

Is copyright protection really free from procedural encumbrances? An analysis of the requirement for publication for copyright protection

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I. ABSTRACT

According to the Berne Convention, copyright protection should not be subjected to any procedural requirements. But nonetheless, the said protection which is provided will be enhanced if in case certain formalities, which include publication and registration, are followed. Publication, amongst these, is a very important aspect of copyright protection as, according to Indian Copyright Act, copyright protection begins from the date of publication. However, the definition of publication provided under the Copyright Act is vague and it opens up a Pandora's box when we try to apply the said definition to certain categories of work. Against this background, this article aims to demystify the necessity of publication for copyright protection, while also pointing out nuances in the current copyright regime in relation to publication. The author concludes the article by opining a possible solution for the way ahead.

II. INTRODUCTION

The famous *I have a dream speech* by Martin Luther King gave rise to an interesting case, whereby the court had to decide if, after the delivery of the said speech, there was a publication. On one hand, it was argued that there was no publication. On the other, it was argued that there was publication because it was made publicly and it was also argued that the said publication is not entitled for any statutory protection because he has published it without fulfilling any formalities for copyright protection, which would include affixing a copyright notice. But the court has said that mere performance of a work, such as delivery of a speech, is not a publication. The court has held that the speech made in the said case was only a limited publication, which did not deprive Martin Luther King of his Statutory Protection.² This brings up two issues – What is a publication and what is its importance for copyright protection?

Copyright basically is a bundle of rights given by the law to the authors or creators of literary, dramatic,

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² Martin Luther KING, Jr. v. MISTER MAESTRO, INC., 224 F. Supp. 101 (1963).

musical and artistic works and the producers of cinematograph films and sound recordings.³ Copyright gives the author exclusive rights to perform certain acts which are mentioned in Section 14 of the Copyright Act. This protection would start from the date of publication.⁴

III. MEANING OF PUBLICATION

The requirement of publication brings us the importance of the same. Copyright protection is not to be subjected to any formalities, which includes publication and registration.⁵ Initially in the US there was a necessity of notice that is to be given to claim compensation for copyright infringement. They needed to say that the subject matter is protected under Copyright. But later this was removed as the Berne Convention has said that there must be no formalities that are to be fixed for one to claim his copyright protection.⁶ Further through an amendment in 1975 the US has said that protection would be there with the author from the moment of their creation, rather than publication.⁷ But in India, the statutory protection would only start from the date of publication and not from the date of creation.⁸

Even though the protection is not subject to any formalities, there could be enhanced protection if the said formalities are followed. For instance, registration of a copyright would be prima facie evidence of the particulars mentioned therein and it shall be admissible in evidence in all courts without further proof or production of the original.⁹ The necessity of publication is discussed in the later part of the article.

Publication can be defined as the reproduction of a work in tangible form and the general distribution of the copies of the work to the public through which it can be read or otherwise visually perceived. According to the Indian Copyright Act, publication means making the work available to the public by issuing the copies or by communicating the work to the public.¹⁰ It can also be construed to mean a work which is “publicly exhibited”.¹¹ It is to be noted that publication with relation to copyright would differ from publication with relation to other laws.¹² It would also differ from other intellectual property rights.¹³

However, a work shall not be deemed to be published or performed in public if the author/owner of the said

³Government of India, *A Handbook of Copyright Law*, (May 23, 2019, 10:04 AM) <http://copyright.gov.in/Documents/handbook.html>.

⁴§ 22 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

⁵ Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 221.

⁶Article 5(1) of the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 221.

⁷Copyright Law of the United States and Related Laws, 17 U.S.C. § 301 (2016).

⁸§ 22 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

⁹ § 48 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India); *Nav Sahitya Prakash And Ors. v. Anand Kumar And Ors.*, A.I.R. 1981 All 200 (India).

¹⁰§ 3 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India); *Warner Bros. Entertainment Inc. v. Mr. Santosh V.G.*, (2009) 2 M.I.P.R. 175 (India).

¹¹*Amrita Bazar Patrika Ltd. v. Board of High School and Intermediate Education, U.P.*, A.I.R.1955All595 (India).

¹²*Wisner v. Harvey*, 694 So.2d 348 (1996).

¹³*American Visuals Corp. v. Holland*, 239 F.2d 740 (1956).

work has not agreed to the same.¹⁴ The same is reflected in the Berne Convention wherein it is said that published works would mean works published with the consent of their authors and by satisfying the needs of the public.¹⁵

IV. NECESSITY OF PUBLICATION FOR COPYRIGHT PROTECTION

In general, while deciding if there was any fair use of a work, courts look for the nature of the work.¹⁶ Publication would be a very important factor in deciding the nature of the work as the scope of fair use is narrower for unpublished works.¹⁷ But in case it is published then the author's right to control the first public appearance of his work will outweigh a claim of fair use.¹⁸

The procedure for registration of Copyright over a work would also depend on the fact as to whether the work is published or not. If in case the work is published then 3 copies are to be sent for registration. But if in case it is unpublished, two copies would be enough or extracts of the unpublished work can be sent and they can ask for return of the same.¹⁹ If later on the registered unpublished work is to be published then necessary fees is to be paid.

Remedies available for infringement would depend on the fact whether it is published or not. Under the Indian Copyright Regime, innocence is no defence to a charge of infringement of copyright.²⁰ But if in case there is an innocent infringement then relief would vary.²¹ In such cases, the remedy would be through an injunction in respect of the infringement and a decree for the whole or part of the profits made by publishing such document.²² Publication would be a very important aspect here as one cannot claim the innocent infringement if in case there is a Copyright Notice that is made visible on the published copies of the work.²³ Further if there is no general publication then there could be no claim of innocent infringement.²⁴

Common Law Copyrights would depend on publication. Copyright is basically a balance between public and private rights.²⁵ Consequently, an author's interest in privacy may justify his perpetual common-law copyright

¹⁴§ 4 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India); State of A.P. v. Nagoti Venkataramana, (1997) 1 A.L.D.(Cri)54 (India).

¹⁵Article 3(3) of the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 221.

¹⁶Copyright Law of the United States and Related Laws, 17 U.S.C. § 107(2) (2006).

¹⁷Harper & Row Publishers v. Nation Enters., 471 U.S. 539 (1985).

¹⁸*Ibid.*

¹⁹Rule 70(4) of The Copyright Rules, 2013.

²⁰Lahari Recording Company Limited v. Music Master Audio Video, (2008) 3 C.T.C. 385 (India).

²¹Playboy Enterprises Inc. v. Frena, 839 F. Supp. 1552 (1993).

²²Proviso to § 55(1) of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

²³Copyright Law of the United States and Related Laws, 17 U.S.C. § 401(d) (1992)

²⁴Intown Enters Inc. v. Barnes, 721 F. Supp. 1263 (1989).

²⁵Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 Minn. L. Rev. 1724 (2008).

in unpublished works. But if he chooses to give up the privacy and if he wishes to exploit his work by publishing it, the balance of interests would shift in favour of the more limited statutory copyright protection.²⁶

Similarly, an author of an unpublished work has a common law right to control the first publication of that work but the author does not have a common law right to control reproduction following the first publication of the work.²⁷ This would also mean that, if I disclose my work to a particular person on a condition of secrecy, then the one is bound not to disclose same. If he discloses the same, my copyright is infringed. The said duty of non-disclosure is both a legal and equitable duty.²⁸

In India, an author has a right to issue copies of the work to the public if the said work is not already published.²⁹ The author can only sell those copies which are not sold already.³⁰ This brings us to the Doctrine of First sale. Once a copyright owner has allowed copies of his work to be published, he or she cannot subsequently use the public issue right to control further dealings in those particular copies and the buyer can choose to sell the same as he wishes.³¹ So on first sale of the work, the author exhausts his right to control the work.

Damages that are given for unpublished works would vary from the damages that are paid for published works.³² In US, if in case the work is registered within 3 months of its publication then the amount that is claimed would be higher than normal.³³

Date of publication attracts importance as, if a work is published before 21 January 1958, then the previous act i.e, The Indian Copyright Act, 1914, will be applied. The period of protection would start from the date of publication and in general, the term of protection would start from the beginning of the calendar year next following the year in which the work is first published.³⁴ The date of publication is important also because in the *Superman Case* it was said that the date of publication decides the question as to whether the author or the heirs can terminate the contract and renegotiate the same for a better price.³⁵

Place of publication of the book also attracts importance as, if in case the book is not published in India then it would not have protection in India if the author is not an Indian Citizen. An exception to the above rule is given

²⁶MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 7.02 [C] [3] (2007).

²⁷Wheaton v. Peters, 33 U.S. 591 (1834); Donaldson v. Becket, (1774) 2 Brown's Parl. Cases (2d ed.) 129.

²⁸BLB Institute of Financial Markets Ltd. v. MR. Ramakar Jha, (2008) 154D.L.T. 121 (India).

²⁹§ 14(a)(ii) of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India); § 38(1)(a)(ii) of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

³⁰Explanation to § 14 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

³¹Sonata Information Technology v. Additional Commissioner, (2006) 103 I.T.D. 324 Bang (India).

³²Nitish Desai Associates, *Law of Damages in India*, (May 23, 2019, 10:04 AM)

http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Law_of_Damages_in_India.PDF.

³³Copyright Law of the United States and Related Laws, 17 U.S.C. § 104(b)(6) (2006).

³⁴§ 26 of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

³⁵Siegel v. Warner Bros. Entertainment Inc., 542 F.Supp.2d 1098 (2008).

in Sections 40, 41.³⁶

Place of publication is also important as, if in case a work is copyrightable in the country of original publication and it is not copyrightable in India, then Indian law does not recognize that work as being copyrightable even though the book was originally published in a member nation of Berne Convention. For instance, if a country follows the “sweat of the brow” doctrine and if a work is originally published there and even though it is copyrightable there, it is not copyrightable in India as we don’t recognize the “sweat of the brow”.³⁷

V.CONCLUSION

The importance of publication is discussed above. Even after having such an important role to play in deciding the copyright protection, the term publication is very vague. It can have different meanings for different purposes.³⁸

As discussed in the beginning, when Martin Luther King made his famous speech, the court didn’t consider it to be a publication.³⁹ In law itself, the term publication would differ when we consider defamation and when we consider copyright. If a song is available for downloading from a web site, it will be considered “published”.⁴⁰ But if in case songs are made available over the Internet through an on-line file-sharing network they are not considered to be published.⁴¹ Even if we go by the literal definition that our act gives us, which says that there would be publication when work is communicated to public, the question still remains as to whether if in case I exhibit the work to 10 people, would it constitute a publication? Hence there is surely a need to find a definition which would apply effectively and which would not cause any ambiguity. Such a definition should be in a way that would apply aptly to all subject matters of copyright.

³⁶§ 13(2)(i) of The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

³⁷Eastern Book Company v. D.B. Modak, (2008) 1 S.C.C. 1 (India).

³⁸ American Visuals Corp. v. Holland, 239 F.2d 740 (1956).

³⁹Estate of Martin Luther King, Jr. Inc., v. CBS, Inc., 194 F.3d 1211 (1999).

⁴⁰Copyright Law of the United States and Related Laws, 17 U.S.C. § 101 (2006).

⁴¹Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976(2008).