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From Editor's Desk

Delhi Law Review Flagship Journal of Faculty of Law, University of Delhi is designed for contribution from academics, policy makers and professionals globally on matters of contemporary legal issues both in public and private law. Team of Editorial Board of this volume with Dean at the helm of affairs are from different legal streams, hence appreciated contributions which were comparative as well as comprehensive in nature. I hope that readers will enjoy not only the Law and Policy but also understand implementation of various legal issues discussed in this volume.

To reach to the standards of the journal was a challenge to all of us which needed some personal efforts in terms of seeking co-operation from contributors both within and outside country as well as the members of the team. I was fortunate to overcome this difficulty due to exceptionally cooperative members of the editorial team and with freehand given by the Dean coupled with the quick response by the contributors of immense repute. Hence this volume 32(2013) of DLR is for your readership and comments.

This volume is significant as it reflects the interest of authors both within and outside India, who have contributed. Further the contributions made are on important contemporary issues like Intellectual Property Laws, International Arbitration, Humanism, Enemies of state, miscarriage of Justice, Reforms in Post. Graduate Legal curriculum, Research methodology in Law Ethical paradigm for regulation of cyber space. Similarly the contributions made by colleagues within the Faculty on Tribunals, Acid attack, MRTP, GI, sustainable development and Right of children of the imprisoned mothers have added to its strength and standard. I thank all the contributors, the Editorial team and Dean Faculty of Law for their co-operation.

All the views expressed are of the authors; however, the editorial team is responsible for editing. In spite of all efforts, readers may have to bear with me for some mistakes left inadvertently. For such problems none else, but I am alone responsible in the capacity of the Editor.

I am sure that all prospective Editors will equally try to improve the Standard, so that the sheen of the DLR is not only maintained but improved.

Professor S.C. Raina

INSIGHTS INTO SELECT ISSUES OF INTELLECTUAL PROPERTY LAW

Professor Ashwani Kr Bansal*

Writing anything in this dynamic world is risky as the same would be called in question by those thinking critically. The diversity of views and conflicting results projected by researches can practically establish anything as an upshot. There is always a scope for improvement in thought as well as the expression. Many may be antagonized with any submission for variety of reasons. The reputation of an author is always at stake. There is recognition in Plato's Seventh Epistle that "no intelligent man will be so bold as to put into language those things which his reason has contemplated... if he should be betrayed into so doing then surely not the Gods but mortals have utterly blasted his wits."

On the other hand, there is increasing acceptance and tolerance in the knowledge sector that nobody may write the last word and if perfection is pursued as test, the writings would become scarce. Knowledge shall flourish only if it is shared.

Sometimes, it is argued that IPRs and copyright restrict the sharing of knowledge, whereas the chief norm of all IPRs and copyright assures that the subject matter would be made public to Government I P office and themes would flourish with many expressions. Competitive works on same theme are encouraged by copyright law and all IP rights must provide a twin environment of monopoly and competition. Contrary to the belief shared by many about Trade Related Intellectual Property Rights (TRIPS) that losses were caused to the developing countries on its advent, it should be increasingly clear that it brought intellectual property rights (IPRs) not only to centre stage, but also within the reach of common man outside the board rooms of large corporations. Another major contribution of WTO and TRIPS is the theoretical equality of each member.

IPRS NOT BASED ON MORALS BUT ECONOMICS

Though, the developing countries could not persuade the developed countries that IPRs are an economic issue and is not a moral one, yet the reassertion of flexibilities at DOHA proved beneficial. Though the concessions claimed in 1970s and 1980s before conclusion of Uruguay round or WTO got delayed by 25 years but most of. Mostly the developing countries took steps and introduced IP legislations.

It is restated that the readjustment of the IP rights among owners, licensees, users by regulating governments¹ is required and is necessarily an economic and/or political process. We are again in a time when a great surge for assertion of public interest is being experienced.² At the altar of

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¹ Governments are major stake holders. The vested interests of the government or its decision makers are stronger moving forces than the established and proven interests of common population.

² The Adoption of Invents Act in USA and decisions like *Authors Guild vs Google Books* Southern District of New York (05 Civ. 8136) (DC) on Nov 11, 2013 case display a rethink and are to be welcomed.

disbelief or a revelation, permit me to state that IPRs are all about protecting investment and economic value of human effort in the work produced and the protection to creativity and intellect is a by-product in extending rights to those features which cannot be secured physically and therefore are to be protected by laws and writ of the State.

The IPR laws have nothing to do with morality. It is emphasised that laws are respected more because of ingratiating rather than fear of punishment. All IPRs and Copyright are pure and simple economic matter. This view was shared by all developing countries but was contested by developed countries and they still continue to contest the same. USA did not become member of Berne Convention till 1989 as it did not suit its publishing industry.

The right holders in developed countries advance the moral aspect because it is difficult to enforce the IP rights or copyright once the material has been published and user public has access to the same. The enacted law of a country is accepted as positive morality. But has a violator of copyright done an immoral task is difficult to answer.³ The right holder is deprived of some economic benefit due to him.

The publishers deprive authors or performers every day in their legitimate due; there is lack of environment or no strict action to protect them. The difficulty of authors is that they per force have to side with publishers, as only the latter has means/power to earn and to pay the former. The work of authors can see the light of the day only through them.

The oft-quoted observation that copyright is based on the principle found in 8th commandment of Bible, 'thou shall not steal', has been superimposed on copyright system in 20th century in a British case, as also in the celebrated book by Copinger on copyright. The copyright has its origin in protecting the investment made by printers after the invention of printing press and publishers. The authors and performers came much later in the scene in the 19th century. Thus, it has always been protection to investment and capital employed in the work and books including the human capital.

Exploiting the virtue, IPRs not for pride: Gains can be made and wealth may be generated by exploiting the IPRs and not by merely possessing the rights. There is no glory in possession of rights without any meaningful exercise of those rights. Glorifying the possession of IP or copyright without exercising the rights is against IP tradition of generating wealth. There is a cost in creation of IP and also obtaining legal recognition for the same, which must be reaped back by exploitation of rights. Similarly, if a patent is not to be exploited then the application money and other effort should not be wasted, rather publish the results and contribute to technological temper.

DOMINATION OF IPR LITERATURE BY RIGHTS OF OWNERS

Mostly the IPR literature talks about rights of owners, through all conventions as they are more about protecting the investment and ensuring yield on investment. IP literature very bleakly talks

³ Anyone who violates the legal rights of a right holder commits infringement and is liable to pay damages and in case of a gross breach may have to suffer in a criminal action. If a person wants to opt out of a contract, he has to pay damages for breach of contract, but is it immoral or even illegal, it appears none – but damages are to be paid.

of the rights of public or the facilities for users, consumers. The first objective of IPR policy has to be an interpretation favourable to licensees or users or deprived sections of populations or developing countries by all decision makers or courts. Knowledge of IP laws has been under shrouds; it has to be brought in open and those who talk pragmatic about IP have to be encouraged in policy formulation.

Unless the enforcement and abuse of IP is brought to equal level for understanding, the interests of the rich would always have precedence over the national interest as every professional would desire to work for the rich and mighty. The legal literature has to start describing the rights together with malpractices and explaining duties to users.

Take the Copyright Law for instance, mostly the literature is silent as to the implicit permissions to the buyer of copyrighted products. It is an onerous task to inform the people that a book or CD bought by a person carries with it various economic rights of owner of copyright. The buyer has very limited rights in respect of the book or music CD or film CD or such subject matter stored in a medium.⁴ It is a difficult task to expect from the people that the information underlying a book or CD or a sculpture which is available and in their hands, cannot be used by them or that its use is strictly regulated and is in favour of owner. It is in fact a tall order and difficult to achieve. If this message can be disseminated to everyone, then respect for copyright in a work can be built, else it would have to be enforced in those sectors where there is a possibility to earn profits for the creator/ owners subtracting the cost of enforcement. Similarly in trade marks the rights of public are scarce in few provisions like section 30 of Indian TMA.

Knowledge about TRIPS: As against common belief, that TRIPS was not to the advantage of developing countries, it is submitted that it's the most apparent advantage has been that the knowledge of this key instrument of making wealth has been brought into public domain from the close doors of Boards of Companies. The spread of knowledge about IPR acquisition, exploitation, enforcement and curbing its abuse and negotiation strategies has to be the top priority. *It is to be emphasised that the knowledge and implementation of IP strategies contributes more to wealth and availability than creation of IP de novo or making inventions at exorbitant costs.*⁵

I

INSIGHTS INTO COPYRIGHT

An appreciable norm or contribution of copyright law is not permitting any copyright in ideas. The first expressed writing on an underlying idea on any subject, throws open the idea or theme, for development into a work of expression by many others in their versions without violating the rights in the first expression of the author⁶. Thus, the basic norm of copyright⁷ continues that

⁴ The matter contained in book, CD etc. is referred to as 'work' in copyright parlance, in which the copyright is enjoyed by its owner.

⁵ India boasts of cheap medicines and drugs because of an IP strategy and not inventions. It is not the scientists which provide affordable medicine but by the Indian business and policy makers in relation to IP component of Patent law. It is equally apparent that both the courts and policy makers did not contribute building popular domestic trade marks.

⁶ See s 13 and 14 of Copyright Act, 1957. S 13 gives us a list of all subject matter in which copyright subsists. S14 enumerates the rights enshrined in copyright.

there is no copyright in ideas. The sweat of the brow doctrine for vesting of copyright is facing revision in most of the countries, as minimal creativity for vesting of copyright in works is being insisted upon⁸. The shift in law for vesting of copyright is apparent whether, it would do well good or otherwise, can only be determined with the passage of time. The whole copyright law has been put at bay.

Determination of Copyright now with court: Earlier even the trivial expenditure of skill and labour on some existing work led to the vesting of copyright, but now the subsistence of copyright would not be determined till the time a competent court having jurisdiction in the territory would pronounce the minimal creativity and resultant vesting of copyright. Till then subsistence of copyright would remain a matter of opinion of author or publisher. Thus, all the business dealings in subject matter of copyright would flourish on expected outcome of subsistence of copyright.

The stray attempts of a few judges to give copyright to ideas by recognising 'concept note' like situations in India seem to be a disappointment, as it may come in conflict with the underlying principle of copyright. The courts have moved in the direction of protecting the expressed idea of a business opportunity of making a cine film or a series of TV episodes⁹ and in practical terms overruled the Supreme Court case of *RG Anand v Deluxe Films* AIR 1978 SC 1614 in practice. Thus the copyright law is increasingly becoming indeterminate.

A difficulty is experienced in enforcing the copyright as normally all works are value addition on existing works. The above, the Internet and other technological developments pose a serious challenge to the copyright system as also add to the difficulties, however holding out remunerative litigation opportunities for lawyers.

INDUSTRY PRACTICE/ SUPPLEMENT AGREEMENTS OPERATE AS LAW

It is necessary to appreciate that Copyright law in the Act is not a complete code. It only gives minimal rules. Most of the real time issues in copyright are governed by agreements, which operate as supplement to the copyright law. The first major issue is mostly the author-owners and performers both are asked to assign the copyright or performers' rights in favour of publishers or producers. Unless the industry practices are understood or drafting of agreements is intelligent together with negotiating skills, bargaining power and capacity and the environment for enforcement is conducive, the copyright law would contribute little.

Similarly, obtaining a trade mark function from copyright, e.g., seeking to convert copyright in artistic work into a guarantee for selling cosmetics, soaps or FMCG goods and using artistic copyright as a right to restrict competition in goods is an abuse of copyright. In the developed countries such parochial monopoly in the name of copyright is not permitted. It is suggested that exercise of IPRs has to be allowed; only if the rightholder is willing to suffer competition. Even if IPR exists, the exercise of IPR could happen with riders. It needs to be declared as a part of the national IPR policy.

⁷ The judicial discourse has not been changed. The difficulty shall be experienced in interpreting rights in s 14(a) (iii) and (iv).

⁸ See cases of *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* [18 USPQ 2d 1275], *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 and *EBC vs D B Modak* 2007 (13) SCR 182.

⁹ *Urmi Juvekar Chiang v. Global Broadcast News Limited & Anr* 2008 (36) PTC 377 (Bom).

SOUND RECORDINGS AND CINEMATOGRAPH FILMS—DERIVATIVE WORKS

World over Sound recordings and Cinematograph films are considered industrial products liable to competition principles. Necessarily, they need not be given same treatment as is given to basic literary, musical, artistic or dramatic works. Reducing competition in industrial production of sound recordings in the name of underlying primary subject matter of copyright would operate as a threat to the respectability attached to copyright. The job of copyright is economic returns to the author-owner but not the monopoly returns.

Condition of 50000 copies: The underlying work of sound recordings, till 2012, was subject matter of Open General License for making sound recordings by another on payment of a fixed royalty to the copyright holder, if the subject matter had already been incorporated into a sound recording and two years exclusive business had already been enjoyed by the producer of the sound recording. The 2012 amendment added a new section 31C, which restricts the right of competitors to undertake manufacturer of competitive sound recordings in the liberal fashion.

The amendment has enhanced the rights of producers of earlier sound recordings by giving them five years monopoly as against the two years thus reducing competition. The owner of copyright of underlying work which is likely to be owner of sound recording¹⁰ is entitled to receive royalty for a minimum of 50,000 cover versions. Thus the 2012 amendment has accommodated the lobby of sound recordings.¹¹ This number may be reduced by the Copyright Board, in respect of works in a particular language or dialect having regard to the potential circulation of such works. This appears a defeatist measure and an unjust arm twisting of competitors.¹² The royalty for 50000 units may far exceed the original value of underlying copyrighted subject matter which is to be used in the sound recording.

If possibility of making lawful version records would decrease, production of spurious sound recordings would flourish. Thus section 14(a)(iv) has to be seen as subject to the provisions of s 31C which may have to be looked up to.¹³ When a sound recording from one manufacturer or a brand is available, the copyright holder in underlying work has a free hand to give voluntary permissions if not already bound by agreement with first producer of sound recording.

The producers of sound recordings in India have been granted the copyright in India of 60 years. The rest of world gives them a limited right of 25 years under Rome Convention.

AUTHORS/PERFORMERS AND THE CINEMA INDUSTRY

The unequal status and dismal bargaining power of authors and performers *vis a vis* publishers

¹⁰ Per industrial practice the ownership of underlying work is mostly with copyright owner of sound recordings.

¹¹ Section 52(1) (j) which allowed repeated making of sound recordings using the same literary, musical or dramatic work at fixed rate of royalty after two years of first sound recording has been omitted. Of course previously such competitors producers were under declaring the number of sound recordings and abusing liberal rules and required strict careful handling.

¹² Arm twisting of competition by a legal provision enacted by Parliament is preposterous. It shows the mechanical attitude of the drafting committee or a complete sell out to the lobbies of Music Industry.

¹³ The monopoly period and the initial investment in favour of first producer of sound recording could be moderate. The lobbyists of whittling down of section 52(1) (j) and stricter regulation of re-mixes were earlier guilty of fleecing the population by exorbitant prices. Invocation of s 52(1) (j) brought the prices of sound recordings down by almost 75 % or to 1/4th of the then price.

ostensibly forces authors and performers to sign on the dotted line. Consistent efforts on the part of authors/ performers especially the lyricist of underlying literary and musical work in a cinematograph film has led to passing of 2012 amendment also referred as Bollywood amendment. It has delivered improvement in the position of authors of literary and musical works incorporated in cine films.

The new proviso added to section 17 under the 2012 amendment now clearly specifies that the ownership of the rights in the underlying musical and literary work incorporated in a cinematograph film continue to vest with the authors of such works and not the producers of the cinematograph films irrespective that literary or musical work was produced by lyricists and music writers or composers when commissioned by producer whether under contract of service or for services.¹⁴

Further, the imbalance between authors and producers is also rectified by adding three new provisions in section 18 that have reasserted the right to royalty of authors. The first proviso that has been added serves as a safeguard with regard to technology.¹⁵ The second proviso strengthens the right of royalty of an author, by denying him as well the right to waive or assign his right to receive royalties with respect to its literary or musical work incorporated in a cinematograph film or sound recording not forming a part of a cinematograph film.¹⁶

It is to be noted that such a restriction upon the author does not apply in the case of copyright itself, but is only with respect to waiver of the right to receive royalty. This has been done keeping in mind the unequal bargaining power of authors. Apart from this, a safeguard with regard to technology has also been provided for under the same section through.

The 2012 Amendment restricts the applicability of assignment only to those media or modes which were in view at the time of agreement and accordingly the content on media which did not exist or were not in commercial use at the time of assignment cannot be said to have been assigned. Thus, it seeks to protect authors and composers from being made to absolutely and unconditionally part with their copyright, which would disentitle them to the benefits that may arise from technological advancements in the future.

It is submitted that 2012 copyright amendment does not display a direction for the management of economy. At times it has a tilt towards owners and industry; at other times authors of subject matter incorporated in film industry are given better rights but similarly placed in other industries have not been rewarded.

¹⁴ By virtue of the second proviso to section 17 added by the Amendment of 2012. The Supreme Court in 1977 interpreted Proviso (b) and (c) of section 17 in the *Indian Performing Rights Society v. Eastern India Motion Pictures Association* AIR 1977 SC 1443, that these clauses shift the default ownership of copyright from the author under a contract of service to the producer applies to cinematograph films as well as the works created for incorporation in cinema film, led to the vesting of copyright in the underlying literary/musical/dramatic artistic work also in the producer.

¹⁵ The 2012 Amendment restricts the applicability of assignment only to those media or modes which were in view at the time of agreement and accordingly the content on media which did not exist or were not in commercial use at the time of assignment can not be said to have been assigned. Thus, it seeks to protect authors and composers from being made to absolutely and unconditionally part with their copyright, which would disentitle them to the benefits that may arise from technological advancements in the future.

¹⁶ It is to be noted that such a restriction upon the author does not apply in the case of copyright itself, but is only with respect to waiver of the right to receive royalty. This has been done keeping in mind the unequal bargaining power of authors.

IP LAWS NOT CONCERNED WITH EXPORTS: TRUE FOR COPYRIGHT

All IP laws world over including India, *only regulate or restrict imports and not exports.* Exports of IP incorporated products have never been addressed in IP laws. Copyright law of no country mingles in export of copyright content and the same is dealt with in the country of import. In the same vein Copyright Act, 1957 of India does not have any provision dealing with export of any product incorporating copyright content. The export of any 'copyright content product' cannot be infringement of copyright, if the work is legally available in country of export. Such exports do not tinker with any of the rights granted in s 14 or 51 of the Act. Exports from India of copyrighted products introduced legally are perfectly legal.¹⁷

The next issue which I forthwith discuss is that, the Courts in India have on certain occasion's interpreted IPR legislation, a bit in favour of foreign parties. One such instance¹⁸ is interpretation of the 'right to issue copies' in section 14(a)(ii) to the benefit of the foreign publishers in an effort to curb exports of Low Priced editions (LPEs) whether it can be used to authorise the segmentation of copyright markets. Whether a stipulation by a publisher on p 2 of the book can operate equal to legal provision or whether a few cases decided by High Court of Delhi have exceeded in protection to multinational publishers. Applicability of International exhaustion in India was not in issue as that would be relevant only in case of imports and this case had to be judged as per the infringement norms in the country of import.¹⁹

LOW PRICED EDITIONS (LPEs) FOR MARKETS - NOT CHARITY - BUT SHREWD BUSINESS DECISION

The copyright is extended to all works including foreign works together with recognition to the right of public to have access to all copyrighted material at affordable price. It is not to cater to the profits of multinational publishing house or copyright owners.²⁰ Sometimes the authorities, judges and scholars in law education wrongly believe that LPEs are a great charity. The production of LPEs is a perfect profitable business decision with differential pricing. Right holders and publishers do not want to lose customers in low parity value countries²¹. As already stated, if

¹⁷ There can be different copyright owners or rightholders for different countries. The exports from a country would work as import in a country X, and such imports may impinge the copyright of an owner or licensee for such country X. The exports of Low Priced Editions (LPEs) produced for market of India from India, may be and can constitute infringement of copyright in the country of import X, if imported into that territory X without the consent of rightholder for the country X. Moreover, in case the country X follows international exhaustion, then if the initial product (book) is produced and issued under the authority of the rights owner for any territory whatsoever, then it will not constitute infringement of copyright even in such country X (of import).

¹⁸ The other major instance is the development by Indian courts of principle of transborder reputation to favour foreign trade marks in an institutionalized manner and issuing injunctions against domestically registered trade marks to facilitate FTMs. See chapter 23, *Law of Trade Marks in India*, p 695-715, Thomson Reuter, 2014.

¹⁹ India is a country of national exhaustion in copyright for now and foreseeable future. Indian attempt to introduce exhaustion by amending section 2(m) of Copyright Act failed in May 2012, when in last minute the proposed proviso was dropped by the Government.

²⁰ They are copyright owners by assignment, as the original author is mostly coerced to sign on the dotted line to assign copyright, if he desires any publicity to his work, knowledge or existence. Alternate support to authors is completely lacking in India. Present author has not studied the plight of authors in the rest of world.

²¹ Such a system is successfully in operation world over in relation to patented drugs and medicines with similar hick ups.

such editions are not introduced, the resultant higher price and/or non-availability of books are grounds for compulsory license, thus the introduction of LPE is a legal necessity and still gives profits²². These LPEs are normally introduced three years behind full priced editions after fully working out the economy of publication. Many a time remainder²³ books are converted to LPEs and such a sale is able to give the publishers much more value for remainder books than they may earn on them in home countries.

It is common knowledge that publishers of costly books²⁴ divide the markets (segmentation) by timing of supplies and differential pricing.²⁵ Sometimes the quality control of books/goods depends on the purchasing power of the prospective buyers. They produce low priced editions (LPE) separately for various combinations of many territories/countries. *The business model of LPEs is useful to publishers as a profit head and necessary to keep the Competent Authority (Copyright Board in India) for compulsory licenses for costly and non-available books off the hook, while ensuring sales.*

Many a time the trade channels or third party bulk buyers in violation of the conditions put up by publishers divert such books to the countries where same book is tagged at higher price. This may be done by chain sellers or third party bulk buyers without any privity of contract with the publisher or distributors.

Often, economic versions (LPEs) of high priced books are exported to the disliking of the publisher to non-designated area are to be stopped at Customs in the country of import. Such bulk buying re-sellers may even advertise on the Internet. The publishers/distributors hate the movement of such LPE books back home or to high price areas which is in conflict with their marketing strategy. Publishers take all measures to minimize this movement of books, *even though IPR laws do not back any such price or profit maximization strategy, by segmentation of markets.* This branch of law is normally addressed by exhaustion or parallel imports principle.

MISAPPLICATION OF IP LAWS ON EXPORTS

Laws and Courts of Country of export have never had anything to do with exports of IPR subject matter. Once the copies have been issued and/or sold in India, further sale of such books cannot be restricted nor their movement and resale can be controlled by publisher/distributor, and thus there was no occasion for court to intervene.

In *John Wiley case infra* the Delhi High Court protected a US copyright owner by prohibiting an Indian party exporter from despatching LPE books for import into USA artificially extending the scope of section 14 of Indian CRA and calling such export as infringement of copyright in India. The Delhi High Court pronounced the import into USA of a validly issued LPE book by

²² Strategy is similar to fashion industry in which prices are fixed quite high for initial market.

²³ Refer to unsold books saved with publisher for which it gave print order as expected sales or other strategy of publisher, sometimes a remainder book may be sold at 15% of print price of book.

²⁴ Also applicable to patents in drugs, medicines and other goods and trade marks.

²⁵ Even the syllabi of universities in courses are made dependent on the timing of availability of books determined by MNCs. Even the course packs strategy of universities is under attack from MNC publishers by filing high profile cases against legally permitted photostating.

publisher having designated it for supply in 8 countries including India an infringement in India, at the stage of export from India.²⁶ a copyright. The Delhi High Court worked as *forum convenience*, and facilitated the plaintiff to enforce the judgement on the defendant in India and deter others in India. It prohibited from exporting LPE books, and thus the Court took upon itself the work of US Courts and Customs, who were the competent authorities to look at imports without the authorization of right holder for the territory of USA. By doing as it did, the High Court did not only go beyond the statutory law but also transcended every principle of IP law.

The Delhi High Court delivered two judgments with *John Wiley & Inc as plaintiffs*²⁷ on 17th and 20 May 2010 on the important aspect of 'right to issue copies' forming part of bundle of rights in copyright. In both the cases the court was approached by owners of copyright to uphold their right to control the movement/export of the copyright goods (books) as per their stipulation on 2nd page (copyright page) of the book. This stipulation was not by agreement between seller and buyer. In both the cases genuine third party buyers, on principal to principal basis, not having any business connection with copyright owners or their licensees LPE publishers, were offering books for sale on web sites for international customers. The plaintiffs claimed that the books were produced only for the territory of South Asia or Indian sub-continent (listed 8 countries) and issued for these territories²⁸ and therefore could not be taken outside the stipulated area; plaintiff asserted taking books out of this territory is infringement.

The books were validly produced and issued by the licensees of copyright owner and sold in India. The books were bought in India and then were sought to be resold by the buyer ignoring the stipulations of publishers on p2 of the book. Two honourable judges of Delhi High Court in the two cases obliged and issued injunctions in relation to exports of books accepting it as *infringement of copyright. The Court on its own without any enabling provision stated the plaintiffs could validly engage in market segmentation. They artificially declared the ignoring of conditions of sale as inserted on p2 of books on buyers equal to infringement of copyright under section 14 read with section 51 in India, without determining that whether such conditions are binding?*

The High Court did not refer to authoritative book of Copinger or the express wordings of the copyright statute. Copinger (XVth edn 2005) in unequivocal terms in para 7.80. states that in exact 'similar situation of export from UK, the UK courts would have nothing to do with it and it would be a matter to be dealt with by the authorities and the law of country of import'. The law also clearly states that the copyright owner cannot control the movement of literary, dramatic and musical work, not being a computer programme, once it is in circulation.

The law as understood for long in India was sought to be changed by Delhi High Court without any change in the domestic law or international treaties. The High Court unintentionally has catered to the greed of the complainant, but the author apprehends that armed with such a

²⁶ Such a verdict has to be looked as stealing an entrepreneurial opportunity from Indians.

²⁷ Discussion on cases of *John Wiley & Inc v Prabhat Chander Kumar Jain* 2010(44)PTC 675 (Del), *John Wiley & Sons Inc & Ors v. International Book Store* 2010(43) PTC 486 (Del), will follow.

²⁸ Would it mean that despatch of the book from another country out of 8 permitted countries would also violate s 14 of Indian Copyright Act and would constitute infringement in those countries? The book would enjoy copyright in those countries as imported book under corresponding copyright law of those countries.

decision the MNC plaintiff would influence the judicial pronouncements in many other developing countries. The national IP Policy must endeavour to persuade judges to follow an interpretation *pro bono publico India*.

CONTROLLING MOVEMENT OF IP GOODS IS ABUSE (COPYRIGHT)

Assertion of an IPR for imposing any collateral conditions in relation to trade in IP goods or their movement which is not sanctified by law is an abuse of IPR. The purpose of IPR laws or copyright law is to protect the content from unauthorised use and not to control the movement of copyrighted goods mostly undertaken to maximise profits. Anyone who seeks to control the production for overpricing IPR products or uses other restrictive methods is guilty of abuse of IPRs and must not be helped by Courts. Arm-twisting on the strength of an IPR is necessarily an abuse and market segmentation is an illustration of the same behaviour. The Delhi High Court accepted and permitted market segmentation without any legal basis in copyright Act, 1957 and became party to sanctifying profit maximization on the pretext of presence of s 14 (a)(ii).²⁹

Conversion of IP owner's desire into IP Obligation/Norm: It is a basic norm of IPRs that as soon as IPR product is sold in the market, the IPR component of the product is exhausted and any further control over its use or movement by the IP owner is unwarranted. The relationship between such IPR owner and buyer has two aspects— one, IPR obligations and second, the obligations arising from stipulations in contract of sale. There is a continuous effort on the part of IP owners to convert the contractual obligations imposed by them on buyers as IPRs, while selling IPR goods (books in this case). *They also make efforts that their profit maximization strategies are not dubbed as anti-competitive or restrictive or hit by unjust enrichment.* Similarly when an infringement action is brought, the dominant purpose of which is to maximize profits and not control the IPR violation, such proceedings are themselves an abuse of the process of court.³⁰ Admittedly, in export of LPE books to non-desired areas there is no violation of copyright content in the book, which is the sole purpose of copyright law. Using Copyright law for an ulterior purpose other than the purpose of its enactment is abuse of copyright law.

The Author submits to Judiciary that stopping the offer of sale on Internet by a third party buyer/ re-seller of LPE books into the territories not liked or authorised by publisher on p2, which in reckoning of publisher were meant for specific market of India (south Asia), is not and cannot be governed by Indian Copyright Act as it contains no provision to control exports. Section 14 (a)(ii) is a provision ushered in UK and India both completely for a different object whereby the permission of copyright owner became necessary for issue of each copy in addition to initial publication of copyright content. Under the present laws it is the job of Customs or Border authorities or Courts of the country of import, both under Berne Convention or WTO-TRIPS.

²⁹ Section 14(a)(ii) admittedly was enacted completely with different purpose. An interpretation was being impressed that initial publication of the work was with permission of owner and further copies did not require permission of the owner. The amendment was made to insist that production of every copy must have permission of owner of copyright.

³⁰ See such a remark in India by Justice Sanjay Kishan Kaul in *Hawkins Cookers Ltd v Murugan Enterprises* 2008 (36) PTC 290 (Del) para 51.

By the decision in *John Wiley* the Delhi High Court is harming the interest of worldwide users of copyrighted materials. It is harming the interest of weaker users abroad where the same publisher is charging a price which the buyer of such LPE from India cannot afford. The ruling of Delhi High Court declaring exports as copyright infringement would hold good for India, even if importing countries apply international exhaustion and welcome LPE books. *Thus Delhi High Court would be seen as supporting profit maximizing strategies of multinational publishers by artificially permitting market segmentation and imposing ban on exports of validly issued IPR goods without any legal backup.* Indian courts respected as they are in developing economies; however this would cause a permanent harm to access of knowledge.

III

DEBATE ON COMPULSORY LICENSING VIS-À-VIS PUBLIC INTEREST: TRIPS TO MOVE FORWARD FOR DETERMINING PRODUCTION CENTRES FOR INVENTIONS

When the competent authority, as appointed by a national patent law, authorises the exploitation of patented invention without authorisation of the patentee, the authorisation is referred to as a Compulsory License. Compulsory license is issued in recognition of protection of larger public interest. Under a compulsory license, an individual or company uses another's patent and pays the rights holder a set fee for the license. The expression 'other use without authorization of the right holder' is new nomenclature for 'compulsory license' and is conferred by competent authority.³¹ More recently an area of fierce debate has been that of drugs for treating serious diseases such as malaria, HIV and AIDS. Such drugs are widely available in the western world and can help to manage the epidemic of these diseases in developing countries. Such drugs are found too expensive for developing countries when supplied by patentees.

The objective of this part of paper is to project a suggestion that "supply by exports as recognised by TRIPS to be equivalent to local working" needs to be reworked further to achieve an equitable distribution of production facilities utilizing the technology disclosure in patent specifications. How to introduce price competitiveness in the patent products and how to ensure a lower price in low per capita countries has to be factored in. The production centres for supplying the countries must be spread in continents or close to consumption centres.

The Paris Convention, 1883 provides that each contracting State may take legislative measures for the grant of compulsory licenses. The concept of compulsory license was prevalent under Paris Convention and continues in TRIPS. Compulsory licensing by member states is allowed by TRIPS in an effort to strike a balance between public and private interests.

³¹ The phrase appears in the title of Article 31 (not quoted) but does not specifically list the reasons that might be cited to issue a compulsory license.

DOHA ON COMPULSORY LICENSING

The Doha Declaration on TRIPS and Public Health postulates that member countries are free to determine the grounds for granting compulsory licenses. Nevertheless, TRIPS Agreement does prescribe a number of conditions which ought to have been fulfilled before issuing compulsory licences.³² Article 31.f. of TRIPS requires that compulsory licenses be used 'predominantly' for local markets. This requirement complicates the ability of member countries to import medicine or drugs which are produced under CL in another country. Thus, countries lacking indigenous pharmaceutical manufacturing capacities may not effectively access medicines in compliance with TRIPS Article 31.³³

The patentee has to be paid adequate remuneration for CL taking into account the economic value of the authorization, but "adequate remuneration" or "economic value" are not defined. Compulsory licensing does not result in exclusivity to licensees; the patent owner continues to have right to produce. The TRIPS waives the requirement of prior negotiation in emergency cases or when the subject matter of the patent is required for public non-commercial use, in other words government use.

COMPULSORY LICENSES UNDER DIFFERENT JURISDICTIONS THE WORLD OVER

Specific situations in which compulsory licenses may be issued are set out in the legislation of each country and vary from country to country. Some examples of situations in which a compulsory license may be granted include lack of working over an extended period in the territory, inventions funded by the government, failure or inability of a patentee to meet a demand for a patented product and where the refusal to grant a license leads to the inability to exploit an important technological advance, or to exploit a further patent. Compulsory licenses have been issued by several countries for a number of different pharmaceutical products. Compulsory licensing has been resorted to by developing as well as developed countries of the world.³⁴

Thailand issued compulsory licences on three patented drugs in 2007 and despite the criticism had announced compulsory licences on three more drugs in 2008. In **Brazil** compulsory licences have been championed on the basis of public interest. The Brazilian

³² Art. 31, TRIPs Agreement, 1994.

³³ The Amendment to the Scope of Article 31(f) of TRIPs in the Doha Declaration was made to allow countries unable to manufacture pharmaceuticals to obtain cheaper versions elsewhere if necessary. The requirement of domestic production in TRIPS Article 31(f) has been waived on the following conditions:

- The importing country must make an application to the WTO.
- The compulsory license granted in the exporting country shall also be notified to the WTO and be limited to the amount necessary to meet the needs of the importing country.
- Products shall furthermore be distinguishable through specific labelling and marking and information must be published on the internet.

³⁴ For instance, Brazil has issued compulsory license for the drug Efavirenz; Canada for Oseltamivir; Italy for Imipenem/cilastatine, Sumatripan succinate; Israel for Hepatitis B vaccine; Ghana for Generic HIV and AIDS medicines; Cameroon for Lamivudine, Nevirapine; Mozambique and Zambia for Lamivudine, Stavudine, Nevirapine; Indonesia for Lamivudine, Nevirapine; Malaysia for Didanosine, Zidovudine; Thailand for Lopinavir/Ritonavir, Clopidrogel, Erlotinib, Letrozole, Docetaxel and Ecuador for Lopinavir/Ritonavir. During the anthrax crisis and the bird-flu endemic, there was demand even in the USA for compulsory licences to be issued as the medicines in both cases were patented and the emergent situation required immediate production of life saving drugs.

government successfully used CL argument to negotiate price reductions with anti-retroviral manufacturers. Earlier, Roche accepted a price reduction of 40% for *nelfinavir* and in 2005 a price reduction was negotiated with Abbott for the combination *lopinavir and ritonavir*.³⁵ When the patentee, Merck & Co. refused to reduce the price of HIV antiretroviral efavirenz, Brazil issued a compulsory licence.

COMPULSORY LICENSING IN INDIA

The Indian Patent Act contains very broad compulsory licensing provisions. The two provisions that allow for compulsory licenses are sections 84 and 92.

Circumstances under which Compulsory License could be Granted: Under Patent Act, 1970 section 84 (not quoted), a compulsory license can only be granted on the lapse of three years after the issuance of a patent, if one of the following conditions is met:

1. The reasonable requirements of the public with respect to the patented invention have not been satisfied; or
2. The patented invention is not available to the public at a reasonable price; or
3. The patented invention is not worked in India.

Under section 92 (not quoted), a compulsory license could be granted in India in case of:

1. A national emergency (including a public health crisis);
2. Extreme urgency; or
3. In the event of public non-commercial use.

The Indian Act lists circumstances in which the "reasonable requirements of the public" will be considered as not met. These circumstances are:

- When, by reason of the refusal of the patentee to grant a licence on reasonable terms the trade or industry in India is prejudiced; or the demand for the patented article has not been met to an adequate extent or on reasonable terms; or a market for export of the patented article manufactured in India is not being supplied or developed; or the establishment of commercial activities in India is prejudiced.
- When, by reason of conditions imposed by the patentee upon the grant of licenses or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment of any trade or industry, is prejudiced.
- When the patentee imposes a condition upon the grant of licenses under the patent to provide exclusive grant back, prevention to challenge to the validity of patent or coercive package licensing.
- When the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable.

³⁵ Darren Smyth, "Compulsory licences: necessity or threat?" *Chemistry World* (May 2013).

- ♦ When the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by the patentee or persons claiming under him; or persons directly or indirectly purchasing from him; or other persons against whom the patentee is not taking or has not taken proceedings for infringement.

A compulsory license could be granted if the patented invention is not worked in India. An invention is considered to be "commercially worked" in India if the patented invention is: (a) manufactured in India; (b) imported into India³⁶; (c) licensed and forms a part of a product that is sold in India; or (d) commercialized in India in any other manner.

The government can notify a patent for issuance of compulsory license under section 92 if any of the conditions —national emergency, cases of extreme urgency, or in case of public non-commercial use are met. Under section 92 the government can also ask generic makers to manufacture patented drugs in emergency situations.

UPHOLDING PUBLIC INTEREST

The issuance of the compulsory license in India has come under criticism from the pharmaceutical industry having headquarters in developed countries. The governments espouse their interests on the ground that CL would be a disincentive to innovate. It would dissuade potential investors from participating in the business of pharmaceutical innovation which as it is inherently risky.

The developed countries where most of the pharmaceutical industry is based, view it as an affront to their guaranteed rights; while the developing countries consider it their responsibility to provide life-saving drugs at affordable price to the poor people. It is debate between strict competition law arguments and liberal human rights approach.

MISPLACED PROJECTION OF ESSENTIALS OF PATENT

Increasingly, the IP literature mentions that disclosure of invention is the essential bargain as symbol of the patent system. The new justification is being publicised³⁷ from the time of Uruguay round in 1991 and earlier. If one scrutinizes the Patent system in 19th century it was a time limited monopoly right as reward for disclosing the invention in first country, but patent was granted by later countries to encourage local production using local labour and raw materials. The benefits of local production to a country whether by the patentee or a licensee outweigh the supply of the patented item through exports. The developing countries were coerced to accept TRIPS 1994 wherein supply by exports was recognised equal to commercial working. Arguing from patentee side, can a compulsory licence be issued only because a patentee does not manufacture in a particular jurisdiction, but supplies at a reasonable price? In the present TRIPS provisions it can be safely said that a CL cannot be

³⁶ This condition was made effective in 1995 ignoring the vehement opposition by all developing countries. Author desires TRIPS to move forward and introduce production facilities for patents on the basis of geographical spread.

³⁷ The spread of literature is under control of MNCs and a misplaced bargain has been successfully campaigned so as to continue with supply by exports as equal to local working of the patent.

issued in such a circumstance. This needs to change in favour of an international agreement as to establishment of production facilities by the patentees.

GOVERNMENTAL INTERVENTION BEFORE CL AS SUFFICIENT SAFEGUARD FOR PATENTEE

No competitor would ask for a CL unless his venture can be run profitably and no Government would interfere unnecessarily against the patentee interest. Otherwise, as soon as poor or non-availability and high prices of patented product were apparent, the TRIPS and domestic laws both could authorize everyone to produce the patented invention subject to payment of a designated royalty³⁸. It is submitted that the requirement of governmental intervention before the grant of CL has to be treated as sufficient safeguard for patentee. A transparent explanation of the circumstances motivating public interest is essential.

The concept of public interest has always been controversial to ascertain and define. The number of compulsory licences issued throughout the world warrants that they are being issued only in exceptional cases.³⁹ The owners of patents have sufficient clout and strategies to contain the issuance of CLs. The debate on permissible 'exceptional cases and to what extent the issue of CLs should be made flexible' continues. Public interest is a very flexible instrument in the hands of the executive and judicial authorities, and should be utilized effectively.

The government clearance to a compulsory license appears an answer to the desire of government that production under that patent should take place in the country. Looking at the criticality of an invention the governments may legitimately take a view in relation to select inventions. Once the production is situated within the country, whether in the hands of a patentee or a voluntary or compulsory licensee, the government can control prices by various measures including doctrinaire price controls. Moreover, training of personnel in the field of technology is permanently beneficial.

EQUITABLY DISTRIBUTED PRODUCTION CENTRES FOR PATENT EXPLOITATION DESIRABLE

It appears time is ripe for revising the concept that favours "supplying from anywhere as equal to local working" which was accepted at the instance of the developed countries which are homes for MNCs and against the interest of developing countries. The TRIPS may not be revised *status quo ante* and local production may not be insisted upon. For every patented invention having large international supplies, the patentee should be required to establish *production facilities or centres distributing them equitably*. Production

³⁸ TRIPS insistence on governmental intervention before compulsory licensing grant allegedly breeds corruption. It is suggested, if two conditions enabling consideration for compulsory license are fulfilled, the person interested in getting a compulsory license should be permitted to undertake production of invention either at pre-determined royalties or the same may be fixed by a specially empowered Authority/Commission in this regard. The whole matter of royalty payment may be deferred to post production and royalties for utilizing invention can be paid for production *ex post facto*.

³⁹ After 20 years of WTO-TRIPS the time is ripe to achieve goals in New International Economic Order (NIEO 1973), Uruguay 1989, and Doha Declarations. The revision of TRIPS in the sphere of patents, to demand withdrawal of 'supplying the market from abroad' as equal to 'local working' of invention should be insisted which was done while adopting TRIPS in 1994. Such a demand projection takes 20 years to fructify for which Asian and African countries would have to be taken along.