INTRODUCTION.

A. Introduction.

Man is a Social animal. He owes a moral duty to enrich the society through his creative ideas, works, inventions and writings etc. These ideas are public in their nature but are private property. It is recognized as a natural right of a man from very beginning. But gradually, it acquired the status of legal right and came to be known as industrial property, such as patents, trademarks and designs etc. All forms of industrial property which are considered as negative rights prevent the appropriation of individual property. With the passage of time, these rights are, now, known as “intellectual property” and includes copyrights, designs of integrated circuits, geographical indications and trade secrets or undisclosed informations in addition to traditional rights patents, designs and trade-marks. Thus, the copyright is a newly emerging “statutory right relating to printing, music, communication, entertainment and computer etc. The primary object of the copyright Act is to protect the interest of the author, the general benefits derived by the public from the labours of the author and provide remedies regarding infringement of such right.¹

The questions of infringement of copyright comes into picture when the people intend to take undue advantage and cause economic loss to the people who by virtue of hard labour have earned those rights. What is apparent is that the technological change has made reproduction of copyright material easy and cheap, and also at the same time it has made piracy of copyright work simple and difficult to control. They have made copyright infringement international in character. When a work is transmitted from one point to another or made available for the public to access, numerous parties are involved in the transmission. These include entitles that provide Internet access or online services. When such service provider participate in transmitting or marking available materials provided by another, which infringe copyright or related rights, they

¹ Remedies Regarding Infringement of copyright in India : An overview – by Dr. Dharmendra Kumar Mishra. Indian Bar Review-2004 July-December; Pages 363-368.
are liable. Such liability could arise in one of two ways; if the service provider itself is found to have engaged in unauthorized acts of reproduction or communication to the public or if it is held responsible or contributing to or making possible the act of infringement by another.²

Copyright law, today, not only protects the rights of the copyright owner and neighbouring rights but also deals with the subject of public interest and tries to strike a balance between the two in this digital environment. Copyright law, thus, has covered a journey from its earlier days when it used to protect only literary and artistic works, and has entered a new world full of technological innovations.

The copyright owner has the exclusive right to-i) copy the work, ii) issue copies of the work to the public, iii) rent or lend the work to the public, iv) broadcast the work or include it in a cable programme, v) perform, shows or play the work in public, vi) make an adaptation of the work or do any of the above in relation to an adaptation. These exclusive rights comprised in the copyright in the different classes of protected works are spelt out by section 14 of the Indian copyright Act, 1957. The copyright subsisting in a work is infringed by any person who does or authorizes another to do any of these acts restricted by copyright without the license (that is, without permission, contractual or otherwise) of the copyright owner under section 51 of the Act. Under the Act both civil and criminal remedies are available to prevent infringement of copyright. While civil remedies include an injunction, an account of profit or damages, Criminal remedies call for imprisonment and fine. But to sustain a criminal proceeding under the Act the knowledge of the infringing party to infringe the rights shall be proved beyond doubt.³

In other words, the copyright Act, Designs and patents Act 1988 contains some express defences to copyright infringement Known as the acts permitted in relation to copyright work or more simply, the permitted acts”. These are acts that can be performed without attracting liability for copyright infringement, but this is without

prejudice to other legal right or obligations. Therefore even though something may be done in relation to a copyright work that does not infringe by reason of being a permitted act, it may still result in a breach of confidence or in the tort of passing off, for example. Defences to copyright infringement are not restricted to the permitted acts, and there are other defences that may excuse or justify an act which at first sight infringes copyright of course, a person sued for infringement may claim that copyright does not subsist in the work in question, that the courts in the UK do not have jurisdiction to hear the action, that the act done does not fall within the scope of the restricted acts or that the act complained of was not done to a substantial part of the work. As regards the secondary infringements of copyright some form of knowledge is required or the Part of the alleged infringer, or there may be some dispute as to whether the copy dealt with is an infringing copy withing the meaning assigned by section 27.

Other issues are whether the copyright owner authorized or consented to the alleged infringement, or whether the defence of public interest is relevant, or whether it is a case of non-derogation from grant. If none of the above points apply, then the defendant may attempt to justify his actions by claiming that they fall within the meaning of the permitted acts. Finally a ‘Euro defence’ might be applicable.

Copyright in a work is infringed by a person who performs or authorizes another person to perform one of the acts restricted by the copyright unless the licence of the copyright owner has been obtained. Under section 173, in the case of a work having joint copyright owners, the licence of all the joint owners is required. The meaning of licence should be considered in terms of the authority of the copyright owner or his permission to carry out particular restricted acts. It would appear that the licence does not have to be formal or contractual, so that the absence of consideration, per se, does not affect the status of the authorization. Of course, if the licence is not contractual, there is the problem that it may be revoked at any time subject to equitable rules and principles, such as the doctrine of estoppels.⁴

Under normal circumstances, the licence given by the copyright owner will be formal and contractual in nature, for example a non-exclusive licence in respect of a computer software package for a licence fee £250. Alternatively, it may be informal and/or non-contractual. If there is no express permission or authority to carry out the restricted act concerned, it may be that the courts will be prepared to imply the copyright owner’s licence. This is usually be limited to adding terms to an existing agreement. For example, if a builder commissions an architect to design and draw up plans for a new house to be built by the builder, in the absence of an express licence, there will be an implied licence that the builder may use the plans for the purposes of constructing the house. An implied licence will be restricted to the minimum necessary in the context of the intention of the parties. The builders implied licence in the above example would not extend to constructing further houses to the plans unless this was the original intention. In other circumstances, an assignment may be implied. For example, if a person obtains a licence to use a computer program, the court might imply a term in the licence agreement that the licensee will be the beneficial owner of the copyright in any reports produced by running the program. Of course, it becomes impossible or difficult to imply the copyright owner’s authorization or permission in the face of express terms to the contrary in an agreement, or if the remaining rights of the owner are prejudiced in some way. An implied licence may overcome difficulties resulting from misunderstanding about the future ownership of copyright, for example, where a person commissioning a work of copyright later discovers that he does not own the copyright and the person commissioned to create the work is trying to interfere with the subsequent use of the work. Implying the copyright owner’s licence may also be a curbing any unconscionable conduct that is proposed by the owner, such as taking advantage of an imperfect assignment or a badly drafted licence agreement.

Commercial reality must also be considered when deciding whether an implied licence is appropriate. In Fylde Microsystems Ltd. V. Key Radio Systems Ltd.;\(^5\) the claimant and defendant collaborated in the design of software for mobile and portable

radios. The claimant was a software developer and the defendant was engaged in the manufacture and sale of mobile and portable radios. There was no contract between the parties covering the development of the software. The circumstances were such that the defendant had no ownership rights in the copyright subsisting in the software which had been written solely by the claimant. Laddie. J rejected the notion that the defendant had an implied licence of a general nature allowing it to exploit the software as it thought fit. This would allow the defendant to exploit the software without making any payment to the claimant even after the claimant had spent four years developing the software. Also the argument was rejected in the alternative that the defendant had an implied licence to copy the software to replace printed circuit boards supplied by the claimant which were defective and not of merchantable quality (the current requirement is satisfactory quality). In respect of defective printed circuit boards, the defendant would have the remedy of requiring the delivery of replacement boards or a claim in damages. The implication of a licence was therefore completely unnecessary.

i. Infringement of Copyright.

The essence of the law of copyright is that it does not permit to make profit and appropriate to himself the labour, skill and capital of another. The law is strong enough to restrain what otherwise would be an injustice. At every stage in the law of copyright, and of performing rights, the author of a work has exclusive right with regard to certain restricted acts. If these acts are performed by another person, without the consent of the owner of copyright, then the persons infringes copyright in that work. Thus, while infringement in its literal sense conveys a breach of some right which a person enjoys, in its application to copyright it refers to some unauthorized use of a copyright work. Section-51 of the copyright Act, 1957 defines infringement in general terms which may be summed up as -

a) Doing anything without license for which the owner of copyright has exclusive rights,
b) Permitting for profit without license any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work,

c) Making for sale or hire, selling or offering for sale or hire distributing, exhibiting in public or importing into India any infringing copy of the work. However, bringing one copy in India for the private and domestic use of the importer is permitted.

The deceptively simple definition of infringement belies a complex legal reality - determination of infringement is treacherously tricky. The definition of infringing copy in section 2(m) of the Act however provides some standards and criteria for the determination that an infringement has occurred. It defines infringing copy to mean -

1) In relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

2) In relation to a cinematograph film, a copy of the film made on any medium by any means;

3) In relation to a sound recording, any other recording embodying the same sound recording, made by any means;

4) In relation to a programme or performance in which such a broadcast reproduction right or a performer’s right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance.\(^6\)

ii. **Elements of Infringement.**

Copying, modifying, displaying, reproducing, communicating or performing a copyrighted work without authorization, all amount to infringement. In order to claim infringement, two elements must be proved:

\(^6\) Infringement of Copyright Law – An overview-by Basharat; Heena, Kashmir University Law Review 2006 12(12) : Pages 232-244.
1. Ownership - the party claiming infringement must prove ownership of a valid copyright;

2. Copyright - the claiming infringement must demonstrate that the infringer had access to the work and violated one of the exclusive rights;

An important point to remember is that intention to infringe is not essential to establish liability for infringement of a copyright. One may be held liable for infringement which is unintentional or which was done unconsciously.

B. Purpose of the study.

The Objectives of Copyright Law are mainly two flow. First, Copyright Law is developed by the nations to encourage and reward authors, composers, artists, designers and other creative people as well as publishers and film producers, who risk their capital in putting their works before the public. This is done by giving to the authors or in some cases his employer, certain exclusive rights to enjoy the benefits of the created subject matter for a limited period of time. These exclusive rights include, for eg. the right to reproduce the work in any material form whatsoever; to issue copies of the work to the public; to perform the work in public to make any cinematograph film or sound recording of the works; to make any adaptation of the work, etc. The grant of exclusive rights to copyright owner is by way of a monopoly for a limited period of time. The monopoly rights are granted to copyright owner in his work so that he can exploit his work to the exclusion of others for a limited period of time, i.e. in India, 60 years after the death of the author. During this period, persons other than the copyright owner are not allowed to enrich themselves at the cost of the labour of the copyright owner which he has put in producing the work.

Apart from the aforesaid rights, which are known as economic rights, the copyright law also provides moral rights to the authors. These are (i) the right to claim authorship of the work; and (ii) the right of integrity. Since the author is the creator or maker of the work which is the expression of his personality, he has a right to prevent any injury or mutilation of the intellectual offspring.
Secondly, the copyright law allows people to make some free uses of the copyright material. A list of these free uses has been laid down in the copyright Act, 1957. The reason for having provisions relating to free uses in the Act is to strike a balance between the interests of the society at large. Thus, the private rights of the copyright owner have been curtailed a limited extent in the interest of society.

The objectives of Copyright law and its system can also be justified on the following counts\(^7\):

a) The copyright system takes care of considerable investment which is needed to make the creation of some works, e.g., Works of architecture or films etc. possible. As the purpose of the creation of practically all works is to make them available to the public, that process too, such as publication and distribution of books or records, is expensive. These investments will not be made unless there is a reasonable expectation of recouping them and making a reasonable profit. In addition, the doctrine of unjustified enrichment may apply if those who make creative contributions are not compensated.

b) The copyright system is also based on the principal of natural justice, as the author of a work has a right to decide whether and how his work is to be published. Since he is the creator or maker of the work which is the expression of his personality, he has a right to prevent any injury or mutilation of his intellectual offspring. Further, the author, like any other worker is entitled to the fruits of his efforts. The royalty he is paid are the wages for his intellectual works.

c) The culture of a nation depicts the creativity of its people and the works produced by creators form a considerable national asset. It is because of the encouragement and the rewarding of creativity that a contribution to the development of the national culture can be made.

d) The dissemination of the works to large numbers of people forges links between various classes, racial groups and age groups and therefore makes for social cohesion. The creator thus renders a social service and the ideas and experiences of creators can be shared by a wide public within a short space of time which ultimately result in the contribution to the advancement of society.

One of the main objects of copyright legislation is to protect the copyright from infringement and piracy. The owner has the exclusive right to do certain acts in respect of the work. If any other person does any of these acts without proper authority he would be guilty of infringement of the copyright in the work.\(^8\)

Section 51 of the copyright Act 1957 defines the varieties of acts which infrings copyright and all other rights created by the Act. This section is the foundation of copyright liability. According to section 51, copyright of a work shall be infringed when any person without a proper licence from the owner: a) does anything, the exclusive right to do which is conferred upon the owner by the Act; b) permits to use any place for the performance of copyrighted work in public for profit unless he was not aware or had no reasonable grounds for believing that such performance would be an infringement of copyright; c) makes infringing copies for sale or hire or selling or letting them for hire; d) distributes infringing copies either for the purposes of trade or to such an extent as to affect prejudicially, the owner of copyright; e) by way of trade exhibits in public; f) imports infringing copies, except for the private and domestic use of the importer. The explanation to the section further provides that the reproduction of dramatic, literary or musical works in the form of cinematograph film shall be deemed to be an “infringing copy”. Thus when any person carries on any activity which contravenes any rights afforded to the owner of copyright in a work, permits any place for the public performance of the works makes infringing copies of the work for sale or hire, distributes, exhibits, or imports infringing copies of the work for the purposes of trade or so as to prejudicially affect the owner of copyright in the work, infringes copyright. Any

dealing in infringing copies too amounts to an infringement. A reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film is also deemed to be an infringing copy.\(^9\)

**C. Scope of this study.**

**Scope of original literary work.**

The first articles which got copyright protection were books. But in due course of time, judicial decisions have extended copyright protection to several other literary works. Under the rubric of original literary work, following works have been included as capable of having copyright; school textbooks; question papers set for examination; law reports; business letter; application and other forms; research thesis and dissertations; catalogues; contract forms; consignment note; directories; football coupons; list of bills of sale; compilation of a book on household accounts and domestic arithmetic; lists of football fixtures; mathematical tables, railway time tables; road books; guide books; trade statistics; compilation of a list of clients and law firms; books of scientific questions and answers; rules of game; student books; opinions and advices to clients; telegraph codes; questionnaire for collecting statistical information; head notes of reports; pan change (almanac), etc.

Apart from the aforesaid works, course materials, research reports, laboratory notebooks in research laboratories, student course work also fall within the ambit of copyright protection. However, syllabus merely prescribing the guidelines which are to be followed by the textbook writer’s has not been accepted as an original work. Justice Story made following observations in respect of original plan, arrangement or compilation of material.

First, that any new and original plan, arrangement or compilation of material will entitle the author to copyright therein whether the materials themselves be old and new. Second that whosoever by his own skill, labour and judgment writes a new work may

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have a copyright therein, unless it be directly copied or evasively imitated from another's work. Third, that to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright.

D. **Methodology.**

The present study proposes to be mainly based on doctrinal but occasionally non-doctrinal study has been taken into consideration. Doctrinal research tries to make critical evolution of the exiting problems of infringement and its protection and also considers the lacuna, if any, in the present system and searches for required development which the time demands.

The main sources of facts and data in this research work will be legislation, judicial decisions, report of various commissions, Gazettes, conventions etc. And the secondary sources of the aforesaid work will be reputed journals, books, Commentaries, Governmental reports and publications, news papers, periodicals, various websites and published and unpublished scholarly writings.