Lakshmikumaran & Sridharan corporate

corporate

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

February, 2013 / Issue–19

February
2013

Contents

Article

Is there a database right protection in India? 2

Circulars & Notifications 4

News Nuggets 4

Ratio Decidendi 5

Article

Is there a database right protection in India?

By **Vidushpat Singhania**

Protection of database and associated rights is gaining traction in India. The vast volume and deluge of data available with the Business Processing Offices in India from jurisdictions which have stringent database protection laws have increased the awareness and need for adequate protection of personal data through domestic legislation or international commitments. But the question whether India has adequate measures in place for database right protection still remains to be answered.

Personal and sensitive data is protected under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 ("IT Rules"). While the IT Rules check the compliance with the international standard of protecting personal data, it needs to be understood that database right is not limited to only personal and sensitive data. The IT Rules protect information pertaining **only** to:

a) Passwords;

b) Financial information;

c) Physical, physiological and mental health condition;

d) Sexual orientation;

e) Medical records and history; and

f) Biometric information.

In India there is no separate legislation for the protection of general database rights as is the case in the European Union (EU Data Protection Directive 1995) or the one proposed in Singapore (Personal Data Protection Bill). The limited protection available to database rights in India is as follows:

1. Article 21 of the Constitution guarantees every citizen the fundamental right to personal liberty which includes the right to privacy and by extension private data not available in public domain. This right extends to data in electronic forms and the Information Technology Act, 2000 ("IT Act") vide Section 66E dealing with punishment for violation of privacy, facilitates protection of such data.
2. Copyright to a database (rights associated with the labour and investment involved in compiling data, verifying it and presenting and using it in a format which creates a value in such data) is protected under the Copyright Act, 1957 ("Copyright Act") and the provisions of the IT Act which deal with protection of data along with penal provisions dealing with compensation and violation of the same act as a deterrent in respect of a person seeking to divulge the data without the express consent of the person whose data has been provided.

With the phasing out of the traditional means of data retention in physical paper form like telephone directories, yellow pages and instead a switch to data being retained in electronic form, it has become easier for a person to copy the data of another and distribute the same for commercial gain. With the absence of a specific legislation on database, companies have to rely on the interpretation of the Copyright Act by the courts, especially those pertaining to how database is a literary work and thus protected under the Copyright Act. In the case

of *V. Govindan* v. *E.M. Gopalakrishna*[1] the court held that the Copyright Act only protects slavish imitation of data. This interpretation would not adequately check the menace of copying another person's database with slight modifications.

The court in *Burlington Home Shopping* v. *Rajnish Chibber* has gone further and have recognized that compilation is also a literary work and thus protected under the Copyright Act[2]. The reason for the protection being that, considerable amount of effort, money and time is spent on putting together a compilation. However the essence of copyright protection extending to compilations has been captured in *Eastern Book Company* v. *D.B. Modak*[3]. In this case the court held that unless a work has been prepared by own labour, skill and there is originality and creativity in its generation, it will not be a protected work. It recognized that compilation may have nothing original on their part but it is the whole work which constitutes an original work as considerable skill and labour are put in. The court also observed that changes like spelling, corrections of typographical errors, additions or eliminations of quotation do not constitute a significant work to warrant a copyright protection in a compilation. Database, especially when it pertains to assimilation of data may not necessarily constitute an original work, additionally with the extensive amount of data possessed by companies, correction and verification of it also require significant effort and therefore has the ability to be distinguished from an earlier work.

Multinational companies take pride in the database of the clients they possess. The value of the right in database and its association with the companies' goodwill is increasingly leading to actions by companies for their protection. Recently GoIbibo terminated the services of its marketing agency as it had GoIbibo's database for sending out promotional emails for another company. In fact some franchising and marketing agreements mandate sharing of data and defines ownership at dissolution of the arrangement. When such agreements propose to deal with personal data, particularly the physical condition or sexual orientation as most traditional forms filled by customers of marketing companies, restaurants, retail chains require, a duty is enjoined upon them to formulate a privacy policy which should be intimated to the information provider.

In summary it can be said that the database right is recognized in India under various statutes, but the protection of value in these rights need to be further appreciated. Companies while creating and harnessing data have to understand the value in these rights and need to jealously protect their asset from unauthorized dissemination, as besides the loss of commercial value in the database, they are also opening themselves to liability under the IT Act and IT Rules.

[The author is a Senior Associate, Corporate Practice, Lakshmikumaran & Sridharan, New Delhi]

1 AIR 1955 Mad 391.
2 61 (1995) DLT 6.
3 Appeal (Civil) 6472 of 2004.

Circulars & Notifications

Cost audit report and compliance report – Last date for filing extended to 28-2-2013: The last date for filing Cost Audit Reports and Compliance Reports for the year 2011-12 in eXtensible Business Reporting Language (XBRL) including overdue reports for previous years has been extended. As per Ministry of Corporate Affairs' General Circular No. 2/2013 dated 31-1-2013, the reports have to be filed within 180 days from closing of company's financial year related to the report or by 28-2-2013, whichever is later. The due date was 31-1-2013 earlier, according to circular issued in December, 2012.

SEBI - ESOP Guidelines amended: In order to prevent listed companies from setting up trusts and dealing with their shares in the secondary market causing fraudulent fluctuation in the price of their securities, the Securities Board of India (SEBI) has inserted Clause 35C in the Equity Listing Agreement and Clause 22B in the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999 (ESOP Guidelines) vide Circular No. CIR/CFD/DIL/3/2013 issued on 17th January, 2013. SEBI has clarified that all employee benefit schemes linked to securities of a listed company shall be compliant with the ESOP Guidelines. It has further mandated that such schemes shall not involve acquisition of shares from the secondary market.

SEBI (Investment Advisers) Regulations, 2013 introduced: SEBI has issued the SEBI (Investment Advisers) Regulations, 2013 on January 21, 2013. An important feature of these regulations is contained under Regulation 19 (3) that mandates that every investment adviser must conduct yearly audit in respect of compliance with these regulations from a member of Institute of Chartered Accountants of India or Institute of Company Secretaries of India. The new regulations will come into force from the ninetieth day of publication of the regulations in the gazette i.e. 20-4-2013.

News Nuggets

SEBI proposes stringent buyback norms

In a Discussion Paper titled 'Proposed modifications to the existing framework for buy back through open market purchase' the Securities Exchange Board of India (SEBI) has proposed to revamp the guidelines for buyback of shares by listed companies. Citing failure of the present system to achieve the objectives of buyback 'in spirit' the regulator has proposed the following changes: (a) Presently Merchant Bankers have been advised to ensure that the company buys back at least 25% of the original quantity proposed. SEBI may increase the requirement of ensuring buy back of at least 25% of the proposed buy back to 50%; (b) Reduce the time limit for completing buy back to 3 months from 12 months; (c) Mandate a deposit of 25% of the total proposed buy back amount in an escrow account; (d) Prohibit a company post buy back from raising capital for two years; (e) Tender route shall be compulsory for the buyback if it exceeds 15% of the paid up capital of the company.

SEBI to align Listing Agreements with Companies Bill, 2012

In a consultative paper on Corporate Governance, SEBI has proposed to align the corporate governance principles reflected in the Companies Bill, 2012 and Clause 49 of Equity Listing Agreement. The Consultative Paper inter alia proposes appointment of independent directors by small shareholders, approval of the shareholders for divestment of major subsidiaries, and increasing the role and responsibilities of institutional investors. The paper proposes certificate course and training for independent directors, treatment of nominee directors appointed by public finance institutions as independent directors and limiting the term of independent directors. If implemented, it will strengthen the position of the small shareholders and increase the level of disclosures but may also make companies seriously consider the implications of public listing. Interestingly, in the paper SEBI has left for the comments of the stake holder the question whether a listed company should be permitted to enter into agreements granting superior affirmative rights to selective investors.

Ratio Decidendi

Competition Commission holds BCCI guilty of abuse of dominant position: The Competition Commission of India (CCI) has held the Board for Control of Cricket in India (BCCI) guilty of abuse of dominant position in connection with the Indian Premier League (IPL) and imposed a fine of Rs. 52.24 crore on BCCI. The informant had alleged irregularities in the organization of IPL and in the sale of various rights associated with same *viz.* franchise rights, media rights and other sponsorship rights. The Commission, while concluding that BCCI is a de facto regulator of sport of cricket in India, and after noting that 'not-for-profit' society form as claimed by BCCI does not take them out of the definition of the enterprise, held that BCCI falls under the definition of an "enterprise" as used in the Competition Act, 2002. It was further held that BCCI also enjoys a "dominant position in the market for organising private professional league cricket events" in the country and that there is no clear separation between the regulatory and the commercial roles of the BCCI. The Commission concluded that by agreeing not to grant sanction to any other professional domestic cricket league during the period of the media rights agreement, the BCCI used its regulatory powers to reach a commercial agreement; hence there was abuse of dominant position in contravention of Section 4(2)(c). [*Surinder Singh Barmi* v. *BCCI* - Case No. 61/2010, decided on 8-2-2013].

Mandatory registration with association is restrictive: The Competition Commission of India has held that the conduct of Motion Pictures Association in pressurising the informant to settle the dispute with one of the exhibitors was anti-competitive. In the present case, the informant stated that as per normal industry practice, a film distributor, prior to booking of theaters in any particular territory, is required to obtain registration of the film with the distributors' association in that territory. A distributor who refuses to become a member of the association and/ or refuses to

register his film with the association is not allowed to distribute and exhibit its film in the territory which is regulated by such association. The informant was denied registration of a film on the pretext that certain monetary claim of one of its members was outstanding towards the informant. The Commission while noting that in its earlier orders it was held that the requirement of compulsory registration of films with the concerned trade associations is restrictive in terms of the provision of Section 3 of the Competition Act, held that the activities of the opposite party did not bring in any improvement in production or supply of films or bring technological improvements. It was held that the opposite party in the garb of acting as an arbitral forum for its members cannot engage itself in a conduct which is contrary to the provision of the Act. The Commission concluded that the acts and conduct of the opposite party instead of bringing in pro-competitive effects have caused appreciable adverse effect on competition. [*Shri Ashtavinayak Cine Vision Limited* v. *PVR Picture Limited* - Case No. 71 of 2011, decided on 10-1-2013].

Obligated entities when consuming power from co-generation power plant: The Appellate Tribunal for Electricity has held that definition of 'obligated entity' under the Orissa Electricity Regulatory Commission (Renewable and Co-generation Purchase Obligation) Regulations, 2010 would not cover a person consuming power from a co-generation plant. It was however held that since the appellant was consuming only a small percentage of power from co-generation plant, while consuming mainly from conventional coal based power plant, it would be covered under the said regulations as obligated entity. As per Regulation 3(1), every obligated entity shall purchase not less than 5% of its total annual consumption of energy from co-generation and renewable energy sources and it was the contention of the State Commission that the appellant was aiming to fulfil its obligation only from co-generation and not from renewable source. The Tribunal while remanding the matter back to State Commission noted that while the Commission allowed obligated entities to purchase entirely from renewable sources of energy, it has not relaxed the requirement of consumers consuming electricity from captive co-generation plants for purchasing from renewable source of energy in the light of the judgment in *Century Rayon* case. [*Vedanta Aluminium Ltd.* v. *Orissa Electricity Regulatory Commission* – Order dated 31-1-2013 in Appeal No. 59 of 2012].