

Copyright in the Digital Era

(Contributed by Latha R Nair for the Economic Times 2002)

The digital era has thrown open a new realm of possibilities that were beyond one's imagination once upon a time. Be it technology, entertainment, education, media or communication, the advancement caused by digital technology is unprecedented.

Let's have a look at the developments in the media, in particular, the print media. What used to be available to us in the morning as crisp newspapers are now available in digital form as "internet editions". In the course of reading, if you find an article or item interesting you have the additional advantage of copying the link to the article or item and sending it to your friends. Obviously, the consumer is greatly benefited here for reasons of easy access and wider reach. The information is at the disposal of the consumer at the click of a mouse irrespective of his location and purpose.

In this grand milieu of things, the contributor and his rights are sadly ignored. Does a freelancer in India have any copyright in his contribution to a newspaper? Does the Indian copyright law balance a freelancer's copyright in his contribution to a newspaper with that of the publisher's copyright in the newspaper?

Generally, Indian copyright law recognizes the natural author to be the first owner of copyright subject to certain exceptions. These are:

- where the natural author creates the work in the course of employment, the employer is deemed to be the owner.
- where the natural author is an independent contractor working under a contract for service/ work for hire arrangement, the commissioner is deemed to be the owner. Peculiarly this exception is limited to photographs, paintings, engravings and cinematograph films and does not cover literary works.

In the context of the newspaper industry, the publisher of a newspaper is deemed to be the owner of copyright in a contribution by an employee and, as owner thereof, it has the right to publish it in such newspaper. This right, however, does not affect the employee's right to utilize or exploit the contribution through other means. For e.g., a cartoonist employed by a newspaper, in the absence of any agreement to the contrary, can make a compilation of his cartoons and publish the same as a separate work under his name as owner of copyright thereof.

Besides the rights of reproduction and distribution, the owner of copyright in a literary work has the right of adaptation of the work. The expression "adaptation" is defined, *inter alia*, to mean "any use of such work involving its rearrangement or alteration". It is important to note that this meaning refers to "any use of such work". Further, the owner also has the right to reproduce the same in any material form including the storing of it in any medium by electronic means. In other words, the publisher of a magazine or a newspaper (which would be a literary work) has the right under Indian law to rearrange or alter the work since such acts would be permitted under the law as an adaptation and publish the same in any form including electronic medium.

What does it entail? Would it mean that the publisher of a newspaper (in the absence of any contract to the contrary) can rearrange or alter the arrangement of the articles contributed to it by its employees or freelancers who have assigned their rights therein for purposes of publication in the newspaper? Would it further mean that the publishers can reproduce the articles in electronic medium since the law permits "any use of such work"? Well, the definition of adaptation is wide and would seem to suggest that it is possible. As owners of copyright in the literary work which is the newspaper or the magazine as the case may be, they are permitted to do so under Indian copyright law as owners thereof.

In this context, it would be interesting to examine two recent decisions of the Supreme Court of United States which dealt with rights of freelancers as opposed to those of newspaper or magazine publishers. In both the cases, the issue was the use by the defendant publisher of an electronic/ digital version of the plaintiff's work which was part of a collective work of the defendant.

Under section 201 (c) of the US Copyright Act, copyright in each separate contribution to a collective work is distinct from the copyright in the collective work as a whole. A collective work under the US law would mean a newspaper, magazine etc. Absent a contract, the owner of a collective work such as a newspaper or magazine publisher possesses a mere privilege to reproduce a freelance author's contribution: (i) as part of that collective work, which is the newspaper or magazine; (ii) any revision of such collective work; or (iii) any later collective work in the same series.

In *Tasini v. New York Times*, a group of freelancers sued the New York Times for publishing their contribution in separate electronic databases without their consent or authority. The defence of the publishers that they were exercising the privilege under section 201 (c) of the US Copyright Act was rejected by the Supreme Court. It was pointed out by the Supreme court

that the database's reproduction and distribution of individual articles, simply as individual articles, would invade the core of the Author's exclusive rights.

In *Greenberg v. National Geographic*, the issue was the use by National Geographic of a photograph, the copyright of which belonged to Greenberg, in a CD ROM version of all the National Geographic Magazines since 1888. The magazine used the photograph not as part of the digital replicas of the magazines, but as a separate work. The defence of 201 (c) by the magazine was rejected by the court and held that the use was infringing use since the defendant publisher transformed and repositioned the work in the digital version.

From the above, it is clear that unlike the Indian copyright law, the US Copyright law specifically protects a freelancer's copyright. With the advent of Internet and electronic medium, the power of authors of copyrighted works to control their creations has become ineffectual thereby reducing their creations to a free-for-all status. The story of technology versus law is being repeated here except that this time the pace and the effect are unprecedented. There is a section of academicians and jurists who believe that the need of the hour is for copyright to take a back seat and let the dissemination of information to proceed uninterrupted. The unintended aftermath of *Tasini* in the US is that a large portion of articles from databases have been eliminated thereby forcing interested readers to search for libraries that still have paper copies of the articles.

Should copyright take a back seat in this race of law and technology? If not, how to protect electronic rights of authors of literary, dramatic and artistic works? Should we have collective administration societies to administer such rights (since universally collection societies were established as a solution to authors who were unable to control the unauthorized use of their copyrighted works)? These would be just a few disturbing concerns of rights holders in the electronic context. It is opportune for the legislators to plug the loopholes in the Indian copyright law. Till then freelancers in India, will not be able to do anything about their contributions being electronically exploited by publishers.

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(The author is a Trademark and Copyright Attorney working at the IP law firm Kumaran & Sagar, New Delhi)