmitted through cable service operators, sought an injunction from the Court against such acts.

The Hon’ble Bombay High Court passed an order “restraining the Defendants from telecasting/broadcasting/distributing/publishing on the cable TV network /disseminating/ reproducing or otherwise making available to the public, the film ‘Happy New Year’” or “from (i) making a copy of the said film, including a photograph of any image forming part thereof, (ii) to sell or give on hire, or offer for sale or hire, any copy of the said film, regardless of whether such copy has been sold or given on hire on earlier



occasions, (iii) to communicate the film to the public in any manner whatsoever including by way of but not limited to telecasting and/or re telecasting the said film, or even otherwise dealing with the rights in the said film which vest exclusively in the Plaintiff, in any manner whatsoever.” ; the order also restrains others “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 “Happy New Year” 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 “Happy New Year” through different mediums like CD, DVD, Blu-ray, VCD, Cable TV, DTH, Internet, MMS, Tapes, Conditional Access System or in any other like manner.”

2. Singham Case¹¹

A similar case to the abovementioned, the Plaintiffs sought an injunction to prevent piracy and loss of revenue, apprehending copies of movie ‘Singham’ being made and sold/distributed in the

form of DVDs/CDs in the market and/or shown on TV by cable operators. In this case, the Hon’ble Delhi High Court, after establishing the basic ingredients of the case, that is, imminent danger and balance of convenience, passed John Doe order restraining all Defendants and other unknown persons constituting part of the same class from distributing, displaying, duplicating, uploading, downloading or exhibiting the movie in any manner. Eventually, several Indian ISPs were ordered to block access to a number of file sharing websites.

C. Ban On Exhibition

In recent times, there have been a few instances when the movies have been banned from being showcased due to the content being hurtful to the sensibilities of certain class of people. In such circumstances, the owner of the copyright suffers from several losses, including financial losses.

The most recent example of such a circumstance is the case of the movie “Padmavat” wherein several states banned the release of the movie as it hurt the sensibilities of certain classes of people.

1. Manohar Lal Sharma v. Sanjay Leela Bhansali & Ors.¹²

The Hon'ble Supreme Court held that when a matter is pending or going to be dealt with by the Central Board of Film Certification ("CBFC"), no one, who is holding any post of public responsibility, should comment on how the application for certification is to be processed. This tantamount to creating a sense of prejudice in the mind of the CBFC. The CBFC is expected to take decisions with utmost objectivity as per the provisions contained in the Act, the rules framed thereunder and the guidelines. The Supreme Court allowed the exhibition of the movie pursuant to a few modifications.

2. Adarsh Cooperative Housing Society Ltd V. Union Of India & Ors.¹³

The Petitioner, Adarsh Co-Operating Housing Society, being a society built for the welfare of defence personnel and war widows, filed a petition before the Hon'ble Supreme Court of India contending that the film "Aiyaary" if released would affect the reputation of the society and its members as the movie was based on the Adarshnagar scam and a movie based on the subject would also affect the outcome of the ongoing trial of the case.

The Hon'ble Court unhesitatingly dismissed the petition on grounds that CBFC had already certified the movie for its release and the authority of CBFC cannot be challenged merely on the basis of such unfounded apprehensions.

The tribulations ranging from acquiring a copyright in the content to protecting the content from unauthorized publication, the content creators are nowadays gripped with an uncanny fear of incurring heavy losses on account of the bans imposed on the release and exhibition of a movie by a certain community or section of society even after acquiring certification from CBFC, on

the basis of the subject being slightly controversial or supposedly hurtful to the sensibilities of a few people. It raises the question that even though, CBFC is the only body that has been endowed with the power prerogative to censor media content, do we want to give every person the right to censor each and every movie?

Even though the Courts, as discussed above in the cases of 'Padmavat' and 'Aiyaary', have dismissed such baseless propositions to ban a film, such litigations have certainly led to extreme revenue losses to the respective production houses or at least result in negative publicity for the makers as well as the artists associated with the movie. Generally, the claims with respect to plagiarism in the content or public policy considerations are raised a few days before the release of the film. It is the peak time for increasing revenue prospects of the film by way of promotions, etc. and these producers lose revenue solely on account such lawsuits being filed irrespective of the decision.

Further, it is significant to mention here that tussles between the Judiciary and the Executive majorly lead to huge losses to a Media Content owner. In Padmavat's Case, even though the Judiciary allowed the release of film, the Executive, that is, the State Governments of 6 states including Rajasthan and Gujarat amongst others imposed a ban on circulation of the film in these States thereby overpowering the Judiciary in lieu of Executive policy matters to maintain security, peace and harmony in these states, leading to a loss of revenue to Bhansali Productions.

In the face of such impediments, the Courts have played a seemingly positive role by balancing the considerations of public sentiments against the efforts and creativity of these content owners, trying to safeguard the media content owners from incurring huge losses endorsing the fundamental right of speech and expression.¹⁴



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