CONCLUSION AND SUGGESTIONS

Copyright infringement occurs when someone other than the copyright holder copies the "expression" of a work. This means that the idea or information behind the work is not protected, but how the idea is expressed is protected. For example, there have been many movies about Pirates, but only one Jack Sparrow.

Copyright infringement can occur even if someone does not copy a work exactly. This example of copyright infringement is most easily apparent in music and art. Copyright infringement occurs if the infringing work is "substantially similar" to the copyrighted work.

COPYRIGHT INFRINGEMENT OCCURS WHEN THE COPYRIGHT OWNER’S RIGHTS ARE VIOLATED.

To fully understand copyright infringement, you must understand what rights you hold as a copyright holder. You own more than just the rights to reproduce the work filed with the US Copyright Office.

An owner of a copyright owns a "bundle" of rights. Each of these rights can be sold or assigned separately. Copyright infringement occurs when one of those rights are used without the express consent of the copyright owner. The rights owned by the owner of a copyright include:

- The Right to Reproduce the Work. This is the right to reproduce, copy, duplicate or transcribe the work in any fixed form. Copyright infringement would occur if someone other than the copyright owner made a copy of the work and resold it.

- The Right to Derivative Works. This is the right to modify the work to create a new work. A new work that is based upon an existing work is a "derivative work." Copyright infringement would occur here if someone wrote a screenplay based on
his favorite John Grisham book and sold or distributed the screenplay, or if someone releases or remixes of one of your songs without your consent.

- **The Right to Distribution.** This is simply the right to distribute the work to the public by sale, rental, lease or lending. The music industry lawsuits targeting file-sharing web services claim that these services violate the right to distribution held by record labels.

- **The Public Display Right.** This is the right to show a copy of the work directly to the public by hanging up a copy of the work in a public place, displaying it on a website, putting it on film or transmitting it to the public in any other way. Copyright infringement occurs here if someone other than the copyright holder offers a work for public display.

- **The Public Performance Right.** This is the right to recite, play, dance, act or show the work at a public place or to transmit it to the public. Copyright infringement would occur here if someone decided to give performances of the musical "Oliver!" without obtaining permission from the owner.

**WHAT ACTS DO NOT CONSTITUTE COPYRIGHT INFRINGEMENT – THE EXCEPTIONS**

There are three exceptions to the copyright infringement rules, which allow one to reproduce another's work without obtaining a license or assignment of rights:

- **Fair Use.** This is a doctrine which permits the reproduction of copyrighted material for a limited purpose of teaching, reviewing, literary criticism and the like. Without the "fair use" doctrine, books and movies could not be reviewed and colleges and high schools would not be able to study works by people like Arthur Miller. This is also how television programs such as The Daily Show are able to use copyrighted material in their commentary. "Fair use," however, is determined on a case-by-case basis.
• **Public Domain.** This refers to works which are no longer covered by copyright law. For example, the song "The Star-Spangled Banner" can be performed without ever paying license fees to anyone because the copyright has expired.

• **Non-Copyrightable Works.** Copyright infringement cannot occur when someone uses material that cannot be protected by copyright, such as facts or ideas. However, if someone puts a bunch of facts into the form of a book (e.g. The Farmer's Almanac), copying all or part of that book would constitute copyright infringement.

**COPYRIGHT AMENDMENT ACT 2012 ON PROVISIONS OF INFRINGEMENTS**

What is not an infringement Section 52 of the Act, enlists certain acts, which do not constitute infringement. The Amendment has introduced the following changes:

• Some of the exceptions (such as fair dealing, use for education purpose) which were earlier applicable only in relation to certain types of work (e.g. literary, dramatic and musical works) applicable to all types of work;

• a fair dealing exception has been extended to the reporting of current events, including the reporting of a lecture delivered in public. Earlier, fair dealing exception was limited for (i) private or personal use, including research, and [ii] criticism or review, whether of that work or of any other work. Further, it has been clarified that the storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy, does not constitute infringement.

Following new exceptions have been added in Section 52:

• transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

• the transient and incidental storage of a work or performance for the purpose of
providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy: Provided that if the person responsible for the storage of a copy, on a complaint from which any person has been prevented, he require such person to produce an order within fourteen days from the competent court for the continued prevention of such storage;

- the storing of a work in any medium by electronic means by a non-commercial library, for preservation if the library already possesses a non-digital copy of the work;

- the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device;

- the adaptation, reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format;

- the importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material, that is purely incidental to other lawfully.

- Section 52 (1) D, which deals with the provision relating to version recording has been deleted and a separate Section 31 C has been incorporated, which is discussed in this hotline.

The copyright has been criticised on the ground that it had not benefited the society except enriching a few economically sound persons. Critics of the copyright argued the protection under the copyright adds additional rights to the holder of the
The recent technological advancement in the field of communication particularly Internet, created an apprehension that copyright system in a digital environment may dilute the copyright in future. In support of this, it is argued that the protection and enforcement of copyright in Internet are difficult under the existing law of copyright since the infringement of copyright is easier compared to traditional and practiced methods of copying. The statutory method of enforcing the copyright in the Internet under territorial law sometimes proved to be also non-effective or far from being satisfactory. The copying the music without the knowledge of the owner of the copyright, distributing and downloading it through internet for economic gain are the glaring examples. Therefore, as substitute of copyright, some suggested encryption technology or such embedded software that prohibits copying or control the access to the material appearing on the Internet. But technological protective measures are still in infancy but costly and cannot cope up with the newer copying technology and hacking of encryption. Notwithstanding the criticism against the copyright, no alternative statutory mechanism has been evolved so far which could strike a balance between the interest of the society and the owner of the copyright. The copyright remains till date as the most effective legal method by which the creators of the original work or the copyright and its owners are assured of legal protection against misappropriation of their right and future income.

1. Under the WTO regime the TRIPS Agreement commits both developed and developing countries to provide procedures and measures to enforce intellectual property rights including copyright, which so far have remained different among them under the liberal, permissive regimes of the intellectual property conventions. It requires them to provide corrective measures, viz., injunctions, damages, confiscation or destruction of counterfeit goods, and criminal sanctions as well as preventive measures in the form of provisional and border control measures. Broadly speaking, enforcement provisions require a two-pronged strategy by the members: (1) To enact the law and frame the procedural rules and incorporate in the national legal system, if it does not exist already, and

thereby empowering the courts and appropriate authorities with the power to enforce IPRS. (2) To ensure the proper execution of these rules, on the first aspect there is not going to be much difficulty, because most of the nations, particularly developing counties, are able to give effect to their obligations by undertaking necessary legislative enactment. But the second aspect is most difficult to come-by because it concerns the subjective criterion of "effectiveness", i.e., to what extent these measures function in practice to provide effective protection. This is bound to be fraught with difficulties, for the reasons, what is "fair and effective" and "equitable" remain unclear. Therefore, a National Commission on Enforcement of Intellectual Property Rights is to be constituted to examine these issues.

2. According to the Paragraph 2 of Article 50 of the TRIPS Agreement the judicial authorities must be empowered, where appropriate, to adopt provisional measures without the defendant being heard (inaudita altera perte), in particular where delay is likely to cause irreparable damage to the right holder or where there is a demonstrable risk of evidence being destroyed. This is similar to Anton Piller order followed in the United Kingdom and other commonwealth counties, whose purpose is to preserve the evidence by preventing the destruction or concealment of evidence by an alleged wrongdoer.

Anton Piller orders represent a response to the sophistication of methods for copyright infringement, but are applicable for suspected infringement of all branches of intellectual property rights. Their purpose is to enable the recovery of infringing articles and other evidence of infringement before this can be destroyed or concealed. The order is made ex parte. However, the plaintiff will only succeed if the candidates set out in the Anton Piller case are met. First there must be an extremely strong prima face case. Secondly the damage, potential or actual, must be very serious for the applicant. Thirdly there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any applications inter parties may be made. The Court
made clear that it is open to the defendant to refuse to comply, but this he can do at his peril of further proceedings for contempt. At the same time the Court made it clear that great responsibility rest on the solicitor of the applicant to ensure that the caring out of such an order is meticulously done with full responsibility for the defender’s rights.

However, in India, there is a conflict among High Courts (Calcutta and Delhi High Courts) regarding the applicability of Anton Piller order. This is a substantive question of law. Therefore, this conflict is required to be settled by the Supreme Court of India.

3. Another mandate of the TRIPS Agreement regarding protection of copyright is to have "sufficient" border measure. During the time of negotiation of the TRIPS Agreement India argued that Indian Custom Act 1962 is sufficient to satisfy the border measure mandate of the TRIPS Agreement regarding protection of copyright. Therefore, during the time of revision of the Indian copyright regime for satisfying the TRIPS Agreement mandate there were no modification or amendment in the Custom Act 1962. But it is observed during post TRIPS Agreement period that sufficient border measure is require to protect copyright in India. Therefore, Indian Custom Act 1962 is to be suitably modified.

4. The Copyright Act 1957 is the law governing copyright protection in India. It extends protection to computer program under the category of literary works provided they constitute “original literary works”. The words “computer” and “computer programme” have been graciously defines in the Act [Sections 2(ffb), 2(ffc)]. The fact that computer programmes are utilitarian works is well imbibed in the definition by using the words “a set of instructions” and “capable of causing computer to perform a particular task or achieve a particular result”. The word “expressed” asserts that even while utilitarian works are give protection, such protection only extends to its expression. Thus the concept of idea-expression dichotomy is advanced. The use of word: “form” and “medium” makes fixation a requirement. The terms “word: codes, schemes, or in any other form” and “including a machine readable form” cover protection for both source code and the object code. The content of what is meant by “originality” has undergone a paradigm shift from the days of “sweat of the brow” doctrine to the “modicum of
creativity” standard. Thus, law mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of creativity. An aspect peculiar to copyright law, is the “doctrine of merger”. This doctrine posits that where the idea and expression are intrinsically connected, and that the expression is indistinguishable from the idea, copyright protection cannot be granted. Applying this doctrine courts have refused to protect the expression of an idea that can be expressed only one manner, or in a very restricted manner, because doing so would confer monopoly on the idea itself. Computer software and databases satisfy the “modicum of creativity” standard. Therefore, protection of computer software and databases through copyright law would be justified only when satisfied the modicum of creativity theory.

5. Indian copyright law does not protect the commercial image of an actor or in creative input., In Manisha Koirala v. Shasilal Nair, the famous Hindi film actress prayed for an injunction in the Bombay High Court against the release of the film ‘Ek Chhoti Si Love Story’. Her contention was that the director of the said film has shown a body of another which was resembling to her to exhibit some naked scenes which has lowered down her image among the viewers., But unfortunately, Bombay High Court dismissed the suit and held that “under section 57 of the copyright Act; 1957 actors of films are not entitled to enjoy any moral rights as are being enjoyed by ‘authors’. Here, it is humble submission that the section 57 of the Act should be amended so that actors also can enjoy the moral rights.

However after this decision, section 57 of the copyright Act have been recently amended in the following words.

In section 57 of the Principal Act – (i) in sub-section (1) in clause (b) the words “which is done before the expiration of the term of copyright” shall be omitted; (ii) in sub-section (2), the words “other than the right to claim authorship of the work” shall be

2 2003 (1) All MR 426.
6. Databases are electronic compilation of data and are susceptible to infringement. With advancement in information technology, the issue of database piracy has been more hotly debated all over the world. The aspect which renders the issue of database piracy more interesting is the fact that the costs of copying or reproducing such databases are minimal compared to the cost of creating them. However, copyright protection of computer databases must address the requirement of “originality”. However, confusion still prevails in judicial decisions rendered by courts in India. In a large number of cases, the court has struck to the “sweat of the brow doctrine” unmindful of the debate on this issue the world over. Inevitably, a higher criterion of “modicum of creativity doctrine” as laid down by the Supreme Courts of the United States and Canada should also be implemented in India.

7. Section 52 of the Copyright Act 1957 contains certain express defences with respect to copyright infringement known as “defence of fair dealing.” Through the Copyright (Amendment) Act, 2012, the defence of fair dealing is now available even to derivative copyrightable works of computer programmes and databases. The new Explanation added through the 2012 amendment to Section 52(l)(a) provides that “[t]he storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.” However, it is not easy to understand the scope of the dimensions provided through the 2012 amendment. In this connection, in August 2012, the Delhi High Court rightly observed in India TV Independent News Service Pvt. Ltd. v. Yashraj Films Pvt. Ltd.4: “the subjects of fair dealing are fairly confusing.” Therefore, Section 52 of the Copyright Act is required to be thoroughly revised.

---

4 MANU/DE/3928/2012