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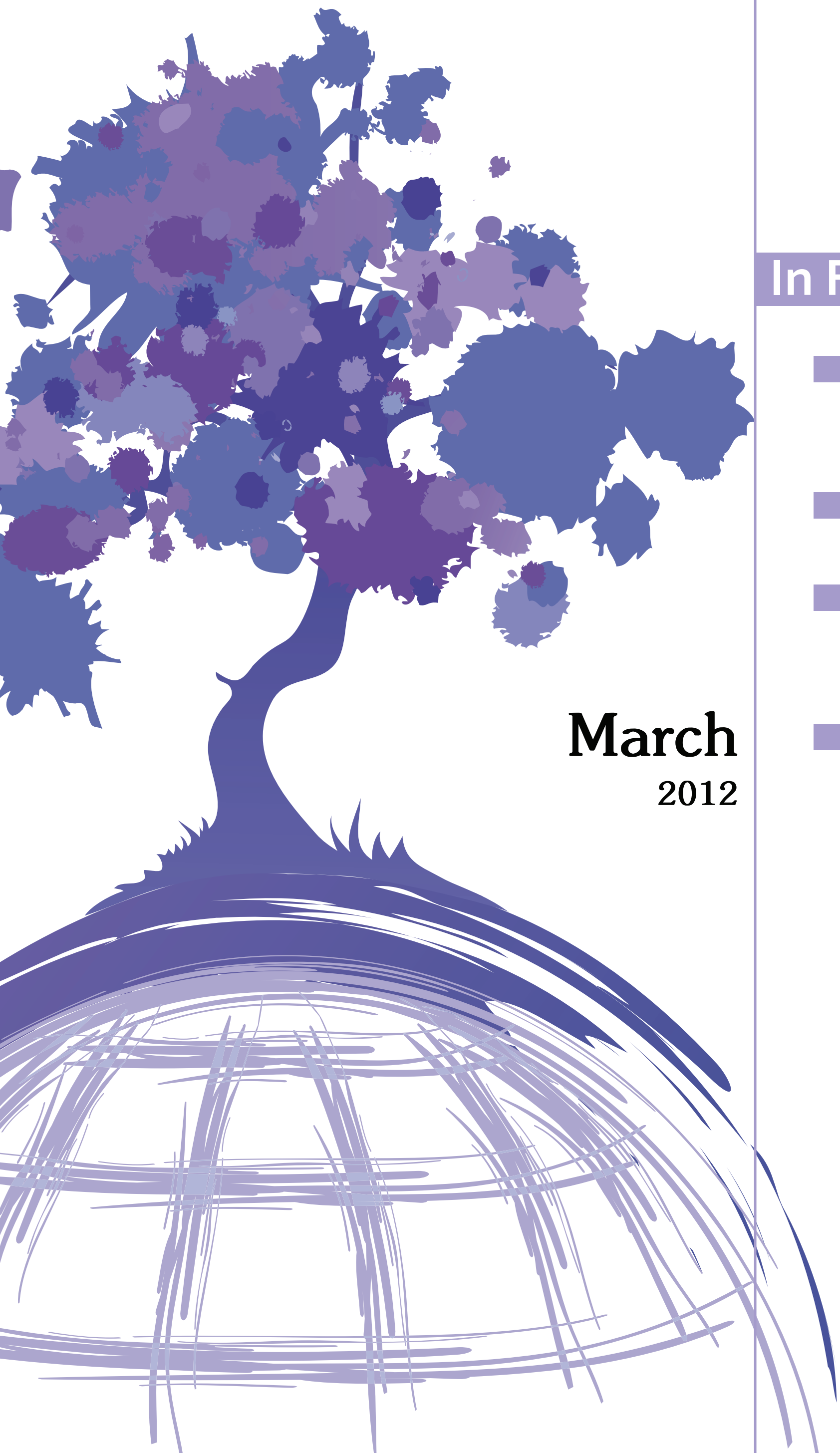

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Fair dealing and broadcasting rights

By **Sayaree Basu Mallik**

Rights of broadcasting organizations are dealt with in Chapter VIII, which provides in Section 37(1) of the Copyright Act, 1957 ("the Act") that every broadcasting organization shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts. [1] Broadcasting Right is a separate and distinct right from copyright. Sections 13 and 14 of the Act make it clear that copyright will subsist only in a 'work'. 'Work', as defined under Section 2(y) of the Act, does not include 'broadcast'. The Statement of Object and Reasons to the 1994 Amendment Act provides that "Certain rights akin to copyright are conferred on the broadcasting authorities in respect of programs broadcast by them" and extends certain exclusive rights to all broadcasting organizations. From a reading of Section 37 of the Copyright Act as well as the Statement of Object and Reasons, it is evident that the definition of 'copyright' under Section 14 of the Copyright Act did not provide any protection to the broadcasters. Case-laws also treat satellite broadcasting rights as a separate and independent set of rights. [2]

However, inter-mingling of copyright and broadcasting right results in certain interesting issues. It is pertinent to note that there is no concept of fair dealing in relation to infringement of copyright in a cinematographic film or a sound recording. In other words, the fair dealing exception to infringement under Section 52(1) (a) does not apply in a case of infringement of cinematograph film or sound recording. However, fair dealing is available as an exception to infringement in the case of a broadcast reproduction right, by virtue of Section 39. However, because these two categories of rights are recognized and distinct and independent, if what is broadcasted amounts to a copyrighted work, then the defence of fair dealing is not available against the right holder of the copyrighted work, though it would be available against the right holder of the broadcast reproduction right. [3]

For instance, in the case of Super Cassettes Industries Limited v. Mr. Chintamani Rao and Ors. [4] , the Delhi High Court differentiated between the two sets of rights, i.e., copyright and "special broadcasting right". The Court distinguished the situation of broadcast of cricket matches from a situation of broadcast of sound recordings. In the case of broadcast of cricket matches, it was noted that although the visual recording of the cricket match becomes a cinematograph film, it does not become the film of any underlying copyrighted work but only of certain events. [5] The Hon'ble Judge observed that in the case of broadcast of cinematograph film, the plaintiff's cause of action is the infringing use of its copyrighted works by the defendants' act of broadcasting them, i.e., communication of the work to the public, which is a completely different situation

[1] *Also the WIPO Performances and Phonograms Treaty (WPPT 1996) grants the right of broadcasting (except in the case of re-broadcasting).*

[2] *As held in Raj Video Vision v. Sun TV, 1994 (2) Madras Law Weekly 158; approved in AA Associates v. Prem Goel, AIR 2002 Delhi 142; similar view has been taken in Video Master v. Nishi Productions, 1998 (18) PTC 117.*

[3] *See, however, Dreier, Thomas, "Unsolved copyright issues in the digital and network environment", Copyright World, No.48 (1995).*

[4] *Order dated 11-11-2011, in CS(OS) 2282/2006 along with I.A. No. 13743/2006.*

[5] *Id. at paragraph 48.*

covered under Section 14(d)(iii) and not Section 37.[6] The defendants' plea that their acts of broadcasting copyrighted cinematograph films were covered under the doctrine of 'fair dealing' was, therefore, rejected since such a defence was not available for infringement of a copyright in a cinematograph film.[7]

Of course, if any form of commercial exploitation is sought to be obtained, this may negate the plea of fair dealing[8]. For example, if under the guise of news reporting, a party was to announce that they would be showing the highlights of the cricket match or something that transpired therein and preceded the same with a commercial break or immediately follow such broadcast with a commercial break, it would ipso facto point to a reasonable inference that a specific attempt at commercial exploitation is being made. If the object is to get the audience to watch the news channel for such extended coverage rather than to impart news and events, it would act against the concept of fair dealing.[9] Similarly to make an entire programme of, say, half an hour, revolving around a cricketing incident, may not be faulted, if the entire visual of the programme is merely the repeat telecast of what was actually broadcast by an authorized broadcaster, such telecast would certainly amount to commercial exploitation, especially when the factum of the programme being aired later in the day is constantly advertised / announced by that news channel and such programme is also liberally interspersed with commercials. This would also amount to a direct competition with the authorized broadcaster since nature of both the programmes is sporting news.[10]

In the case of *ESPN Star Sports* v. *Global Broadcast News Ltd. and Ors.*[11], the Delhi High Court observed that fair dealing cannot be pre-judged and instead, can only be decided on a case-to-case basis. It held that fair dealing was purely a question of fact and no order could possibly be made in relation to fair dealing, except after a full trial of issues alleging breach of fair dealing.[12] The court went on to state that in the context of re-broadcasting, there was no universal prescribed time cap and determination of the extent to which an allegedly infringing telecast was exempt under the doctrine of fair dealing, would necessarily depend on the facts and circumstances of each case.[13] To establish the relevant parameters to be used in determining fair dealing, the court adopted the parameters laid down in the case of *Media Works NZ Limited and Anr.* v. *Sky Television Network Ltd., wherein it was stated that "fair dealing meant that the extract must be brief, and should be considered in light of the length of the recording."*

Broadcasting encompasses enormous economic value in fields like education, information, entertainment, broadcasting, media, and design. But not many of the previous judicial precedents given in the context of broadcasting give us the governing principles on it.[14] While it can be well appreciated from the above stated judicial precedents that application of doctrine of fair use in the context of broadcasting rights is completely based on the facts of every case and no universal time cap can be prescribed for it, it can be said that clarity is needed on what is the difference between application of fair use under Section 52 and under Section 37 of the Copyright Act.

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[6] *Id.*

[7] *Id. at paragraph 105.*

[8] *See, Super Cassettes Industries Ltd v. Hamar Television Network Pvt. Ltd. & Anr., 2011 (45) PTC 70; Prasar Bharti v. Sahara TV Network Pvt. Ltd. & Ors., 2006 (32) PTC 235.*

[9] *Vikram Raghavan, Communiction Law In India (Legal Aspects Of Telecom, Broadcasting, and Cable Services) (Butterworths, 2007) Page 266*

[10] *Id.*

[11] *2008 (38) PTC 477 (Del)*

[12] *Id. at paragraph 12 (i).*

[13] *Supra note 11 at paragraph 26.*

[14] *ESPN Software India Private Ltd vs. Tudu Enterprise and Ors. CS (OS) 384/2011 decided on 8.2.2011*

IPR LAW & PROCEDURES

Australian Senate raises the bar with Intellectual Property Laws Amendment Bill, 2011

The Australian Senate, on 27th February, 2012, passed the Intellectual Property Laws Amendment ("Raising the Bar") Bill, 2011. The Bill, which saw a unanimous endorsement, has now been returned to the House of Representatives and is expected to see a clear way in the autumn session of 2012.

The 'Raising the Bar' Bill seeks to amend the Patents Act, 1990, the Copyright Act, 1968, the Trade Marks Act, 1995, the Designs Act, 2003 and the Plant Breeder's Rights Act, 1994 and is intended to meet the growing IP needs of the rapidly advancing Australian economy, by encouraging investment in R&D.

The Bill intends to raise standards for grant of patents, by making them more aligned with international standards. It also provides for speedy resolution of patent and trade mark applications by tightening up opposition proceedings. Improvised procedure for trade mark and copyright enforcement may also be observed, as the Bill provides stronger penalties and additional damages in civil infringement proceedings. The Bill seeks to amend the Trade Marks Act and Designs Act, conferring juridical powers on the Federal Magistrates Court with reference to trade mark and design matters. Interestingly, the Bill widens the scope of IP profession in Australia by allowing Patent and Trade Mark Attorneys to incorporate and extend their client-attorney privilege to third-parties.

RATIO DECIDENDI

Compulsory licensing granted by India to produce life-extending drug

The Controller of Patents, Mumbai on 9th March, 2012, allowed Natco Pharma's application for compulsory licensing to produce generic version of 'Nexavar' i.e. 'Sorafenib Tosylate' used for the treatment of advanced stages of kidney and liver cancer. The compound is presently covered by a patent held by Bayer Corporation. The Controller while allowing such application held that the reasonable requirement of the public with respect to the patented invention had not been satisfied as even after 3 years, the patentee had made available only insignificant proportion of the patented product. The Controller while observing that the term "reasonably affordable price" has to be used to balance the interest of consumer without compromising the interest of the innovator, held that the patented invention is not available to the public at a reasonably affordable price. It was also held that the patented invention is not worked in the territory of India. While holding so the Controller held that 'worked in the territory of India' means 'manufactured to a reasonable extent in India'.

As per the order, the working statements (Form-27) filed by the patentee would be considered as material information as to the extent to which the patented product was made available in India. He also noted that grant of such licensing did not violate any provision of the TRIPS agreement under the WTO. Plea on supply of allegedly infringing generic substitutes was disregarded in assessing whether the reasonable requirements of the public have been met by the patentee. This is the first time such provisions of the Patent Act namely Section 84 have been invoked in India [*Natco Pharma* v. *Bayer Corporation* – Compulsory Patent Application No. 1 of 2011 decided on 9-3-2012].

Parallel importation can amount to infringement

Stressing on plain and contextual reading of Sections 30(3) and 30(4) of the Trademarks Act, 1999, the Delhi High Court in a recent case ruled that the section provides for very limited applicability of principle of exhaustion within the domestic market. The plaintiffs alleged that by importing certain categories of printers from the world market and selling the same in India, the defendants had infringed the trademark. The court stated that the right to import is not an unfettered right and that Section 29 of the Trademarks Act, 1999 does not make any exception for importation of genuine goods. According to the court, when goods are imported by a person who is not a registered proprietor of the trademark or a permitted user and used in course of trade, it would amount to infringement.

The Court also held that as per Indian law the word 'market' has a narrow meaning and importation from a right holder in the world market, though lawful, is not a defence against charges of infringement. The defendants were thus restrained from importing, exporting and dealing in printers and their ink cartridges/toners bearing the trademark 'Samsung'. [*Samsung Electronics Company* v. *Kapil Wadhwa & Ors,* Delhi High Court order dated 17-2-2012]

NEWS NUGGETS

Saregama pursues 11 seconds of infringement litigation

Saregama India Ltd., a popular Indian music company, has initiated two infringement proceedings at the High Court of Calcutta in the last one month. In a suit filed against one of the leading Indian film distributors, Eros International Media Ltd., Saregama has disputed incorporation of 11 seconds of the clipping from the famous song 'Dum Maaro Dum', in the last year's popular movie 'Rockstar'. It has been alleged that no prior permission for the same was obtained and when the movie was recently broadcast on television channels and released on DVDs, Saregama decided to sue Eros International. At present, the High Court of Calcutta has granted an interim injunction in favour of Saregama, thereby ordering Eros International to delete the 11 second clipping for the purposes of public broadcast.

In another suit filed on March 2, 2012, Saregama has sued several ISP's, including Dishnet, seeking removal of websites allegedly hosting sound recordings belonging to Saregama, without necessary license permission. The ISP's have been directed by the High Court of Calcutta to block websites hosting such infringing content.