



THE EFFECTIVENESS OF THE REMEDIES FOR THE INFRINGEMENT OF COPYRIGHT IN INDIA

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Abstract

Intellectual property is the creative work of the human intellect. Copyright is a kind of intellectual property. It subsists in literary, dramatic, musical, & artistic works, cinematograph films & sound recordings. It is a legal right created by the law of a nation that gives the creator of the original work certain exclusive rights over his work. It protects only the original expressions of ideas & not the underlying ideas themselves. Infringement of copyright takes place when exclusive rights of the owner of copyright are exercised by the infringer without prior permission of the copyright owner. There are three kinds of remedies available for the infringement of copyright, namely, civil remedies, administrative remedy & criminal remedies. In the interest of justice, it is necessary that there should be an effective remedy available for the infringement of a right. In this paper, the effectiveness of the remedies for the infringement of copyright in India is analysed. The remedies for the infringement of copyright in India are not completely effective as there are many problems which made them ineffective.

Introduction

The intellectual property plays an important role in the economic development of a nation. Thus, it is necessary to protect the intellectual property rights. Copyright is a

type of intellectual property. For the enforcement of a right, it is of vital importance that remedies should be available to those who are aggrieved as a result of its violation. The concept of remedies in law is based on the maxim *ubi jus ibi remedium* which means where there is a right, there is a remedy. In India, the Copyright Act, 1957 protects the copyright in various works. In case of infringement of copyright, the owner of the copyright has certain remedies under the Act. There are three kinds of remedies available for the infringement of copyright, namely, civil remedies, administrative remedy & criminal remedies. The existence of a right is meaningless unless an effective remedy is available against its violation. The effectiveness of a remedy depends on its ability to redress the violation of the right. In this paper, the effectiveness of the remedies for the infringement of copyright in India is analysed.

Intellectual Property

Intellectual property means the creative work of the human intellect. Intellectual property right is an intangible right to a product of the human intellect. The main reason of its protection is to promote the progress of science & technology, arts, literature & other creative works & to encourage & reward creativity. Countries provide statutory expression to the economic rights of creators in their creations & to the rights of the public in accessing those creations. Intellectual property includes copyright, trade marks, service marks, patents, geographical indications, plant varieties, utility models, industrial designs, trade secret, etc. The Constitution of India guarantees the right to property as a



constitutional or a statutory right under Article 300A which provides that no person shall be deprived of his property save by authority of law. The expression "Property" in Article 300A includes not only tangible property, but also intangible property, such as the intellectual property rights and includes every possible interest recognised by law. However, the right to property is subject to reasonable restrictions.

Copyright

Copyright is an essential element in the development process of a nation. The level of protection given to literary, dramatic, musical, & artistic works, cinematograph films & sound recordings affects the enrichment of the national cultural heritage. The higher the level, the greater the encouragement for authors to create. Copyright is a legal right created by the law of a nation that gives the creator of the original work certain exclusive rights over his work. However, the exclusive rights are not absolute but subject to the provisions of the Copyright Act, 1957. Copyright protects only the original expressions of ideas & not the underlying ideas themselves. In India, copyright subsists in original literary, dramatic, musical & artistic works; cinematograph films; computer programme; & sound recording. Under the copyright law, the owner of copyright has the right to reproduce the work in any material form; to issue copies of the work to the public; to perform the work in public, or communicate it to the public; to make any cinematograph film or sound recording in respect of the work; to make any translation of the work; to make any adaptation of the work; etc. The term of copyright protection extends to the life of the author & 60 years after his death.

After expiry of the copyright term, the copyrighted work falls into public domain. It means that after the expiry of copyright term, any person can use the copyrighted work without any permission or authorization & without paying any royalty or fee.

Infringement of Copyright

The Copyright Act, 1957 provides copyright protection to the work by conferring certain exclusive rights on its author. The copyright protection is provided to the owner of the copyrighted work to enable him to reap the fruits of his labour & investment to the exclusion of others. However, at the same time, public has also been given certain rights in his work under section 52 of the Copyright Act, 1957 (permitted uses). Thus, if a person uses any of the exclusive rights available to the owner of copyright without his prior permission or without any licence granted by the Registrar of Copyright, he shall be deemed to have infringed copyright provided such use was also not permitted under section 52 of the Act.

Section 51 of the Copyright Act, 1957 lays down provisions regarding the infringement of rights of copyright owner. For copyright to exist in a work, registration is not mandatory, but for availing civil or criminal remedies against the infringement of copyright, such work should be registered. Under section 51, infringement of copyright takes place when exclusive rights of the owner of copyright are exercised by the infringer without prior permission of the copyright owner.

Remedies for the Infringement of Copyright in India



There are three kinds of remedies available for the infringement of copyright which are as follows:

1. Civil remedies,
2. Administrative remedy, and
3. Criminal remedies.

1. Civil Remedies

Section 55 of the Copyright Act, 1957 deals with civil remedies for infringement of copyright. It provides that where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by the Copyright Act, 1957, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.

The civil remedies for the infringement of copyright are of two types which are as follows:

- (i) Preventive civil remedies, and
- (ii) Compensatory remedies.

(i) Preventive Civil Remedies

Preventive civil remedies are used before the actual occurrence of the act of infringement of copyright or before the damage is caused. Due to this reason, these are also the most popular among the remedies.

(a) Interlocutory injunction

Injunction is considered as the most important remedy for the infringement of copyright. Interlocutory Injunction is the main civil remedy which is awarded in cases related to infringement of copyright. An interlocutory injunction is an order of the court to compel or prevent a party from doing certain acts until further order. A temporary injunction consists of two stages, one granted without finally disposing of the

application for injunction to operate immediately till the disposal of the said application & the other granted while finally disposing of the main application to operate till the disposal of the suit. While the former is known as *ad interim* injunction, the latter is known as temporary injunction. In granting interlocutory injunction, three factors are taken into consideration. First, the existence of a *prima facie* case, second, the balance of convenience in the favour of plaintiff & finally irreparable injury would be caused to plaintiff if interlocutory injunction was not granted.

(b) Mareva injunction

Mareva injunction is a particular form of interlocutory injunction. Its purpose is to restrain the defendant from disposing of assets which may be required to satisfy the plaintiff's claim or removing them from the jurisdiction of the court. Mareva injunction was granted in *CBS v. Lambert*¹ case where the principal assets, however, were cars & the order included a provision requiring the defendant to disclose their whereabouts. The prevention of disposal is not of much use if the plaintiff cannot locate the assets when it comes to seek to enforce any final judgment obtained. Therefore, such injunctions are usually sought *ex parte*.²

In India, the Copyright Act, 1957 provides the remedy of interlocutory injunction for the infringement of copyright. Interlocutory injunction is granted under Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure, 1908. The principles laid down in English

¹ 1983 FSR 127.

² V.K. Ahuja, *Law relating to Intellectual Property Rights*, 176 (3rd ed., 2017).



precedents are frequently relied upon & followed in India.

The remedy of injunction is based on equity & it cannot be sought as a matter of right. It is also liable to be refused where the court found that plaintiff had approached it with unclean hands by suppressing material facts & had acted in an unfair & inequitable manner. However, where his claim appears to be *bona fide prima facie*, his rights would have to be protected pending adjudication of his claim in the suit as the purpose is to mitigate injustice to him & avoid the possibility of his being non-suited.

The appellate courts normally do not interfere in the exercise of the discretion by the subordinate courts as the power to grant or refuse an *ad interim* injunction is discretionary. The appellate court does not generally reassess the material on record before that court & substitute its view to grant or refuse a temporary injunction. It also not disturbs the order in this regard even where a contrary view or conclusion is possible. However, at the same time, the appellate court does not hesitate to intervene where the impugned order is found to be against the settled principles of Law regulating grant or refusal of interlocutory injunction or where it proceeded on non-appreciation of nature of controversy or the material on record.

The proviso to Section 55(1) of the Copyright Act, 1957 states that if the defendant proves that at the date of infringement, he was not aware & had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other

than an injunction in respect of the infringement & a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies, as the court may in the circumstances deem reasonable.

(c) Permanent or Perpetual injunction

If the plaintiff succeeds at the trial in establishing copyright infringement, he will normally be entitled to a permanent injunction to restrain future infringements. This injunction operates only during the unexpired term of copyright. It is granted in accordance with the provisions of section 38 of the Specific Relief Act, 1963. The permanent injunction can only be granted by the decree made at the hearing & upon the merits of the suit. The defendant is thereby perpetually restrained from the assertion of a right or from the commission of an act, which would be against the rights of the plaintiff. For obtaining the final injunction, plaintiff need not prove actual damage. If the plaintiff establishes that his copyright has been infringed, the court will grant an injunction without the proof of actual damage. However, at the same time, the plaintiff must show that there is a probability of damage, that this is not, simply trivial.

(d) Anton Piller Orders

In certain cases, the courts in the United Kingdom issue orders *ex parte* on the application of the plaintiff after a hearing in camera & in the absence of defendant, to order the defendant or the occupier of his premises to allow the plaintiff & his solicitor to inspect the defendant's premises. The order permits the plaintiff's solicitor to take possession of infringing copies & documents & other relevant materials or



require the defendant to keep infringing stock, thereby preserving or securing the evidence. The order is called as ‘Anton Piller Order’ named after one of the first reported cases in which such an order was issued.

This order is not a search warrant. It only permits entry & inspection by permission of the defendant. Entry without defendant’s permission in defendant’s premises would be a trespass. But the defendant is ordered by the court *in personam* to give his permission with the result that if he doesn’t do so, he is in contempt of court, but the plaintiff still has no right to enter without defendant’s permission.

Conditions for making Anton Piller Order

This order can be issued only in the most extreme circumstances. It is frequently accompanied by a *Mareva* injunction. The combination of both the orders could have a drastic effect on the defendant’s business. Thus, three conditions must be satisfied before the court issues the order. These are as follows:

1. The plaintiff must prove that he was having an extremely strong *prima facie* case;
2. The plaintiff must prove that he has suffered, or is likely to suffer very serious & irreparable damage if an order is not made; and
3. There must be clear evidence that the defendant has in his possession incriminating documents or things & that there is a real possibility of its being destroyed by defendant before & after the *inter partes* application is made.

If the order is misused by the plaintiff or his solicitor, the defendant is entitled to claim damages from the plaintiff.

(ii) Compensatory remedies

Compensatory civil remedies for the infringement of copyright are of three types which are as follows:

(a) Damages

Damages are awarded to restore the plaintiff to his position before the infringement of his copyright. Thus, such damages are considered as compensatory. The infringement of copyright is considered as a tort & it is the principle of tort law that damages should be compensatory. Damages in tort aim to restore the victim back to his position before the tort. If the infringement of copyright is established, damages are presumed. Nominal damages are always awarded where a legal right has been infringed irrespective of the actual damage. Many factors are taken into consideration to assess the damages, e.g., diminution of the sales of copyright owner’s work, or the loss of profit which he might otherwise have made.

In *Microsoft Corporation v. K. Mayuri*³, the court held that in cases where blatant infringing activities of the defendant are found, damages can be awarded under the following three heads:

i. Compensatory/ Actual damages

Actual damages means the damages which the plaintiff actually suffered because of the infringement of the plaintiff’s intellectual property rights by the defendant.

³ 2007 (35) PTC 415 (Del.)



ii. Damages to goodwill

Such damages are awarded on account of undermining the plaintiff's goodwill & reputation in the market as a result of unauthorised counterfeiting by the defendant of the plaintiff's product.

iii. Exemplary/ Punitive damages

They are awarded to deter the wrong-doer & the like-minded from indulging in such unlawful activities.

(b) Damages for conversion/ delivery up

Section 58 of the Copyright Act, 1957 provides that all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof:

Provided that the owner of the copyright shall not be entitled to any remedy in respect of the conversion of any infringing copies, if the opponent proves—

- (a) that he was not aware and had no reasonable ground to believe that copyright subsisted in the work of which such copies are alleged to be infringing copies; or
- (b) that he had reasonable grounds for believing that such copies or plates do not involve infringement of the copyright in any work.

Section 59 provides that the remedies of claiming recovery of possession of infringing copies or damages for conversion thereof are not available in respect of the construction of a building or structure which infringes or which, if completed, would

infringe the copyright in some other work. The remedies of damages for copyright infringement and for conversion, are cumulative & not alternative. The court may provide both the remedies in the appropriate cases.

(c) Account of profits

In the interest of justice, in appropriate cases, the defendant may be required to account to the plaintiff for profits made from wrong doing such as the infringement of copyright. Thus, the plaintiff has the right to require the defendant to account for the profits made by him by the infringement of former's copyright. This is not a notional computation as with damages, but an investigation of actual accounts. The account is of net profits, that is, the sale price of infringing article as deducted by the manufacturing & delivery cost.

A plaintiff has the right to opt for damages or for an account of profits. He cannot claim both an account of profits & damages. The basis on which an account is ordered is that there should not be any unjust enrichment of the defendant & that the defendant should be deprived of any profit which he earned by wrongful acts committed in breach of the plaintiff's right.

The plaintiff shall be refused an account of profits, if there are no profits. In such a case the plaintiff may opt to claim damages & he shall be bound by his choice once made. The difference between damages & an account of profits is that by the former the infringer is required to compensate the party wronged for the loss he has suffered whereas by the latter he is required to give up his wrongful



gains to the party whose rights he has infringed.

Section 62 provides that every suit or other civil proceeding for the civil remedies arising in respect of the infringement of copyright in any work or the infringement of any other right conferred by the Copyright Act, 1957 shall be instituted in the district court having jurisdiction.

2. Administrative Remedy

For preventing importation of infringing copies in India, the Copyright Act, 1957 provides an effective & quick administrative remedy to the owner of copyright.

Section 53 of the Act provides that the owner of any right conferred by the Act in respect of any work or any performance embodied in such work, or his duly authorised agent, may give notice in writing to the Commissioner of Customs, or to any other officer authorised in this behalf by the Central Board of Excise and Customs,—

(a) that he is the owner of the said right, with proof thereof; and

(b) that he requests the Commissioner for a period specified in the notice, which shall not exceed one year, to treat infringing copies of the work as prohibited goods, and that infringing copies of the work are expected to arrive in India at a time and a place specified in the notice.

The Commissioner, after scrutiny of the evidence furnished by the owner of the right and on being satisfied may, subject to the provisions of section 53(3), treat infringing copies of the work as prohibited goods that have been imported into India, excluding goods in transit:

Provided that the owner of the work deposits such amount as the Commissioner may require as security having regard to the

likely expenses on demurrage, cost of storage and compensation to the importer in case it is found that the works are not infringing copies.

When any goods treated as prohibited have been detained, the Customs Officer detaining them shall inform the importer as well as the person who gave notice of the detention of such goods within forty-eight hours of their detention.

The Customs Officer shall release the goods, and they shall no longer be treated as prohibited goods, if the person who gave notice does not produce any order from a court having jurisdiction as to the temporary or permanent disposal of such goods within 14 days from the date of their detention.

Section 53(1) of the Act empowers the Registrars of copyrights to make an order prohibiting the importation into India of copies of a copyrighted work made outside India which, if made in India, would infringe copyright in the work, on the application of the owners of copyright in such work, or his duly authorized agent, after making such inquiry as he deems fit.

In *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Others*⁴, the Supreme Court held that the word import in sections 51 & 53 of the Act meant bringing into India from outside India & that it was not limited to importation for commerce only, but included importation for transit across the country.

3. Criminal Remedies

The copyright owner can bring criminal proceedings against infringer. This is also

⁴ AIR 1984 SC 667.



called as criminal remedies. The criminal remedy is different & independent of other remedies & can be availed simultaneously to prevent further infringement & punish the infringer. The pendency of a civil suit does not justify the stay of criminal proceedings in which the same question is involved. Besides, a criminal complaint cannot be dismissed merely on the ground that the dispute is civil in nature.

Knowledge or mens rea is an essential element of the offence. Sections 63 to 70 of the Act deal with offences relating to copyright. Section 70 of the Act provides that no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under the Act.

Section 63 provides that any person who knowingly infringes or abets the infringement of—

- (a) the copyright in a work, or
- (b) any other right conferred by the Act except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 3 years & with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 2 lakhs:

Provided that where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.

However, the construction of a building or other structure which infringes or which, if completed would infringe the copyright in

some other work is not an offence and thus not punishable.

Under section 63A of the Act, for the second and subsequent convictions, the minimum term of imprisonment is enhanced to 1 year & minimum fine to Rs.1 lakh which may be relaxed for adequate and special reasons to be mentioned in the judgment where the infringement was not made for gain in the course of trade or business. However, there is no change in the maximum punishment.

The offence under section 63 of the Copyright Act, 1957 is a non-bailable offence. The provisions of section 438 of the Criminal Procedure Code, 1973 can, thereof, be applied in respect of offence punishable under section 63 of the Act.

Knowing use of infringing copy of computer programme

A new Section 63B has been inserted by the Copyright (Second Amendment) Act, 1994. It provides that knowing use of infringing copy of computer programme shall be an offence, under which the offender is punishable with imprisonment for a term which shall not be less than 7 days but which may extend to 3 years and with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 2 lakhs. But, where the computer programme has not been used for gain or in the course of trade or business, the court for adequate and special reasons to be specified in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to Rs. 50,000/-.

Seizures of infringing copies by police

Before the enactment of the Copyright Amendment Act, 1984, seizure of infringing copies by police was possible only after a magistrate had taken cognizance of an



offence relating to infringement under Section 63 of the Act. Also, such seizures could only be of infringing copies and did not extend to plates used for making infringing copies.

The Copyright Amendment Act, 1984 had widened the powers of the police. After the amendment, Section 64 lays down that where any police officer not below the rank of sub-inspector of police is satisfied that an infringement or an abetment of infringement of copyright in any work of has been or is likely to be committed, he may seize without any warrant all copies of the work and all plates used for the purpose of making infringing copies of the work, wherever found. The copies so seized must be produced before a magistrate as soon as practicable.

Section 64 further provides that any person having an interest in any copies of a work, or plates seized may, within 15 days of such seizure, make an application to the Magistrate for such copies, or plates being restored to him and the Magistrate, after hearing the applicant and the complainant and making such necessary inquiry, shall make such order on the application as he may deem fit.

Delivery of infringing copies to the owner of copyright

Section 66 of the Act provides that in a criminal proceeding, the Court may, whether the alleged offender is convicted or not, order that all infringing copies of the work or all plates in the possession of the alleged offender, be delivered up to the owner of the copyright or may make such order as it may

deem fit regarding the disposal of such copies or plates.

Punishment for contravention of section 52A

Section 52A provides that it is compulsory to provide certain information on the sound recordings or video films, regarding the name and address of the person who makes such sound recording or the video film; and the name and address of the owner of the copyright in such works, etc. Section 68A provides that any person who publishes a sound recording or a video film in contravention of the provisions of section 52A shall be punishable with imprisonment which may extend to 3 years & shall also be liable to fine.

Appeal

Section 71 of the Act deals with the provisions regarding the appeals against certain order of Magistrate. It provides that any person aggrieved by an order made under section 64(2) or section 66 may, within thirty days of the date of such order, appeal to the Court to which appeals from the court making the order ordinarily lie, and such appellate court may direct that execution of the order be stayed pending disposal of the appeal.

Effectiveness of the remedies for the Infringement of Copyright in India

The remedies for the infringement of copyright in India are not completely effective as there are many problems which made them ineffective. The effectiveness of the remedies for the infringement of copyright in India can be analysed as follows:



In civil remedies, the remedy of damages is effective when the loss suffered by the plaintiff is an economic loss as only the economic loss can be compensated by way of damages. The harm other than economic loss cannot be compensated by damages. Thus, the remedy of damages is not effective in such a case as the damages cannot restore the plaintiff to his original position if the plaintiff has suffered harm or injuries other than economic loss. They also do not compensate for the time wasted, inconvenience, & stress caused in litigation. The remedy of injunction is effective as in certain circumstances it can effectively prevent further damage to the plaintiff. But it is ineffective also as it cannot compensate the plaintiff for any loss already suffered.

In *R.M. Subbiah v. N. Sankaran Nair*,⁵ the Madras High Court held that injunction being an equitable remedy, which is granted by a court in exercise of its judicial discretion has to be considered from various facets which arise from a particular set of circumstances in each case. There may be cases in which the grant of an injunction temporary or permanent will only meet the ends of justice & an alternative safeguard for the preservation of the rights of the challenging party cannot at all be thought of. The owner of copyright wants speedy & effective remedy to prevent further infringements of his copyright and further damage to his business and cannot afford simply to wait for years until the full trial takes place. As a result, the law provides interim relief to the plaintiff by way of grant of interlocutory injunction. The plaintiff who gets an interlocutory injunction has tremendous advantage because the

defendant is prevented from doing further infringement of his right. The grant of this remedy is within the discretion of the trial court. The discretion exercised by the court is a judicial one which is governed by rules. It is not arbitrary, but legal and regular.

One of the main difficulties with pursuing civil remedies is the cost involved in it. There incur huge amount of cost in litigation for availing civil remedies. Also the cost awarded by the court is lesser than the actual cost incurred by the complainant. Also the people refrain from approaching court for availing civil remedies due to heavy expenses incurred in litigation. This made the remedies ineffective.

The effectiveness of any remedy also depends on how expeditiously the remedy for the infringement of a right is provided to the concerned person. In the judicial system of India, there causes delay in giving the judgements by the courts. Thus, this made the remedy ineffective. Also the judges of the courts do not have the expertise knowledge of the intellectual property rights. This also affects the effectiveness of the remedies badly. In India, there are no separate tribunals especially established for the purpose of dealing cases related to the intellectual property rights. If such tribunals are established in India, then remedies can be provided to the concerned person expeditiously.

From a particular point, criminal remedies are more effective than civil remedies as the former can be disposed of quickly. Besides, criminal proceedings directly strike at the honour & social status of an infringer, as a result of which sometimes he comes for a settlement out of court to save his reputation. The criminal remedies cause a deterrence which has the effect throughout

⁵ AIR 1979 Mad 56.



the market which cannot be brought about by initiation of civil litigation.

Though the Copyright Act, 1957 has provided for enhanced punishment for second and subsequent offence, there is only a slight increase in punishment for second and subsequent offence. The penal provisions of the Act should be made more deterrent for preventing the infringement of copyright.

Conclusion

Copyright is an exclusive right of the author of the original work over his work. In case of infringement of copyright, there are three remedies available which are civil, administrative and criminal remedies. The remedies for the infringement of copyright in India are effective to some extent. There are some problems which made the remedies ineffective to some extent. Thus, appropriate steps need to be taken for the effective enforcement of the rights of the owner of copyright.

