

## Relevance of Copyright and Related Rights for SMEs

Professor Prabuddha Ganguli [PhD]

Advisor, VISION-IPR

&

Adjunct Professor, SJM School of Management, Indian Institute of

Technology, Bombay, Powai, Mumbai, India

[ramugang@vsnl.com](mailto:ramugang@vsnl.com)

Of all the tool of Intellectual Property Rights, Copyright and the Related Rights cover protection for the broadest range of innovative works. It provides a framework for the protection of creative works that are expressions fixed in any medium. Copyright by its very nature interfaces with the publishing, photography, computer generated works, entertainment including films, drama, architectural, works of artistic craftsmanship, audio recordings, dance forms, educational, transmission / broadcasting, art including industrial drawing, sculpture, painting, lectures etc. Creative expressions are as old as human societies and hence this field of IPR also gets organically linked to cultural dynamics of societies. The associated IPR issues need to be appreciated and addressed. [see *Intellectual Property... A Powerful Tool for Economic Growth* WIPO Publication No. 888, Chapter 6, pages 190-236]

There is thus copyright of the creators in literary, dramatic, musical and artistic works and neighbouring rights or related rights for those who produce sound recordings, films, broadcasts, cablecasts and published editions.

Central to copyright are the recognition of the creator and the owner of the work. Hence documentation and establishment of the author, the time, place of creation of the work, the nature of the creative work and the circumstances under which the work is created are of paramount importance. Based on these parameters, the work qualifies for a copyright or neighbouring and related rights (in some texts also defined as entrepreneurial copyrights). Accordingly the copyright law has provisions for ownership, nature of the right, the duration of the right and scope of monopoly. [see *Intellectual Property by W.R. Cornish Universal Law Publishing Co Pvt Ltd, Delhi India, 3<sup>rd</sup> edition, 1<sup>st</sup> Indian Reprint 2001 pages 330-331*]

*For example it is reported that an author and a government-owned publisher have settled their copyright infringement litigation, the Vietnam investment Review has reported. Nguyen Thi Thu Hue an author of popular love stories had sued the Literature Publishing House, a government-owned company for publishing 10 of her stories without her permission or paying her for them. [Managing Intellectual Property, p 6, March 2003]*

Unlike other forms of IPR, copyright subsists as soon as the work is created and fixed in a tangible medium.

Key terms to be appreciate and effective use in the field of copyright are original work, fixed in tangible medium of expression, derivative work, ownership, author, adaptation, artistic work, literary work, work of sculpture,

work of architecture, photograph, musical work, engraving, computer, computer program, performance, performer, composer, producer, cinematographic film, and audiovisual production, publication, broadcast, communication to public, cable-cast, infringing copy, bootlegged, fair use, transformative use, personal use, duplication equipment, reprography, sound recording, work of joint authorship, employment, contract of service, contract for service, government work, moral rights, copyright society and duration/term of right. These are not elaborated here and can be referred to in any standard text dealing with copyright.

Copyright, neighbouring and related rights is therefore of immense significance to all sectors including the SMEs involved in traditional businesses and e-businesses of creative arts, crafts, technologies.

Copyright as a form of IPR has been most strongly influenced by the development of technologies related to communication, reproduction and evolution of the medium for fixing of works. The law has had to keep pace with technology (though with some phase lag) and has had to make several adjustments in its scope, definitions, nature and extent of rights, features of enforcement etc.

## **International Conventions in Copyright**

### Treaties in the field of Copyright and Neighbouring Rights

- Treaty Providing for the Protection of Copyright
- Berne Convention for the Protection Literary and Artistic Works (1886)
- WIPO Copyright Treaty (WCT) (1996)
- WIPO Performances and Phonograms Treaty (WPPT) (1996)

### Treaties providing for the protection of Neighbouring Rights

- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)
- Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971)
- Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974)
- Documents of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (Geneva, December 2 to 20, 1996)
- WIPO Copyright Treaty (1996)
- WIPO Performances and Phonograms Treaty (1996)

## **The effect of Berne Convention**

The Berne Convention protects the rights of authors in their literary, dramatic, musical and artistic works. As per the convention, each Member must follow the principle of National Treatment i.e. where the country or origin is a Berne State, other members must accord to the work the same treatment as they

offer to their own nationals. By this convention, the rights of an author as a result of copyright in one country are recognized in another member state. One therefore does not have to register copyright separately in various Member /states of the Berne Convention. The convention also requires each Member /States to apply national treatment in respect of the rights which it accords to performers, record producers and broadcasting organization.

Advantage may therefore be taken of this convention by the SME sector as their copyright in their country of origin should be adequate to enforce the copyright to their works in any of the Berne Convention countries without having to separately register a copyright application in those countries.

Quaker Fabric has reported that it has successfully resolved another copyright infringement dispute--its fourth in the past year. The case involved a fabric distributor accused of "knocking off" Quaker designs with product brought in from China. Terms of the resolution were not immediately available [Home Textiles Today, Vol. 24, n 19, p 2, January 20, 2003]

A federal court in Manhattan has ordered Penguin to withdraw and pulp its 'Complete Poems of Dorothy Parker' after a successful lawsuit from an amateur anthologist who claimed that the publisher had reproduced his editing work. Stuart Silverstein had his collection of unanthologised poems by Parker published by Scribner in a single volume after turning down an offer from Penguin to publish them as part of a complete collection. An editor working for Penguin confirmed that Silverstein's manuscript was copied for one section of the 'Complete Poems of Dorothy Parker' entitled 'Poems Uncollected by Parker'. [M2 Best Books, UK, July 03, 2003]

Author Barbara Taylor Bradford lost her case against Sahara Television which she claimed had plagiarised three of her novels, especially 'A Woman Of Substance', in its USD13m serial 'Karishma - The Miracles of Destiny'. The Calcutta High Court ruled on 21 July that there had been no infringement of copyright, after temporarily banning the broadcast of the serial following the airing of its first episode in May. Bradford's lawyer said that the court had ordered the payment of costs and damages of approximately two million rupees (USD43,000). The author will appeal against the ruling [M2 Best Books, July 23, 2003]

### **Term of copyright and neighbouring rights**

The rights under copyright have a specified duration of protection.

The term of a literary, dramatic, musical and artistic works shall be at least until the end of the fifth year from the author's death. For sound recordings the term shall be at least up to the end of the fifth year from making or the fifth year from release if release is within fifty years of making. For films the term is at least 50 years from the beginning of the calendar year next following the year in which the film is published. Similarly for broadcast and cable cast the term is till the fifth year from first transmission. In the case of photographs the

term shall subsist until 50 years from the beginning of the calendar year next following the year in which the photograph is published.

It should be appreciated that these are the minimum term of the copyright stipulated by the TRIPS agreement. However various countries have terms more than the minimum stipulated years as is passed by their legislatures. For example the term in India for copyright is 60 years.

### **Case Study**

#### **Importance of documentation to exercise copyright to turn IP dispute into a business opportunity**

*WIPO SME Newsletter October 2003: Contributed from Pankaj Jain, Director (IPR Cell), Ministry of Small Scale Industries, Government of India, in consultation with Mr. Sajan Poovayya*

There is a small firm of goldsmiths at Chikpet, Bangalore in the Southern Indian State of Karnataka. Over the years, the goldsmith, assisted by his son, has been creating new designs, making ornaments, and selling them directly to customers. One day, while visiting an upmarket road in downtown Bangalore, he happened to stop at a famous Jewelry retail outlet of a large Indian industrial conglomerate and was horrified to find on display items of jewelry based on some of his original designs.

The goldsmith was shell-shocked and did not know what to do. His son, however, decided not to take things lying down. He approached an intellectual property rights (IPR) Attorney at Bangalore. Although the goldsmith had not registered his novel designs under the Design law in India, he was able to produce before the Attorney a number of paper-based sketches and drawings (protected automatically by copyright) that he had made earlier in respect of the design in question, which clearly indicated the evolution of the designs. A legal notice was sent to the large Indian industrial conglomerate. In reply the large Indian industrial conglomerate's lawyer argued that there was no malafide and, in fact, the designs had been developed independently by their employees and were coincidentally common.

On receiving this reply, the goldsmith's son went through the records of sales. In the sale register, he was able to locate the details of sale to the large Indian industrial conglomerate who had purchased from them a few pieces of this presentation item for distribution as New Year gifts. This turned out to be clinching evidence and the large industrial conglomerate agreed to settle the matter out of court. As a part of the settlement, a lumpsum payment was made to the goldsmith. It was also agreed that the large industrial conglomerate would stop manufacturing this item and would outsource its entire requirements over the next five years from the small firm.

This case study provides a number of important insights. Firstly, it shows the importance of keeping good records of any drawings, designs and business transactions that may be used in future as evidence in case of an IP dispute. Admittedly, the case would have been simpler had the goldsmith registered his design under the design law of India in the first place. However, having preserved the drawings in a systematic manner (dated, numbered, signed and properly filed) of the gold ornaments in question and having made proper entries in the sale register showing that the large company had once purchased the items proved crucial in turning the case in the goldsmith's favor. Secondly, it illustrates the importance of relying on qualified IP advice. Thirdly, it shows how an IP dispute, may be turned into a business opportunity, as the large company has now become a key client of the small firm of goldsmiths.

#### **The concept of "fair use"**

This attempts to address the issue of how to strike an appropriate balance between the authors' interest in preserving the integrity of copyright, and the public's right to enjoy the benefits that reprography technology offers. Copyright laws in various countries have fair use provisions. The key parameters in the determination of fair use have been 1) The purpose and character of use including whether such use is of commercial nature or is for non-profit educational purpose; 2) Nature of copyrighted work wherein the law

generally recognizes a greater need to disseminate factual works than works of fiction or fantasy; 3) Amount and substantiality of portion used and 4) Effect on potential market or value. A case study will elaborate on the ramifications of this aspect.

Five publishers of scientific, technical and medical publications have filed suit against Paradigm Books, Inc. (Austin, TX), Paradigm Course Resource, Inc. (Minneapolis) and their president and owner, Robert Pyeatt, for copyright infringement. The suit, coordinated by Copyright Clearance Center (CCC) and brought by Elsevier, Inc., The MIT Press, University of Chicago Press, Sage Publications and John Wiley & Sons, charges that the defendants routinely photocopied materials from the publications without authorization.

The defendants operate copy shops near the campuses of several colleges and universities in Minnesota and Texas; the publishers also allege that Paradigm has been operating near the University of Illinois at Urbana-Champaign, under the name Notes & Quotes. The shops are said to have been copying the publishers' materials to create coursepacks, which are selected readings for a college or graduate course.

Copy shops cannot reproduce and sell coursepacks without the rights holders' permission.

In related news, Elsevier, The MIT Press, Sage Publications and Wiley Periodicals, Inc. have settled pending copyright-infringement litigation against Westwood Copies (Los Angeles) and owner Elias Negash. The suit, also coordinated by CCC, alleged that Westwood produced unauthorized coursepacks containing the publishers' material for courses taught at the University of Los Angeles. [American Printer, Vol. 231, n 1, April 01, 2003]

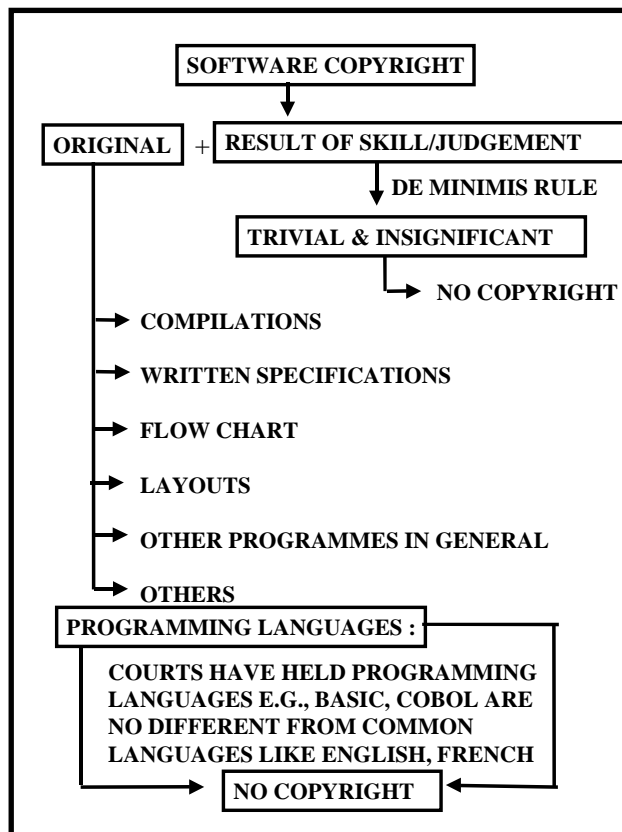
## **Moral Rights**

Moral rights seek to protect the integrity of a work and the author's connection with it. The author shall have the right to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the work which is done before the expiration of the term of the copyright if such distortion, mutilation modification or other acts would be prejudicial to his honour or reputation.

## **Software and copyright**

Historically software has been considered to be a subject matter that may be protected by copyright. It is obvious that any item protected by copyrights automatically comes under the ambit of the Berne Convention, and all statutory provisions under the copyright law become applicable to the software protected by copyright.

The general criteria for the protection of software using copyright are illustrated in figure 2.



**Fig. 2 Copyright and Computer Software**

Ref: "Intellectual Property Rights... Unleashing the Knowledge Economy"; P. Ganguli (Tata McGraw-Hill, India, 2001)

One has to be very clear about the concepts of authorship and ownership of computer programs. The programmer or programmers are to be considered as joint authors of a work. If the work is created in the course of one's employment, then the first ownership goes to the employer in the absence of any contrary contractual agreement. If someone is specifically hired to do develop the program then it is implied that the ownership is assigned to the one who commissioned the work. However one has to exercise considerable care as issues of prior knowledge, proprietary object codes from one's library may be used for the development of the program & the associated applications and hence the issue of authorship and ownership can get fairly murky under such circumstances.

**Technology led case studies**

ESS Technology has filed a motion for a preliminary injunction, or alternatively an expedited trial, in its lawsuit against Taiwanese chip designer MediaTek Inc. for copyright infringement of ESS's DVD firmware and user interface alleging that MediaTek intentionally and unlawfully copied ESS's DVD firmware and user interface in MediaTek's integrated DVD products. The motion requests that the Court issue a preliminary injunction to immediately stop MediaTek's products and DVD players containing those products from being imported into the United States and recall all infringing products from distributors, retailers and end users. Alternatively, the motion asks the court to grant an expedited trial, which would make the injunction permanent should ESS prevail. [DVD News, March 12, 2003; ([www.m2.com](http://www.m2.com))].

Image licensing provider Corbis Corp. expanded its copyright-infringement battle to include Internet retailer Amazon.com Inc. last week, alleging unauthorized use and sale of thousands of images. The lawsuit is the eighth filed by Corbis since November and one of about two dozen cases the company plans to file, a company spokesman says. Corbis, owned by Microsoft chairman Bill Gates, has already settled several suits and received more than \$1 million in compensation. [Information Week, p 12, July 07, 2003<http://informationweek.com/> ]

Yahoo settled a copyright lawsuit brought against it by Sony Music Entertainment and other major record labels in connection with Yahoo's Internet radio service, LAUNCHcast. Yahoo will make an unspecified one-time payment to Sony Music Entertainment for the past use of its recordings. Besides resolving their dispute, Yahoo has entered into a non-exclusive license to play SME-owned recordings on LAUNCHcast. [Online Reporter, February 01, 2003]

Heavy-metal band Metallica in 2000, filed the first of a series of copyright-infringement lawsuits by the music industry against Napster, which led to Napster's closing. Metallica's drummer, Lars Ulrich, delivered to Napster's headquarters the names of 300,000 users he said were illegally trading the band's songs, demanding that they be kicked off the Napster service. [Washingtonpost.com, June 05, 2003]

### **Collection Societies**

The concept of collective administration of copyright has given birth to the concept of collection societies which represent the interest of copyright owners in diverse copyright industries such as in publishing, music, screen writing, film, television and video, visual arts etc. This has become a popular and powerful means of exercising the right so copyright owners. Such societies seek to establish "minimum term agreements, collectively negotiate licence terms, collect royalties and arrange for a fair and equitable distribution of the benefits to the copyright owners after deduction of administrative expenses, etc. SMEs involved in diverse copyright industries should be able to take advantage such arrangements through their industry associations and collection societies.

### **Case Study 1: Effectiveness of Collection Societies**

Record companies in Japan have succeeded in ensuring that a company that operated an illegal, web-based file sharing service and its boss have to pay damages for copyright infringement. At the end of January the Tokyo District Court imposed an interlocutory injunction on MMO Japan and Michihito Matsuda, the company's president, saying they had to pay up for distributing software called FileRogue, which allowed internet users to exchange music files. In a preliminary injunction in April 2002 the court had ordered MMO Japan and Matsuda to stop the service after it rejected their defence that the users of FileRogue were the copyright infringers and that MMO Japan and Matsuda were only facilitating the exchange of files. They had begun the service on November 1 2001. In further hearings the court will determine how much damages MMO Japan and Matsuda should be liable for. When the record companies filed the suit in February 2002 they claimed for (yen) 151 million (\$1.26 million).

The case was taken by the Recording Industry Association of Japan and 19 of its members and Jasrac, the Japanese Society for Rights of Authors, Composers and Publishers. Jasrac has claimed damages of more than (yen) 280 million (\$2.33 million). [Journal Name: Managing Intellectual Property, p 14, March 2003]

### **Case Study 2: Effectiveness of collection Societies**

Film and TV composers have reached a conditional \$25.4 million settlement of their class-action copyright-infringement lawsuit against ABC and Viacom. The suit alleged that ABC, among others, willfully infringed thousands of copyrighted works by illegally placing them in such soap operas as "General Hospital," "All My Children" and "One Life to Live." [Hollywood Reporter, Vol. 377, n 26, p 8, February 26, 2003]

### **Case Study 3: Effectiveness of Collection Societies**

The Recording Industry Association of America settled its copyright infringement lawsuits against four university students. Aaron Sherman and Jesse Jordan of Rensselaer Polytechnic Institute, Daniel Peng of Princeton University and Joseph Nievelt of Michigan Technological University agreed to pay the RIAA between \$12,000 and \$17,500 each for downloading music Napster-style on their campuses. [Managing Intellectual Property, p 12, June 2003]



## Examples of Copyright Licensing, buyouts and settlement of copyright lawsuits

**Data Source:** Patent/copyright infringement lawsuits/licensing awards by Gregory Aharonian; [www.patenting-art.com/economic/awards.htm](http://www.patenting-art.com/economic/awards.htm)

Amount US\$	Year	Parties	Legal Action	Business Area
2,500,000,000	2002	Major League Baseball <-- Fox Television	Copyright License	Sports
1,725,000,000	1996	NCAA Basketball <-- CBS	Copyright License	Sports
820,000,000	2001	Hallmark Entertainment <-- Crown Media	Copyright Buyout	Miniseries
500,000,000	2002	Paramount Pictures <-- KirchMedia	Copyright License	Movies
500,000,000	1998	College Football <-- ABC	Copyright License	Sports
470,000,000	2002	Lucas Licensing <-- Hasbro	Copyright License	Toys
340,000,000	2001	Winnie-The-Pooh estate <- - Walt Disney	Copyright Buyout	Story Characters
301,000,000	1993	Motown <-- Polygram	Copyright Buyout	Music
136,000,000	2002	RIAA <-- Media Group	Copyright Lawsuit	Music
130,000,000	2001	Warner Brothers <-- Walt Disney	Copyright License	Harry Potter
100,000,000+	2003	Celine Dion <-- Caesars Palace	Copyright License	Theatre
82,500,000	1994	Novell <-- Sun Microsystems	Copyright License	Software
75,000,000	1996	Columbia/TriStar <-- USA Network	Copyright License	Television
65,000,000	2002	Polo Ralph Lauren <-- Jones Apparel Group	Copyright license	Clothing
50,000,000	1985	Apple Records <-- Michael Jackson	Copyright Buyout	Music
30,000,000	2002	Michael Crichton <-- HarperCollins	Copyright License	Books
20,000,000	2002	Mariah Carey <-- Universal Music Group	Copyright Advance	Music
19,000,000	2001	Brian Webster <-- 20th Century Fox	Copyright Law Suit	Movie Script
11,700,000	2002	Alexis Leon <-- Nat. Lib. Ireland	Copyright Buyout	Book
5,200,000	2001	Kipp Flores Architects <-- Signature Homes	Copyright Lawsuit	Architecture
4,500,000	2002	Microsoft <-- Lisa Chan	Copyright Lawsuit	Software
700,000	2002	Claudia Schiffer <-- Hello magazine	Copyright License	Photographs

One has to appreciate that copyright spans a wide range of creative activities and the law provides an expansive framework to protect the rights of the creators. This article has attempted to highlight a few aspects of copyrights and its ramifications on creative businesses.

#### Acknowledgements

The author is grateful to Mr Jaideep Verma, Country Manager of Thomson Dialog in India for giving him free access to the dialog OnDisc and dialog @Sitre databases for the preparation of this article. The source of information related to the case studies are from these datsabaseds