We have witnessed in the preceding three chapters the various dimensions of the law of copyright. In the first chapter we have discussed the value and importance of the Law of Copyright and the issues & challenges being faced by the copyright jurisprudence at the present time. In the second chapter the researcher has as witnessed traced the emergence of various scientific inventions which have posed newer problems and issues before the owners of copyrighted work. In the third chapter we have witnessed the establishment of International Legal Regime of copyright which regulate the works of authors at the global level. Now the researcher proposes to discuss various aspects of the law of copyright in general which includes enumeration of various protectable subject matter, the rights given to the authors and remedies available to the owners of copyright in case of infringement of their works.

4.1 OBJECT OF COPYRIGHT LAW:-

The object of copyright law is mainly twofold. 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 author, 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 ex, 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 work; to issue copies of the work; to make any adaptation of the work, etc. The grant of exclusive rights to copyright owner is by way of a monopoly of others for a limited period of time i.e. in India. 60 years after the death of the author during the 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 author. 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 his intellectual offspring.

\[210\] Copyright Act 1957, sec.22.
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 copyright owner and the interests of the society at large. Thus, the private rights of the copyright owner have been curtailed to a limited extent in the interest of society.

4.2 PROTECTABLE SUBJECT- MATTER

4.2.1 Original Literary Works:

An original literary work is the product of the human mind which may consist of a series of verbal or numerical statements, not necessarily possessing aesthetic merit, capable of being expressed in writing, and which has been arrived at by the exercise of substantial independent skill, creative labour, or judgment.

The Copyright Act 1957 provides an inclusive definition of literary work. Prior to the Copyright (Second Amendment) Act 1994, 'literary work' was defined to include 'table, compilations and computer programmes, that is to say, programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into

211 Copyright Act 1957, sec. 52
or located in computer or computer based equipment, is capable of reproducing any information'. The 1994 amendment has substituted a new definition for the earlier one. The Act now defines literary work to include 'computer programmes, tables and compilations including computer databases.' The Amendment has made the definition simple.

An original literary work may enjoy protection even though it is devoid of any aesthetic merit. Justice Peterson stated in University of London Press Ltd v. University Tutorial press Ltd that the words 'literary work' covered work which was expressed in print or writing, irrespective of the question whether the quality or style was high. For a work to be original, it is important that it should not have been copied from another work.

**Scope of Original Literary Works**

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;

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212 Copyright Act 1957, sec.2(0)
213 [1916] 2 Ch 601.
214 Ibid, p 608.
215 Macmillan v Cooper AIR 1924 PC 75
216 Ghafur v. Jwala AIR 1921 All 95.
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 timetables; road books; guides books; book of scientific question and answers; rules of a game; compilation of a list of clients and law firms; opinions and advises to clients; telegraph codes; questionnaire for collecting statistical information; head notes of law reports; Panchang (Almanac) etc.

217 University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch. 601; Jagdish Prasad v Parameshwar Prasad AIR 1966 Pat 33; Aggarwala Publishing House v Board of High School and Intermediate Education, U.P AIR 1957 All 9
218 Butterworth v Robinson (1801) 5 Ves 709.
219 British Oxygen co v Liquid Air Ltd [1925] Ch. 383
220 Southern v Bailes (1894) 38 sol Jo 681; Kalamazoo division (Pty) Ltd v Gay (1978) 2 SA 184 (S Afr).
221 Fateh Singh Mehta v Singhal AIR 1990 Raj 8.
222 Maple & Co v Junior Army and Navy Stores (1882) 21 Ch D 369 (CA); collis v Cater (1898) 78 LT 613; Masson Seeley v Embosotype (1924)-41 RPC 160.
223 Real Estate of New South Wales v Wood (1923) 23 SR (NSW) 349 (Aus).
224 Van Oppen Co Ltd v Van Open (1903) 20 RPC 617.
225 Kelly v Morris (1866) LR 1 Eq 34; Morris v Ashbee (1868) LR 7 Eq 634.
226 Ladbrooke (football) Ltd v William Hill (football) Ltd (1964) 1 WLR 273.
227 Trade Auxiliary co v. Middleborough and District Tradesman Protection Association (1889) 40 Ch D 425 (CA)
229 Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637.
230 Bailey v Taylor (1824) 3 Lprs 66.
231 Black lock & Co Ltd v Pearson Ltd [1915] 2 Ch 376; Leslie v Young [1894] AC 335 (HL).
232 Taylor v Bayne (1776) Mor Dict 8308 (SC).
233 EM Forster v AN Parasuram AIR 1964 Mad 391
235 Caley & Son Ltd. v. Garnett & Sons Ltd. (1936-45) MCC 99.
236 Burlington Home Shipping (P) Ltd v Rajnish Chibber (1995) PTC 278 (Del).
238 Anderson & Comp city v Lieber Code Co (1917) 2 KB 469.
239 Interfirem Comparison (Australia) Pty Ltd v Law Society of new South Wales (1977) RPC 149.
240 Eastern Book Co v Navin J Desai (2001) PTC 57 (Del)
241 Vishwanatha Iyer v Muthukumaraswami AIR 1948 Mad 139.
Apart from the aforesaid work, 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 ‘writers’ has not been accepted as an original work.242

**Original Computer Programmes:**

‘Computer software’ includes computer programmes, computer files and associated printed documentation such as manuals for users. The term ‘computer’ is defined under the Act to include any electronic or similar device having information processing capabilities,243 whereas the term computer programmed' is defined to mean a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium capable of causing a computer t perform a particular task or achieve a particular result.244 The definitions of ‘computer software’ and ‘computer’ were inserted by the Copyright (Second Amendment) Act 1994.

**4.2.2 Original Dramatic Works:**

An original dramatic work is the product of human mind, arrived at by the exercise of substantial independent skill, creative labour or

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242 Nag Book House v State of West Bengal AIR 1982 Cal 245.
243 copyright Act 1957, sec. 2 (ffb).
244 Ibid, sec. 2 (ffc).
judgment, which requires acting or dancing for its proper representation and is of a sufficiently definite and permanent nature as to be capable of being recorded in writing. 245

The Copyright Act 1957 provides that 'dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film. 246 Since the definition is an inclusive one, the other things which fall within the general meaning of dramatic work, may also be covered by the definition.

4.2.3 Original Musical Works:

The Copyright Act defines musical work' to mean a work consisting of music and includes any graphical notation of such work, but does not include any words or any action, intended to be sung, spoken or performed with the music. 247 This definition extends copyright protection to a musical work which has not been reduced to any material form. Thus, in order to claim copyright protection for a musical work in India, it is not required to be in writing. In order to qualify for copyright protection, a musical work must be original.

246 Copyright Act 1957, sec. 2(h).
247 Ibid, sec. 2(p)
4.2.4 Original Artistic Works:

Artistic work means:-

(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

(ii) a work of architecture; and

(iii) Any other work of artistic craftsmanship\textsuperscript{248}

In Associated Publishers (Madras) Ltd. v. K. Bashyam Alias 'Arya'\textsuperscript{249}

The Madras High Court held that ‘artistic work’ under sec.2(c) includes paintings, sculpture, drawings, engravings and photographs and work of architecture, etc.

Similarly, in Camlin Private Ltd. v. M/S National Pencil Industries\textsuperscript{250}

The Delhi High Court held that ‘labels’ are copyrightable because label is an ‘artistic work’.

\textsuperscript{248} Copyright Act 1957, sec. 2(c).
\textsuperscript{249} AIR 1961 Mad 114.
\textsuperscript{250} AIR 1986 Del. 444.
4.2.5 Cinematograph Film:

"Cinematograph Film"\textsuperscript{251} means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and cinematograph shall be construed as including any work produced by any process analogous to cinematography including video films.

In Entertaining Enterprises v. State of Tamil Nadu,\textsuperscript{252} the Madras High Court held that any work analogous to cinematography are within the definition of cinematographic film. Therefore, videotape had to be taken within the definition of cinematographic film.\textsuperscript{253} Similarly, in Raj Video Vision v. K. Mohana Krishnan,\textsuperscript{254} the Madras High Court held that both video and television fall within the definition of cinematograph' under Sec. 2 (f) of the Copyright Act, 1957. Whereas in Fortune Films v. Dev Anand,\textsuperscript{255} the Bombay High Court held that definition of 'cinematograph film' includes the film as well as the sound track which is married to the film. Similarly, in Gramophone Company of India Ltd.

\textsuperscript{251} Copyright Act 1957, sec. 2(f).
\textsuperscript{252} AIR 1984 Mad. 278.
\textsuperscript{253} Ibid
\textsuperscript{254} AIR 1998 Mad 294.
\textsuperscript{255} AIR 1979 Bom 17.
v. Shanti Films Corpn., 256 the Calcutta High Court held that "cinematograph film" under sec. 2(f) includes sound track of the film.

4.2.6 Sound Recording:

The copyright Act 1957 originally contained the terms 'record' and recording'. The Copyright (Second Amendment) Act 1994 has omitted the definition of 'record' and substituted a new definition for recording'. The term 'recording' has been substituted by ‘sound recording’, which means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.257

Version Recording

Version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version recording is thus neither copy nor reproduction of the original recording 258. In Super Cassette Industries Ltd v Bathla Cassette Industries Pvt. Ltd259., The Delhi High Court observed that 'version recordings would really be such sound recordings where while

256 AIR 1997 Cal. 63.
257 Copyright Act 1957, Sec. 2 (xx).
being inspired by the original melody a distinct interpretation, different both in presentation, rhythm and orchestral arrangement emerges’.

The Authors of – the above mention protectable subject – matters have been granted certain rights in respect of these works. The following discussion throws some light upon some of such rights permitted to be exercised by the law. These rights are as follows.

4.3 Economic Rights:-

Sec.14 of the Copyright Act,1957 confers economic rights on the copyright owner. The economic rights include such rights which have pecuniary value. Exploitation of work by the exercise of these rights brings economic benefit to the owner of the copyright. The owner of the work may exploit the work himself or licence others to exploit any one or more of the rights for consideration. The right enjoyed by copyright owner is a negative one, i.e., it is the right to prevent others from using his work in certain ways and to claim compensation for the usurpation of that right.260 The exclusive rights are also known as economic rights of the copyright owner. These Exclusive rights are following:

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4.3.1 Right of Reproduction:

In all types of work i.e., literary, dramatic, musical, artistic, cinematograph film and sound recording, the exclusive right to reproduce the work is with the author. The exclusive right to prevent copying and reproduction of the work is the most fundamental and historically the oldest right ow a copyright owner. Though the Copyright Act has recognized this right in all types of work, the terminology used in different and so is the ambit of the right. The Act has neither defined the term ‘Reproduction’ nor the term ‘Copying’ nor has it laid down the difference between these two.

The Terms ‘Reproduction’ and ‘Copying’ have been used simultaneously though reproduction encompasses a wider range of Acts.

It was held by the House of Lords in Ladbroke Ltd v. William Hill Ltd, that reproduction meant copying and did not include cases where an author or compiler produced a substantially similar result by independent work without copying. If he did copy, the question whether he had copied a substantial part depended much more on the quality than on the quantity of what he had taken.

261 Art. 9, 14 and 14bis of the TRIPS also recognize these rights.
263 [1964] 1 All ER 465.
4.3.2 RIGHT OF ISSUING COPIES TO PUBLIC:

The copyright owner has the exclusive right to issue copies of work to the public not being copies already in circulation.\textsuperscript{264} Therefore, the right to bring the work to public for the first time vests with the author of the work. If anyone other than the copyright owner issues the work to the public without the authority of the owner, then he is an infringer of this right.

4.3.3 RIGHT TO PERFORM THE WORK IN PUBLIC OR COMMUNICATE IT TO THE PUBLIC:

In India, the Copyright Act restricts the performance of the work in public, or to communicate it to the public.\textsuperscript{265}

‘communication to the public means’ making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.” An explanation to the definition states that communication through satellite or cable or any other means of simultaneous communication to more than one household.

\textsuperscript{264} Copyright Act 1957, sec.14(a)(ii)
\textsuperscript{265} Ibid, sec.14 (a)(iii)
or place of residence including residential rooms of any hotel or hostels is considered as communication to the public.\textsuperscript{266}

‘Communication to public’ is linked to commercial exploitation of the work. All activities of third parties which tend to deprive the commercial sale or provision of the work undertaken by the owner or his licensees or agents the spirit of the exclusive right to communicate to public. Because if the need of public would get satisfied by an action of a third person in the name of private audience, such action would harm owner’s right to communicate the work commercially to public.

A work can be reproduced before the public by way of performance or recitation of the work. If this done without the authorization of the author it may undermine the right of reproduction of the author, therefore, a separate right in the from of public performance and right to communicate to public are given a exclusive economic rights to copyrights owners.\textsuperscript{267}

\textbf{4.3.4 RIGHT TO MAKE TRANSLATION OF THE WORK:}

Translation means reproducing the expression of a work in a language other than that of the original version. In order to do a

\textsuperscript{266} Copyright Act, 1957, sec.2 (ff).
\textsuperscript{267} Ibid, Sec. 14 (a) (iii).
translation of a work protected by copyright you need the authorization of the copyright owner. The translation also enjoys copyright without prejudice to the rights of the original author.\textsuperscript{268}

4.3.5 RIGHT TO MAKE ADAPTATION OF WORK:

Adaptation is usually understood to involve adapting a pre-existing work from one medium to another or reproducing the work from one medium to another medium or alterations to a work in the same medium.

The Act\textsuperscript{269} defines adaptation with reference to each category of works as under:

Adaptation means:

(i) In relation to a dramatic work, the conversion of the work into a non-dramatic work,

(ii) In relation to a literary work or an artistic work, the conversion of the work into a dramatic work by way of performance in public or otherwise,

\textsuperscript{268} Copyright Act 1957, Sec. 14 (a) (v)
\textsuperscript{269} Id, sec.2 (a).
(iii) In relation to a literary or dramatic work, any abridgement of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical,

(iv) In relation to a musical work, any arrangement or transcription of the work, and

(v) In relation to any work, any use of such work involving its rearrangement or alteration.

In a broader sense this also includes the right to make cinematograph film or sound recording in respect of a work although in the Indian Copyright Act, this right is separately provided.

4.4 Moral Rights:

Moral rights flow from the fact that a literary or artistic work reflects the personality of the creator, just as much as the economic rights reflect the author’s need to keep body and soul together.  

Moral rights or ‘droit moral’ originated in French Law. The Rome Act of 1928 added the droit moral to the Berne Convention of 1886. Moral

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270 S.M. Stewart, International Copyright and Neighbouring Rights (London: utterworths, 1983) at p.59
rights are exceptions to the general rule that after an author has assigned his rights in favour of a publisher or other person, the latter alone is entitled to sue in respect of infringements. The author has a right to claim moral rights in the work even after the assignment of copyright.\textsuperscript{271}

There are two basic “moral rights” available under the Act,\textsuperscript{272}

4.4.1 Right of paternity (\textit{Droit de paternite})

Right of paternity means that an author has a right to claim authorship of his work and can prevent all others from claiming authorship of his work. The author also has a right to demand that his name should appear in all copies of his work at the appropriate place. He can also prevent others from using his name in their works.

4.4.2 Right of integrity (\textit{Droit de respect de l’oeuvre})

Right of integrity means that an author has a right to prevent distortion, mutilation or other alteration of his work, or any other action in relation to the said work which would be prejudicial to his honour or reputation. This right is important particularly where a licence or assignment has been granted to adapt or alter the work in some way, eg, a novel into a play, play into film, etc. It is for the courts to decide the borderline between the adaptation and distortion.

\textsuperscript{271} Prof. A.K.Koul & Dr V. K. Ahuja, Law of Copyright : From Gutenberg’s Invention to Internet (2001) p.10.
\textsuperscript{272} Copyright Act 1957, sec. 57.
The judgment in Amar Nath Sehgal v. Union of India\textsuperscript{273} Case gives a new dimension to the right of integrity. The right can now be exercised to protect an artistic work not only from distortion or mutilation, but also from outright destruction.

**Moral Rights in India:**

The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work, if such distortion, mutilation, modification or other act is prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned. Section 57 falls in Chapter XII of the Act concerning civil remedies. It is a statutory recognition of the special care with which the intellectual property is protected.

The proviso to section 57 states that the author will not have the right to restrain or claim damages in respect of any adaptation of a computer programme by a lawful possessor of a copy of a computer programme, to utilize the computer programme for which it was supplied and to make backup copies as a temporary protection against loss. By the proviso, this section also confers the special rights on the authors of computer

\textsuperscript{273} (2005) 30 PTC 253.
programmes. A computer programme is defined to mean a set of instructions expressed in words, codes, scheme, or in any other form including a machine, or recordable medium capable of causing a computer to perform a particular task or achieve a particular result.\textsuperscript{274}

Under section 57, the author has a right to restrain infringement or claim damages for infringement of the copyright. This section provides an exception to the rule that after an author has parted with his rights in favour of a publisher or other person, the latter alone is entitled to sue in respect of infringement. These rights are independent of the author’s copyright and the remedies open to the author under section 55 (relating to infringement of a copyright).

Section 57 clearly overrides the terms of the contract of assignment of the copyright. The contract of assignment would be read subject to the provisions of section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract, which are inconsistent with the provisions of section 57.

This section prohibits any distortion, mutilation or other modification of the author’s work. The words “other modification” are ejusdem generis

\textsuperscript{274} Copyright Act 1957, sec.2 (ffc).
with the word “distortion” and “mutilation”. The modification should not be so serious that the modified form of the work looks quite different from the original.

“Modification” in the sense of the perversion of the original, will amount to distortion or mutilation.

In *KPM Sobharam v. M/s Rattan Prakashan Mandir*,\(^{275}\) the plaintiff, an author of certain books instituted the suit against the defendants for injunction, restraining them from printing, publishing and selling the specified books, rendition of accounts for the illegal gains made by the defendants for all unauthorized publications, and, for damages under the provisions of sections 55 and 57 of the Act. The plaintiff claimed that the defendants mutilated and distorted the original works of the plaintiff by publishing various books in modified form in gross violation of the plaintiff’s copyright. The plaintiff alleged that the defendants had changed the original works’ title and made a distortion and mutilation of the plaintiff’s work prejudicial to the plaintiff’s reputation. The plaintiff claimed that he never gave any authority to the defendants to print and publish the books in that manner. The court granted injunction restraining the defendants from printing, publishing

\(^{275}\) AIR 1983 Del. 461.
and selling the goods written by the plaintiff till final disposal of the suit.

In Smt. Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd. and another,276 the court observed that “section 57 lifts the author’s status beyond the material gains of copyright and gives it a special status. An author’s right to restrain distortion etc. of his work is not limited to a case of literary reproduction of his work. The restraint order in the nature of injunction under section 57 can be passed even in cases where a film is produced based on the author’s novel. The language of section 57 is of the widest amplitude and cannot be restricted to ‘literary’ expression only. Visual and audio manifestations are directly covered. The court observed that by reading the contract with section 57, it is obvious that modifications, which are permissible, are such modifications, which do not convert the film into an entirely new version from the original novel.

The modifications should also not distort or mutilate the original novel. The fact that Mannu Bhandari is the author of the story will be published in all the credits.

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276 AIR 1987 Delhi 13
This is for giving due recognition to the author’s reputation.” The court therefore, directed certain modifications and deletions to the film before screening it.

In *Phoolan Devi v. Shekhar Kapoor*, the plaintiff claimed that the basis of the film, being a novel dictated by the illiterate plaintiff herself had been considerably mutilated by the film producer. The plaintiff sought a restraint order against the defendant, from exhibiting publicly or privately, selling, entering into film festivals, promoting, advertising, producing in any format or medium, wholly or partially, the film “Bandit Queen” in India or else where. Granting an injunction Vijendra, Jain J. held, that “the defendant had no right to exhibit the film as produced violating the privacy of plaintiff’s body and person. The balance of convenience is also in favour of restraining the defendants from exhibiting the film any further as it would cause further injury to the plaintiff. No amount of money can compensate the indignities, torture, and feeling of guilt and shame which has been ascribed to the plaintiff in the film. Therefore, the defendants were refrained from exhibiting the film in its censored version till the final decision of the suit.”

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277 AIR 1995 Delhi 316.
The author of a work has the right to claim the authorship of the work. He also has a right to restrain the distortion or mutilation of his work or to claim damages for the distortion even after assigning the copyright. The contract of assignment will require being consistent with section 57. The author of a computer programme is also protected under this section. The moral rights will subsist with the programmer even after assigning the copyright in a software programme. If the assignee distorts the software as a result of which the programmer’s reputation is harmed, the programmer can sue for restraining such distortion and for damages. The proviso to the section excludes from the purview of the section, the adaptation of a computer programme by a lawful possessor of a copy of a computer programme to utilize the computer programme and making of backup copies as a temporary protection against loss.

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Therefore, even if the contract for assignment of software makes a provision for assignment of all economic and moral rights, the assignor can at any time exercise his special rights granted under section 57 of the Act.

**4.5 NEIGHBOURING RIGHTS:**

Neighbouring Rights are primarily a result of technological developments. Since 1971, when the Berne Convention was last
amended, and the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations) in 1961, there have been sweeping technological changes. The advent of digital technologies has posed serious challenges to the copyright regime. To examine the impact of the new technologies on copyright and neighbouring rights, the WIPO had set up two Committees of Experts 278. These Committees, after exhaustive discussions, in which India was an active participant, drafted basic proposals for three new treaties, viz.,

i) Treaty for Protection of Literary and Artistic Works,

ii) Treaty for Protection of the Rights of Performers and Producers of Phonograms, and

iii) Treaty on *sui generis* Protection for Databases.

The Conference adopted two treaties, the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. In the area of Copyright and neighbouring rights Indian law has shown a significant advance and protection term for these multiple rights has been enhanced to provide wider protection. According to International commitments the term of

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protection for copyrights and right of performers and producers of phonograms is to be no less than 50 years. In case of broadcasting organizations, the term of protection is to be at least 20 years. India being a signatory to the Berne Convention has streamlined the Indian Copyright laws in order to conform to WTO requirements. In fact, Indian Copyrights Laws provide for greater protection to Copyrights than is required under WTO obligations in some matters such as period of copyright protection (60 years in India). The law was amended in December 1999 to grant a 25-year term of protection for (Broadcaster’s right) neighbouring rights.279

The law of copyright provides neighbouring rights to the following persons and entities:-

**4.5.1 Producers of Phonograms:**

The rights of producers of phonograms are recognized because their creative, financial and organizational resources are necessary to make recorded sounds available to the public in the form of commercial phonograms and because of their legitimate interest in having the legal resources necessary to take action against unauthorized uses, weather it be through the making and distribution of unauthorized copies i.e., piracy or

279 Copyright Act 1957, sec 37 (2)
in the form of unauthorized broadcasting or communication to the public of their phonograms. A producer of a phonogram is referred to as the producer of a sound recording in our Act and gets the exclusive right to:

(I) make any other sound recording (i.e., copies);

(II) sell or give on hire or offer for sale or hire any copy of the sound recording;

(III) communication the sound recording to the public.

The duration of this right is 60 years from the beginning of the calendar year next following the year in which the sound recording is published.

4.5.2 Broadcasting Organizations:

The rights of Broadcasting Organizations are recognized because of their role in making works available to the public and in light of their justified interest in controlling the transmission and retransmission of their broadcasts.

Broadcasting Organizations having been accorded protection under the Act. Every broadcasting organization is given a special right called the "broadcast reproduction right" in relation to its broadcast.

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280 Copyright Act 1957, sec.37
Thus, any person who would like to do any of the following acts in respect of any Broadcast can do so only with his licence:

(i) re-broadcasts the broadcast;

(ii) causes the broadcast to be heard or seen by the public on payment of any charges;

(iii) makes any sound recording or visual recording of the broadcast;

(iv) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for another purpose;

(v) sells or hires to the public or offers for such sale or hire, any such sound recording or visual recording.

The duration of this right is 25 years from the beginning of the calendar year next following the year in which the broadcast is made.\textsuperscript{281}

\textbf{4.5.3 PERFORMERS:}

Copyright Act, 1957, Section 2(qq) states that performer ‘a ‘Performer’ includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who

\textsuperscript{281} Copyright Act 1957, sec 37 (2).
makes a performance’ Copyright Act, 1957, Section 2(q) says that performance’ in relation to performer’s right, means any visual or acoustic presentation made live by one or more performers.

Sec. 38 says that if any person during the continuance of performer’s right without the consent of the performer does any of following acts in respect of the performance or a substantial part thereof he will be deemed to have infringed the performer’s rights:

1. Reproduces a sound recording or visual recording of the performance which was,\textsuperscript{282}
   
   (i) Made without the consent of the performer,\textsuperscript{283}
   
   (ii) Made for the purposes different from those for which the performer given his consent,\textsuperscript{284}
   
   (iii) Made for purposes different from those referred to in sec 39 from sound recording or visual recording which was made in accordance with s. 39 (acts not constituting infringement)\textsuperscript{285}.

2. Broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in

\textsuperscript{282} Copyright Act, 1957, s. 38(b).
\textsuperscript{283} Ibid, sec.38(b)(i)
\textsuperscript{284} Ibid, sec.38(b)(ii).
\textsuperscript{285} Ibid sec.38(b)(iii).
accordance with s. 39 or in rebroadcast by the same broadcasting organization of an earlier broadcast which did not infringe the performer’s right,\textsuperscript{286} and

3. Communicates the performance to the public otherwise than by broadcast except where such communication to the public is made from sound recording or a visual recording or a broadcast.\textsuperscript{287}

**ACTS NOT CONSTITUTING INFRINGEMENT OF A PERFORMERS RIGHTS**

Copyright Act, 1957, Section 39 speaks about acts not constituting infringement. The following acts do not constitute the infringement of performer’s right in his performance:

1. The making of any sound recording or visual recording for private use of the person making such recording or solely for the purpose of bonafide teaching or research;

2. Fair dealing of excerpts in a performance in the reporting of current events or for bonfire review, teaching or research; or

\textsuperscript{286} Copyright Act, 1957, s. 38(c).
\textsuperscript{287} Ibid, sec.38 (d).
3. Such other acts with any necessary adaptations and modifications which don’t constitute infringement of the copyright under Section 52;

4. Reproduction for the use of judicial proceedings;

5. Reproduction for the use of the members of the legislature;

6. Use of sound recording or visual recording of the performance in the course of the activities of an educational institution if the audience are limited to the students and parents and guardians of the students and persons directly connected with the activities of the institution; and

7. Makes a sound recording or visual recording of the performance. Thus making of the sound recording or visual recording of or the above purposes doesn’t constitute infringement.

**TERM OF RIGHTS:**

The Performer’s rights subsist for 50 years from the beginning of the calendar year next following the year in which the performance is made. Copyright Act, 1957, Section 40 A says about the application of performer’s right to foreign countries where there is no rights of such a
nature presently. The Central Government may by notification may extend these rights to such countries if the country has already provided and intended to provide the such rights.

Copyright Act, 1957, Section 42A similarly talks about restriction of foreign organization and performers, if the foreign country does not give protection of these rights, the central government may by notification may put restriction upon the applicability of the provisions of this act on that country or organization established there.

A JUDICIAL APPROACH:

Copyright Act, 1957, s. 39(A) says that the other provisions of the Copyright Act, 1957 will be applied to performers right also, that is provisions like assignment, licenses, civil remedies, rights of the owner possessing or dealing in infringing copies, power of the police, etc.

In Music Broadcast vs. Phonographic Performance\textsuperscript{288}, the plaintiff had been granted permission to start an FM Radio Station, for which it had obtained licenses from various organizations including the Indian Performing Right Society (IPRS). The defendant, a society administering the public performance rights of publishers of sound

\textsuperscript{288} (2004) 29 PTC 282 (Bom)
recordings, refused to reduce their prohibitive high tariff. The plaintiff, while applying to the Copyright Board for a compulsory license, filed an action seeking permission to broadcast sound recordings of the defendant on reasonable royalty rates. The Bombay High Court observed that the current rate quoted by the defendant was prima facie excessive. The court directed the defendant to grant a license to the plaintiff. This order assumes importance as, although a court may not fix royalty rates and is not competent to grant a compulsory license, it may, in exceptional cases, compel the rights holder to grant an interim license until the disposal of the compulsory license application.

**Performer’s right in cinematograph Films and Musical Works:-**

The rights of the performer is based on the concept of the consent of the performer, if the performer has consented to the producer of the cinematograph film for the incorporation of his performance, he may not further claim any right over it, as then the producer of the film becomes assignee of the copyright which subsists in performer’s right. Since a film includes performance of various actors, dancers and so on, their permission is required to film their performance. This is usually done by separate contract with the performers.
However in *Fortune film vs. Dev Anand*\(^{289}\) the court said that the copyright protection is available only to film including the soundtrack, the cine artists who act in the film is not protected by copyright law for their acting.

In the case of the *Indian Performing Rights Society vs. East Indian Motion Pictures Association*\(^{290}\) the Apex Court held that if an author of a musical work has authorized a cinematograph film producer to incorporate his works within the cinematograph film thereby permitting him to appropriate his work by such incorporation in the sound track of the film, the composer may not restrain the film producer from causing the acoustic portion of the film to be performed/projected/screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film or from communicating or authorizing the communication of the film by radio diffusion.

*Neha Bhasin vs. Anand Raj Anand and Anr.*\(^{291}\)

The Plaintiff was a singer who claimed that her voice was used by the defendants for three versions of song in Hindi film produced by

\(^{289}\) AIR 1979 Bom.17.  
\(^{290}\) AIR 1977 SC 1443  
\(^{291}\) 2006 (32) PTC 779 (Del)
defendant. The plaintiff alleged that defendant no. 2 in connivance with
defendant no. 1 who was the music director, had shown herself to be the
singer along with defendant No. 2 whereas plaintiff was shown as
backup vocalist in all three versions of song.

The plaintiff alleged that this is an infringement of the performers’
right and prayed that instead of defendant No. 2’s name, her name must
appear as lead singer. Present suit was filed for seeking decree of
permanent injunction against the defendants from using, selling,
distributing, exhibiting the motion picture as well as audio cassettes,
compact discs, promos of the film containing the song without
displaying name of the plaintiff as lead singer. It was alleged by the
respondent that the right subsists only in live performances and thus no
right exists here as the song is a recorded one. But the Court observed:

‘It is essentially the reproduction of the performance through
sound or visual recordings without the permission of the performer that
is prohibited. Every performance has to be live in the first instance
whether it is before an audience or in a studio. If this performance is
recorded and thereafter exploited without the permission of the
performer then the performer’s right is infringed. So, as regards the performers’ rights, the plaintiff definitely has a serious tribal case’.

Court heard all versions of song and it was held that the voice contained in all versions belonged to petitioner. Thus, plaintiff must have been shown as lead singer instead of defendant. The Court issued interim order for restraining defendants using, selling, distributing, exhibiting, advertising the motion picture as well as cassettes, CDs, promos of the film.

4.6 OWNERSHIP OF COPYRIGHT

Copyright protection is given for a work having originality, i.e., it should be from the author and must have minimum degree of creativity. So it is the author who is the real creator of the work thereby first owner of the copyright and Indian law recognizes author as the first owner of the copyright.\(^{292}\) But by the term ‘ownership’ it means it includes not only the author, but also assignee and can even a legal entity even though not defined in the Act. In Bern convention the term Author is not defined, instead it says the person under whose name the work is disclosed, which implies that it is not necessary that always the author

\(^{292}\) Section 17 statutorily recognizes the author of the work to be the first owner of the copyright. The author is defined under the Act for various works, which comes u/s 2(d) of the copyright Act.
should be the owner. However Indian copyright Act defines the term ‘Author’ with respect to various works, but still leaves some problems. It becomes more complex in the context of changing technologies, i.e., cinematographic works, sound recording, broadcasting etc which is a combination of different works, also when author does the work in the course of employment. When new technologies emerge, different mode of communication simultaneously arise and the exploitation of the copyright by way of assignment & licensing will add economic benefits to the copyright owner and the provisions of assignment and licensing becomes crucial. By amendments Indian Copyright Act has taken care of such provisions, but still leaving lacunae & the role of judiciary becomes crucial in interpreting such provisions for effectively protecting the rights of the authors.

The owner of the copyright means person who possess and enjoys the legal right. The definition given to the author in the context of copyright protection depends on the nature of the work & sec.2(d) defines ‘author’. The creator of the work can also be joint authors, but dilemma

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293 Art 1 &15(1) of Bern convention
294 Sec. 2(d) defines author, it says “Author” means, -
(1) In relation to a literary or dramatic work, the author of the work;
(2) In relation to a music work, the composer;
(3) In relation to artistic work other than a photograph, the artist;
(4) In relation to photograph, the person taking the photograph, the artist;
(5) In relation to a cinematograph film or sound recording, the producer; and
(6) In relation to any literary, dramatic, musical or artistic work which is computer- generated, the person who causes the work to be created.
lies in determining the criteria for joint authorship, S. 2(z) of the Copyright Act defines work of joint authorship. Such an issue came before the court in Najma Heptulla v. Orient longman Ltd. the question before the Court was whether a person who gives form to the narration will become the joint author of the book India Wins freedom.’ Even though the work was composed by the Kabir the material for the book was supplied by the Azad with a clear understanding that kabir will describe those thoughts & conversations and write the same in English language and Kabir’s function was only to record Azad’s findings and not to let his views colour the narrative. The preface itself shows it is the Azad who decided as to which 30 pages of the book were not to be publish and which of his views should be contain in his book and read every word of manuscript and made alterations additions, omissions and correction.

But the finding of the Court was Azad and Kabir are the joint authors of the work and Kabir was more than a mere scribe of thoughts of Azad. Since both of them actively and intellectually collaborated in the composition of literal work. However no specific criteria was laid down

\(^{295}\) Sec. 2(z) of the Copyright Act defines work of joint authorship which means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of other author or authors. \(^{296}\) AIR 1989 Del. 63
by the court to determine what amount to active and close intellectual collaboration to determine join authorship. It raises an interesting question whether a person who has not himself put pen to paper but someone else has done that effectively writing what the first person had created can become a joint author. Or mere recording a narration makes him a joint author. However, after this case no such issue has came before the judiciary.

In U.S. the condition to satisfy joint authorship has to prove (a) in what part of expression of the work he significantly and substantially collaborated and that it originated from him. (b) contribution must be original expression to the work (c) contribution of the joint author to the work need not be equal but has to be substantial or significant (d) what constitute significant and substantial contribution involves his contribution to original expression, qualitatively and quantitatively, either equally or significantly or substantially pursuant to a common goal.

In **Hardly v. Kemp**²⁹⁷ in the context of pop group one member devised the song and the group as whole performed them held members of the group were not joint authors. Contributions need to be creation of

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²⁹⁷ (1999) E.M.L.R589
musical work not to the performance or interpretation of them here, however significant and skillful their contribution to the performance of musical work are not right kind of contribution to give them sharing copy rights. Also the contributing to authoring of the software was like a proof reader skill not authorship skill

Another kind of complexity lies when the work is a combination of different works e.g., cinematographic works, sound recordings etc & the lack of clarity in the definition of “producer” adds to it. Such a question came before the court in GeePee Films(p) ltd. Vs. Pratik Chowdhary, the question before the court was by taking the financial responsibility of sound recording whether one will fall under the definition of ‘producer’. Even though the plaintiff paid all the expenses of recording including hire charges of studio and remuneration of musicians it will not amount to taking responsibility of such recording and thus cannot be held to be a producer, since the ‘responsibility’ appearing in sec 2(uu) does not refer to financial responsibility but “consequential legal liability” for such recording.

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299 Section 2(uu) defines the producer, in relation to cinematographic film or sound recording, means a person who takes the initiative and responsibility for making the work.
300 (2002 ) ( 24 ) PTC 392
Also to decide the ownership of copyright when the author does the work at the instance of any person for valuable consideration, or in the case of the course of employment under contract of service faces some complexity and what amounts to contact of service also depends on facts of each case & judiciary has laid down different tests to determine it. An author may create a work independently, or he may create a work under a contract of service or contract for service.

One of such instance that came before the court was in V.T Thomas v. Malayala Manorama, where the question before the court was after termination of employment of employee (Tom) from Manorama regarding the future work of Tom Manorama can claim authorship it was held that in the case of termination of the employment, the employee is entitled to the ownership of copyright in the works created subsequently and the former employer has no copyright over the subsequent work so created. After his termination of employment from Manorama Tom is

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301 Section 17 (a) provides that where a work is made by the author in the course of his employment by the proprietor of a newspaper, magazine or a periodical under a contract of service or apprenticeship for the purpose of publication in a newspaper, magazine or periodical, the said proprietor, in the absence of any agreement to the contrary will be the first owner of the copyright in the work in so far as it relates to the publication of the work in any newspaper, magazine or similar periodical or to the publication of the work for the purpose of being so published. Except in such cases, the author will be the first owner of the copyright in the work.

Section 17(b) provides that where a photograph is taken or a painting or a portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person, in the absence of any agreement to the contrary, shall, be the first owner of the copyright therein.

Section 17 (c) provides that in the case of work made in course of the author’s employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

302 AIR 1989 Ker 49.
the author of the work he is free to draw the cartoons and Manorama has no right to restrain him from drawing the cartoon. Here the interesting question is that if the Manorama contended that they are the owner of the cartoons then is it possible for them to restrain Tom to use such characters. If the cartoon is developed during the course of employment whether the author can use it after his termination from employment. It seems rather than giving clear reasoning to the legal questions arised the court allowed both parties to continue the publication of the cartoons. Concluding that cartoon characters were developed by the author in 1957 which entitle him to copyrights.

In determining whether a person is engaged in a contract of service or contract for service fundamental test to be applied is “whether a person who has engaged himself to perform these services is performing them as a person in business on his own account” If the answer is yes then it is contract for service or whether the employee employed is part of business and his work is integral part of the business, or whether his work is not integrated into the business but is only accessory to it or the work done by him in business on his own account. In the former case it is a contract of service and in the latter a contract for service.\(^{303}\)

\(^{303}\) (1973) RPC 765
A different test was considered and laid down by the court in Zee Entertainment Enterprises Ltd v. Gajendra Singh and others. Here the plaintiff (Zee TV) alleged that the defendants (star TV) employee was in contract of service with the plaintiff from 1992-1997 and created a concept note of Anthakshari & during the course of his employment with the Plaintiff, Defendant No. 1 in consultation with other senior employees and the Plaintiff’s programming team originated the format of a television game show titled ‘Antakshari’ and reduced the same to writing in the form of a concept note, hence the employer is the owner of the copyright. The question before the court was whether the defendant was in contract of service or contract for service. After going through the employment agreement of 1994 find some clauses indicates contract of service and some clauses was in favour of contract for service. Taking in to consideration of the facts that the signing of the voucher by the defendants on behalf of the plaintiff to make payments, TDS certificate indicates him as contractor, Regarding letters send to defendants by the plaintiff appointing as a chairman, seeking his career progress, Gross salary package revised, usually. The word salary never used etc held as contract of service.

304 2008,53 PTC(36)(Bom)
In University of London Press v. University Tutorial Press,\textsuperscript{305} the examiner was free to prepare his questions at his convenience so long as they were ready by the appointment for the examinations, and it was left to his skill the syllabus, the book work, and the standard of knowledge to be expected at the matriculation examination, and in view of this aspect of matter, the examiner was not acting under the contract of service but contract for service.

Where a man employs another to do work for him under his control, so that he can direct the time when the work shall be done the means to be adopted to bring about the end, and the method in which the work shall be arrived on, then the contract is contract of service, copyright vest in the employer. If, on the other hand, a man employs another to do certain work but leaves it to that other to decide how that work shall be done. What step shall be taken to produce that desired effect, and then it is a contract for service. In such cases a copyright vests in him and not the employer. Control test is a useful way of determining whether a person is an employee where the parties are in master -servant relationship.\textsuperscript{306}

But it provides little help in relation to those professions where a person has considerable amount of freedom. In the circumstances the courts

\textsuperscript{305} (1916) 2 ch 601.
have stressed that the question of whether some one is an employee depends on whether the work they perform is an integral part of the business. In determining whether someone is an employee, court, looks at nature of relationship and what is that and what it is that a person does in day to day activities. Also factors like their responsibility provide their own equipment, hire their own helpers, take financial risk and have opportunity of profiting from the task they perform. Also financial arrangement between the parties etc.

The modern approach has been to abandon the search for a single test, and instead to take a multiple or 'pragmatic' approach, weighing upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually of importance are as follows - the power to select and dismiss, the direct payment of some form of remuneration, deduction of PAYE and national insurance contributions, the organization of the workplace, the supply of tools and materials (though there can still be a labour-only sub-contract) and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own account'). A further development in the recent case-law (particularly concerning atypical employments) has been the idea of
mutuality of obligations ' as a possible factor i.e. whether the course of dealings between the parties demonstrates sufficient such mutuality for there to be an overall employment relationship

In IPRS Vs. Eastern India Motion Pictures,\(^{307}\) The question before the court was whether the producer of a cinematography film can defeat the rights of composer of music or lyrist and the court held that u/s17(b) there is automatic transfer of all rights of the author. Therefore, the producer is the owner of musical or sound recording the producer can defeat right of the composer of music or lyrist .But Sec 13(4) says that copy right in a cinematographic film or a sound recording shall not affect the separate copyright in any work in respect of it or a substantial part of which, the film, or, as the case may be, the sound recording is made, so by the combined reading of sec. 13(3) and (4) presupposes contractual relationship with these creators to safeguard the interest S.17 contemplates contract of employment and in the case of sec.17(b) cinematography film can be made under contract for employment in such cases copyright of composers and lyrists still remains with them. It is the contractual obligation which binds the producers and composers and lyri\(^{\text{ists }}\), and sec. 17(b) there is no automatic transfer of all rights of

\(^{307}\) (1977) 2 SCC 820
the author. In sec. 17(b) there is no mention of the sound recording or literary or musical work only cinematographic film is mentioned. Therefore, the producer is not the owner of musical or sound recording unless it complies with Sec.17(c) thus the producer cannot defeat right of the composer of music or lyrist. So it is clear that intention behind Sec.17 (b) is to provide incentive to the author of literary or musical or sound recording work otherwise the whole purpose of sec. 17 and 13(4) which safeguards the balance will be defeated. But here the court give different interpretation to 17(b) without considering S 13(4) and (5) and held that there is automatic transfer of all rights of authors u/s.17(b) .By this decision, it will be the producer who will be enjoying economic benefits from the work of composer or lyrist. The producer is getting the right to incorporate literary or musical work in the cinematographic film. So once the literary or musical work of the composer or lyrist is incorporated in cinematographic film i.e., right u/s. 14(a)(iv) is transferred to the producer but the other rights of author on musical and literal work still rest upon composer or lyrist. To an extent it was made clear by later amendments in sec. 2(g) &(uu)also sec.14.

In the case of Govt. work Govt. shall be the first owner of the copyright in the absence of agreement to the contrary, In **BM Piros Vs. State of**
Kerala\textsuperscript{308} the Govt. (defendant) as part of information technology implementation in Govt. department a software development project was entrusted to CDIT they in turn entrusted the work to plaintiff. On completion of the work plaintiff filed a suit claiming to be owner of the program. So it was held that work was a government work and hence defendants (State of Kerala) was the author of the work. U/s 17(d) which states that in the case of Govt. work Govt. shall be the first owner of the copyright in the absence of agreement to the contrary, here there was no agreement to contrary.

4.7 Assignment and License of copyright

One of the rights of the copyright owner is the right to transfer his rights u/s, 14 of the copyright Act either wholly or partially by assignment or license, even exclusive license. In the case of tangible property by assignment of his property he loses his rights over it but in the case of IP even after its assignment the owner can still enjoy the property depending upon the right assigned. This major difference is due to the nature of intellectual property from other property. In the case of copyright the transfer of right depends upon diverse nature of IP. Even though there is exclusiveness in the copyright but copyright owner

\textsuperscript{308} 2004 IPLR 26.
cannot exclude independent creators of work. It is only expression that is protected not the idea is based on its implication in public interest.

Change of concept of indivisibility to licensing of copyright is due to changing technologies and tremendous advancement in the field of communication technology. One of the characteristics of the copyright is that it has the potential to be used by a range of different users at the same time. For example, a sound recording can be played in numerous public places simultaneously. As works are increasingly exploited in this manner, the role of licensing in exploitation becomes ever more important. It enables copyright to be transferred to those who can exploit it most profitably. And the terms of the transfer agreement will determine how the profits are to be distributed. The Indian copyright recognizes two types of transfer of IP i.e., license and assignments, it always depends upon nature of property transferred. Depending upon the nature of monopoly created by IP and its implication on public interest has created problems in respect of licensing and assignment. The terms and conditions incorporated in the agreement determines whether the party intended is assignment or license is from the intention of the parties. The word “devolves upon” is a term similar to assignment

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309 Jaypee Bros Medical Publishers (p) Ltd V. Ramya Reghu & ors 2008 (38 ) PTC 212 ( Del )
But sometimes the court finds it extremely difficult to distinguish the exclusive license and partial assignment, if the agreement contain express words or terms like the copyright vest on the owner or ,liability to revise the book vest on the owner or not to edit similar kinds of work or if the demand of the work has ceased the agreement was considered as terminated it is an assignment. Where the agreements contain no such terms, but the consideration is the payment of royalties or a share of profits instead of downright payment then the copyright is not assigned it would be an exclusive license to sell. So if the payment is by way of royalty or some other way then it is a license such interpretation is quite absurd\textsuperscript{311} If there is a usual term of payment of certain percentage of royalty to the owner of the copyright or by a share in profits instead of a sum of money paid down, the inference is that copyright is not assigned, but sole and exclusive license is concerned upon the publisher\textsuperscript{312} This kind of wrong interpretation assumed by the court in deciding the agreement is a license or assignment by taking in to account of the nature of consideration paid is what later followed in KPM Sundarams case. What the court has to look into is the real intention of the parties, if

\textsuperscript{310} Bharati Dutta v. Dr. Saradindu 2008 (37) PTC 178 (CB) Cal
\textsuperscript{311} K.P.M Sundaran v Rattan Prakasam Mandir AIR 1983 Del 461
\textsuperscript{312} Misra Bandhu Karyalaya v. Shivratanlal Koshal AIR 1970 MP 261
the terms are expressed clearly then to follow plain interpretation. It was nature of the agreement which decides the nature of property transferred.

**Difference Between Assignment and License**

Assignment of copyright and copyright license are two forms of contract involved in the exploitation of copyright work by a third party. Each has its own distinct characteristics. A license is an authorization of an act without which authorization would be an infringement. Licensing usually involves licensing of some of the rights and not the whole. Licenses can be exclusive or non-exclusive. An assignment involves the disposal of the copyright: the author (assigner) assigns the copyright to another person (assignee) or transfer of ownership of the copyright. In the case of license only specified interest in IP is transferred not the ownership is transferred to the licensee. A license normally does not confer any right to licensee against licensor or third party but exclusive licensee has substantial rights against the licensor, even to sue the licensor. And by s.30 if the licensee in the case of future work dies before the work comes in to existence his legal representatives shall be entitled to such works, in the absence of any provision to the contrary.

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314 Section 2(J) which reads as "exclusive license" means a 'license which confers on the licensee or on the licensee and the persons authorized by him to the exclusion of all others including the owner of the copyright any right comprised in the copyright in a work and exclusive license shall be construed accordingly’
Unless he joins the owner of copyrights as a party to the infringement action, he can not take an action for infringement against third party but a purchaser in good faith and for value of the proprietors interest without notice of previous licensee is unaffected by it. The licensee can however, sue the assignor for damages for breach of contract if the latter does not protect his interest. A licensee has a right to make alterations except in so far as his license expressly or impliedly restricts the right. A failure to pay royalties enables the licensor to revoke the license. But in the case of assignment it is not possible but if there is any harsh terms which affect the author can lead to revocation if a complaint is made to the copyright Board. Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects to the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly. The expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence. The owner of the copyright has the power to assign his entire rights or assign only some of

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315 Bharat Law House Vs. Wadhwa AIR 1988,Del 68
316 Gramophone Co of India Ltd v. Shanti Films Corpn AIR 1997 Cal 63,
the rights. In case the rights are split up there is only partial assignment. Assignee will be the owner of the copyright as regard rights so assigned, the owner will be the owner of the copyright of remaining rights. The assignment could be for whole duration of the copyright or for a short duration.

**Mode of assignment (sec. 19)**

No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent. It shall identify such work, specify the rights assigned, duration, territorial extent of such assignment, amount of royalty payable to the author. If the period is not stated it shall be deemed to be five years and territorial extend shall be presumed to extend within India. If the assignee does not exercise such rights within one year from the date of such assignment it shall be deemed to have lapsed unless otherwise specified in the assignment. The assignor can file a complaint to the copyright board if the assignee fails to make sufficient exercise of the rights assigned, failure not attributable to the act or omission, then copyright. board after such enquiry as it deem necessary may revoke the assignment, this provision may be used for u/s 31 as a ground for

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317 Copyright Act. 1957, Sec. 19A
compulsory licensing. Also regarding any dispute to assignment it follows the same procedure including an order for recovery of any royalty payable. Provided that if the terms of the assignment is harsh to the assignor (author) it shall revoke the assignment, but after five years from the date of assignment. This proviso seems to be irrational, it may not help the author to revoke within five years which means he has to suffer. s.19 & 19A are applicable in the of licensing too. In the case of unpublished work the author must be a citizen of India or domiciled in India at the time of the creation of the work. Copyright in an architectural work will subsist only if the work is located in India irrespective of the nationality of the author.

**Assignment of Future Rights**

The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright, either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof. However, in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence. When new rights are granted by the legislature on existing works due to the technological development, problem arises as to the
ownership of the new rights, whether the assignor who assigned already all the existing rights on the work or the assignee is the owner of the future rights.

This question came before the court in *Raj video vision v. K. Mohanakrishnan*, here the defendant (producer) assigned all negative rights to Azam and Co. and they transferred to defendant (D2) in 1961. But in 1988 D1 entered into agreement with plaintiff and assigned video right of film ‘Pasamalar’ and it exploitation, distribution and exhibition in India and Srilanka. In 1989 D2 restrained plaintiff claiming that they have entire copy right in film ‘Pasamalar’ and they have not assigned the video rights to anyone. So the plaintiff filed a suit to declare his rights as in agreements and restrained defendant from interfering with his video rights. After going through the agreement the court held that as per section 14(1)(ii) and Sec.2(d)(v) of copyright at the producer as the original owner had the said right on the date of assignment in favour of plaintiff and when the producers themselves were not aware of their future rights accrued due to scientific advancement, it cannot be said that they have already transferred the rights not in existence by way of assignment. the D2 can not claim a right which was not contemplated at

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318 AIR 1998 Mad 294
the time of original assignment in the year 1961. But in *Maganlal Savany v/s. Rupam Pictures*\textsuperscript{319} here the plaintiff was given wide rights of exploitation of the film’ Chupke Chupke’ by the producer that is “the assignor here by agrees and undertake that the said picture shall not be exploited or distributed or exhibited commercially, non commercially or in any other manner what so ever in the contracted territory “ D1 (Producer) assigned satellite rights to the third party, which was not contemplated at the time of assignment to the plaintiff. The plaintiff wants to restraint the defendants by injunction. Here the court held that the term exploitation has to be given a wider meaning that is exploitation of a film takes in all the scientific and technological device that may be invented in future also and plaintiff could make use of those inventions. Given such an interpretation of word exploitation satellite telecasting of the picture ‘Chupke Chupke’ will per se be violative of the provisions of the agreement to the plaintiff.

Thus from the above two cases it could be seen that a very wide interpretation was given to the term exploitation in Maganlal’s case which is against the interpretations given in Raj video visions case. It seems that it is the nature of terms used in the agreements which made

\textsuperscript{319} 2000 PTC 556 (Bom)
the judge to give such wide interpretation but the concern is that such interpretations will affect the rights of the producers who is the real owner of the works. In the event of new technological advancement new rights emerging from it which was not contemplated at the times of assignment, must vest upon the producer. Otherwise, it will be someone who will be enjoying the economic benefits emerging out of it. So the plight of the producer has to be considered by the judiciary while giving such interpretations.

Re-sale Share Right (sec.53A )

The first owner of the copyright and his legal heirs are granted a right called resale share right in original copy. This right is exercisable even after the assignment of the work. This right is confined to certain works only i.e., original copy of painting, sculpture, or drawing or original manuscript of a literary or dramatic or musical work and is available only to the first owner of right or his legal heirs.\textsuperscript{320} This right is conferred by S.53A the share shall be fixed by copyright Board. Different shares for different classes of work, share shall not exceed 10\% of re sale price. The decision of the copyright Board shall be final if any dispute arises.

\textsuperscript{320} Copyright Act 1957, Sec 53 A
Right of author to relinquish copyright (Sec.21)

The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon such rights shall, subject to the following conditions, cease to exist from the date of the notice. On receipt of a notice, the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit. The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice.

4.8 Term of Copyright Protection

The term of copyright varies according to the nature of the work and whether the author is a natural person or a legal person, e.g. a Corporation, Government Institution, etc., or whether the work is anonymous or pseudonymous.

In the case of literary or musical works or artistic works, other than photographs, have a life span, which extends for the life of the author
and 60 years from the end of the year in which the author dies.\textsuperscript{322} However, if the work has not been published, performed, or offered for sale or broadcast during the life of the author, the copyright protection shall continue for a period of 60 years from the end of the year in which any of these acts are done relating to the work.

Cinematograph films,\textsuperscript{323} photographs\textsuperscript{324} and computer programs are protected for 60 years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or published, or, failing such an event, for 60 years from the end of the year in which the work is made. Sound recordings are protected for 60 years from the end of the year in which the recording is first published.\textsuperscript{325} For broadcasting, the term is 25 years from the beginning of the calendar year following the year, in which the broadcast was made. In the case of anonymous or pseudonymous works, the copyright is for 60 years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, which ever term is shorter.

\begin{itemize}
\item \textsuperscript{322} Copyright Act 1957, Sec 22
\item \textsuperscript{323} Ibid, Sec 26
\item \textsuperscript{324} Ibid, Sec 25
\item \textsuperscript{325} Ibid, Sec 27
\end{itemize}
4.9 Copyright Registration in India

Copyright provides the creators of original works of authorship with a set of exclusive rights to copy, distribute, and perform their works for a limited period of time. Protected works include (but are not limited to) books, plays, music, movies, photographs, paintings, sculptures, digital files, and web pages; these all are valuable creations worth protecting. Although copyright in a work exists automatically when an original work is created, a certificate of registration is evidence that your creation is protected by copyright and that you, the person registered, are the owner. It can be used in court as evidence of ownership.

Who Can Apply for Registration:

The author or publisher of, or the owner of or other person interested in the copyright in, any work may make an application in the prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights:

Provided that in respect of an artistic work which is used or is capable of being used in relation to any goods, the application shall include a statement to that effect and shall be accompanied by a certificate from the Registrar of Trade Marks referred to in section 4 of the Trade and
Merchandise Marks Act, 1958, to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under that Act in the name of, or that no application has been made under that Act for such registration by, any person other than the applicant.] 326

On receipt of an application in respect of any work under sub-section (1), the Registrar of Copyrights may, after holding such inquiry as he may deem fit, enter the particulars of the work in the Register of Copyrights. 327

Benefits of Copyright Registration

Below are some of the benefits of registering your copyright works:-

- Registering your copyright protected work provides evidence that you are the owner of your work.

- Copyright Registration is generally required before you can pursue an infringement action against someone who used your work without authorization.

- Copyright owner can take legal action against any person who

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326 Copyright Act 1957, Sec 45 (1)  
327 Ibid, Sec 45 (2)
infringes the copyrighted work. The copyright owner is entitled to remedies by way of injunctions, damages and accounts.

Registration helps pre-empt the defense of “innocent infringement” for infringers who claim they didn’t know the work was copyright protected.

4.10 Copyright Society:

Copyright Society is a legal body which protects or safeguards the interest of owners of the work in which copyright subsist. The Copyright Societies gives assurance to the creative authors of the commercial management of their works.

The authors of creative works license a publisher to publish the work on a royalty basic. This also leads to infringement of the work anywhere in India or abroad therefore it is extremely difficult for the owner of the work to prevent from such infringement. To overcome such difficulty owners of Copyright works have formed Societies to licence their works for performance or communication to the public or issue copies of the work to the public. ‘Copyright Society’ means a society registered under Section33 (3).
The Copyright societies are also authorized to watch out for infringement of the copyright and take appropriate legal action against the infringer.

4.11 INFRINGEMENT AND THE CONCEPT OF FAIR DEALING:

The Infringement in literal sense conveys a breach of some rights which the person enjoys. In its application to copyright it refers to unauthorized use of a copyrighted work. The question of infringement generally depends upon the degree of resemblance between the two works Copyright Act 1957 gives certain rights to the copyright owner which are commonly referred to as exclusive economic rights. The rights are called economic rights because the exploitation of work by the exercise of these rights may bring economic benefit to the author of the copyright. He may exploit the work himself or license others to exploit any one or more of the rights for a consideration which may be in form of royalty or a lump sum payment. The exclusive rights conferred on the copyright owner includes inter alia reproduction of the work in a material form, storing a work in any medium by electronic means, publication of the work, communication of the work to the public, making of adaptations and translations and doing any of these acts in relation to a substantial part of the work.

328 Section 14 of the Copyright Act, 1957 (Hereinafter referred as the Act.)
4.11.1 INFRINGEMENT OF COPYRIGHT

Section 51 of the Copyright Act, 1957 provides as to when the copyright in a work shall be deemed to be infringed.\(^{330}\) Several persons may originate similar works in the same general form without anyone infringing the law in regard to copyright. The infringement comes in only when it can be shown that someone has, instead of utilizing the available sources to originate his work, appropriated the labours of another by resorting to a slavish copy or mere colorable imitation thereof. For infringement to be made out, the act must be done to a substantial part of the work. But this is measured qualitatively and not quantitatively.\(^{331}\)

The Act also defines the infringing copy.\(^{332}\)

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\(^{330}\) Section 51 of the Act: When copyright infringed – copyright in a work shall be deemed to be infringed:
(a) When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act——
(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright or
(ii) Permits form profit 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, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, or
(b) When any person——
(i) Makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
(ii) Distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
(iii) By way of trade exhibits in public, or
(iv) Imports into India, any infringing copies of the work.

\(^{331}\) David Bainbridge, Software Copyright Law 27 (1999).

\(^{332}\) Infringing copy means——
(i) In relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematograph film;
(ii) In relation to a cinematograph film, a copy of the film made on any medium by any means, (iii) In relation to a sound recording, any other recording embodying the same sound recording, made by any means, and
A copyright owner who has a registered copyright may bring an action for infringement when another has infringed any of his or her exclusive rights. Generally, to prevail an infringement action, a plaintiff must show ownership of copyright and impermissible copying. Demonstrating that the defendant had access to the work and the defendant’s work is substantially similar to that of the copyright owner generally proves copying. 333

ELEMENTS OF INFRINGEMENT:

In order to claim infringement, two elements must be proved: Ownership and Copying. Intention to infringe is not essential to establish for infringement of a copyright. One may be held liable for infringement which is unintentional or which is unconsciously. 334

The party claiming infringement must prove ownership of a valid copyright. Ownership of copyright in a work is quite independent of the ownership of a physical material in which work is fixed. A person who owns a manuscript is not necessarily the owner of the copyright therein.

(iv) 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 cinematograph film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act;


As a rule the author of the work is the first owner of the copyright in the work.\textsuperscript{335} Under the Act, the author\textsuperscript{336} remains:

1. In relation to a literary or dramatic work, the author of the work.
2. In relation to a musical work, the composer.
3. In relation to an artistic work, other than a photograph, the artist.
4. In relation to a photograph, the person taking the photograph.
5. In relation to a cinematograph film and sound recording, the producer.

**INFRINGEMENT OF COPYRIGHT BY COPYING:**

(I) **DIRECT COPYING:**

Reproduction of the plaintiff’s work by defendant falls under this category. Apart from this, if defendant copies the plaintiff’s work with some minor additions or alterations, infringement will be said to have taken place. Where there has been copying and all or virtually all of a work is taken without any change, the proof of infringement is clear. The difficulties, however, may arise where entire work of the plaintiff has not been copied by the defendant. In *Ladbroke v. William Hill*,\textsuperscript{337} it was held that ‘the question whether the defendant has copied a substantial part depends much more on the quality than the quantity of what he has taken.

\textsuperscript{335} Section 17 of the Act.
\textsuperscript{336} Section 2 (d) of the Act.
\textsuperscript{337} (1964) 1 WLR 273, p.276.
(II) INDIRECT COPYING:

Indirect copying means copying the work of a person by changing its form. If a novel is turned into a play, which is in turn converted into a ballet, there may be indirect copying. In *JC Bamford Excavators Limited & Another v Action Construction Equipment Limited & Others* the Delhi Court has held that where the defendants produced their products on the basis of the drawings they reached by way of reverse engineering of the plaintiffs’ products, there was no infringement of copyright in the drawings of the plaintiffs.

(III) SUBCONSCIOUS COPYING:

Copying may occur subconsciously where a person reads, sees or hears a work, forgets about it, but then reproduces it, genuinely believing it to be his own.

CAUSAL CONNECTION:

In order to prove infringement, the plaintiff must prove that defendant has copied from his work. In other words, causal connection between the works of plaintiff and defendant is to be proved.

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Similarity between the works of plaintiff and defendant may also occur due to other reasons, such as both of them might have used a common source, or that they have arrived at their results independently be investing their time and labor. In such a case, there shall be no infringement of plaintiff’s copyright. However, if the evidence shows that there are striking similarities between the two works, that the plaintiff’s work was earlier in time and that the defendant had the opportunity to get to know the plaintiff’s work, then the presumption shall be that the defendant has copied from the plaintiff’s work, unless it is rebutted.

**CRITERIA OF PROTECTION:**

**Idea Expression dichotomoy**

Copyright subsist in work, not in ideas. Idea is not a subject – matter of copyright. It was held by Farwell J in *Donoghue v Allied Newspaper Ltd*, Copyright in a work is not infringed, if someone takes essential idea from it and develops his own work. In *R.G. Anand v. Deluxe Films* the Supreme Court laid down following propositions after

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340 Corelli v Gray (1913) 29 TLR 116.
341 (1937) 3 Ch D 503.
343 AIR 1978 SC 1613.
careful consideration and elucidation of the various authorities, and the case law on the issue of infringement of copyright:

(i) There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts, and violation of the copyright in such cases is, confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

(ii) Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case, the courts should determine whether the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant’s work is nothing but a literal imitation of the copyrighted work with some variations here and there, it would amount to violation of the copyright. In other words, in order to be actionable, the copy must be substantial and material one, which at once leads to the conclusion that the defendant is guilty of an act of piracy.

(iii) One of the surest and safest test to determine whether there has been a violation of copyright is to see if, the reader, spectator or the viewer after having read or seen both the works is clearly of
the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

(iv) Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

(v) Where, however, apart from the similarity appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental, no infringement of the copyright comes into existence.

(vi) Since a violation of copyright amount to an act of piracy, it must be proved by clear and cogent evidence after applying the various tests laid down by case law.

(vii) Where the question is of the violation of the copyright of stage play by a film producer or a director, the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has much broader perspective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyright work has expressed the idea.
Even so if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of copyright may be said to be proved.

The test laid down in R.G. Anand v. Deluxe Films was applied by Kerla High Court in **R. Madhavan v S.K. Nayar**.

### 4.11.2 ACTS WHICH DOES NOT AMOUNT TO INFRINGEMENT:

Fair dealing is the most significant limitation on the exclusive right of the copyright owner. It has been interpreted by the court on a number of occasions by looking at the economic impact on the copyright owner of the use; where the economic impact is not significant, the use may count as fair dealing. Fair dealing is not defined in the Copyright Act, 1957 except a provision which states that the publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of clause.

Section 52 of the copyright Act, 1957 provides for certain acts which shall not constitute infringement of copyright. There are certain situations when the reproduction of work infringement of copyright. There are certain situations when the reproduction of work without

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345 Explanation to section 52 (1) (b) of the Act.
obtaining the permission or authorization of the copyright owner does not amount to infringement. Such instances are like:

**DEFENCE AGAINST INFRINGEMENT (FAIR DEALING):**

The copyright law allows people to make some fee uses of the copyright material. In India, the list of these free uses has been laid down in the Copyright Act 1957.\(^{346}\) The reason for having provisions relating to free uses in the Act is to strike a balance between the interests of the copyright owner, and the interests of the society at large. The principle of balancing the exclusive rights of the author/publisher in the work with the public interest in the free dissemination of all works got ensconced in the British legal system with the historic judgment of the House of Lords in the case of *Donaldson v. BeedKett*\(^{347}\) in 1774. Since then, the common law countries including Indian have adhered to this principle of balance between the exclusive rights of the copyright owners and the interests of the society at large. This principle now finds place in the domestic law of every nation.\(^{348}\)

➢ **EXCEPTIONS TO INFRINGEMENT:** 

I. **COMMON LAW EXCEPTIONS:-:**

\(^{346}\) Copyright Act 1957, sec.52.  
\(^{347}\) 4 Burr 2408  
\(^{348}\) V K Ahuja, Intellectual Property Rights in India (1) 25 (Lexis Nexis, 2009)
The fundamental notion behind providing exceptional treatment by the common law courts to the certain categories of uses of copyrighted work is ‘public interest’. So any kind of use of a copyrighted work, which is serving any public interest, is considered as an exception under the Common Law. But the common law protection is denied to a work of illegal, immoral or irreligious nature, as it is found to be contrary to the notions of public interest. Therefore, no protection is provided to libelous, obscene, vulgar, blasphemous and fraudulent work. But the principles upon which the courts have denied protections were not certain.\footnote{Hugh Laddie et al, The Modern Law of Copyright, 1980, p.68.} \footnote{[1973]1 All ER 241.} In \textbf{Beloff v. Pressdram Ltd}.\footnote{[1973]1 All ER 241.} the court observed that, the court may refuse to enforce a copyright on the ground of public interest, even though there is no reference of the same in Copyright Act. The scope of such denial is based upon misdeeds of a serious nature, such as breaches of national security or of law, frauds or matters destructive of the country or its people including matters medically dangerous to the public.

The concept of public interest depends upon public policy of the state. These are issues which never remain static or stagnant to any geographical boundaries, and are henceforth bound to change time and
again from society to society. For example, in the US courts are of the view that, public has an over-riding interest in the prominent public figures.\textsuperscript{351}

\textbf{II. EXCEPTIONS TO THE INFRINGEMENT OF COPYRIGHT UNDER THE INDIAN LAW:-:}

Copyright as such is exclusionary or a negative form of right. But there are certain works which do not amount to infringement of copyright even when they are used, without authorization from the copyright owner. These are the works which are provided statutory immunity. So, a copyrighted work can be used broadly in the following ways:

1. By taking the permission/license from the copyright holder, or
2. By paying adequate/requisite compensation to the copyright owner, or
3. Without taking permission from the copyright holder, in case the nature and extent of such usage of the copyrighted work is a fair use, i.e. if it falls within the ambit of Section 52 of the Copyright Act, 1957.\textsuperscript{352}

\textsuperscript{351} Rosemant Enterprises Incorp. v Randon House Incorp., 1966 IInd Cir F 366; Times Incorporation v Bernard Gees Association, 1968 F 293 Supp 130, the court justified defendants unauthorized duplication of several frames of the film titled ‘Zapruder’ in its magazine regarding the murder of John F Kennedy. It becomes clear from these cases that the notion of public interest has found its rightful place in law.

\textsuperscript{352} Hereinafter called the Act.
In Case of the former two options, the scope and extent of the usage of the copyrighted work depends upon the discretion of the copyright holder, as he is supposed to take such a decision. In case of the later, there is no need to take any permission from anyone for the usage of the copyright work, provided that, the scope and extent of the usage of the copyrighted work falls within the statutory limitations prescribed by the Section 52 of the Act. This kind of a usage is known as fair use or fair deal or permitted use. But since section 52 also comprises of language, therefore the words are subject to the judicial interpretation.

Such provisions are enacted for the purposes of balancing the rights of owners with the society as a whole. The Berne Convention also provides the right of reproduction of protected works in special cases, provided the following two requisites are satisfied:

1. The reproduction does not conflict with the normal exploitation of the work, and
2. Such reproduction does not unreasonably prejudice the legitimate interests of the author.

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\[353\] Article 9(2) bis.
Now, what amounts to the violation of the legitimate interests of the author depends upon the legislative and the judicial thinking of a state. Only if the national law choose to disregard one or both of the conditions laid down by the Article 9 (2) bis would the words is member country be in the breach of the Convention.\textsuperscript{354} Permitted usage of the copyrighted work is prescribed under section 52 of the Act and the same can be understood under the following heads:

**FAIR DEALING WITH CERTAIN WORKS :-----**

(i) **Fair Dealing for Research and Private Study:**

Section 52 (1) (a) (i) of the Act provided that a fair dealing with a literary, dramatic, musical or artistic work for the purposes of private use including research work did not constitute an infringement of copyright. The Oxford English Dictionary defines research as, ‘a search or investigation directed to the discovery of some fact by careful consideration or study of subject; a course of critical or scientific enquiry.’\textsuperscript{355}

In De Garis v. Neville Jeffress Pidler Pvt. Ltd.\textsuperscript{356} the Court defined research as the diligent and systematic inquiry or investigation into a subject

\textsuperscript{354} S.M. Stewart, International Copyright and Neighboring Rights122(1989)

\textsuperscript{355} Vol VIII, p. 507.

\textsuperscript{356} (1990) 18 IPR 291.
in order to discover facts or principles. The defined study as the application of the mind to the acquisition of knowledge, as by reading, investigation or reflection; a particular course of effort to acquire knowledge; a thorough examination and analysis of a particular subject.

(II) **Fair Dealing for Criticism or Review:**

Section 52 (i) (a) (ii) of the Act provides that a fair dealing with a literary, dramatic, musical or artistic work for the purposes of Criticism or Review, whether of that work or any other work shall not constitute an infringement of copyright in the work.\(^{357}\)

(iii) Fair Dealing for the purpose of Reporting of Current Events\(^ {358}\)

(iv) Reproduction of a work for Judicial Proceedings,\(^ {359}\)

(v) Reproduction of a work in Legislature’s Work,\(^ {360}\)

(vi) Reproduction of a work in a certified copy made under any law,\(^ {361}\)

(viii) Reading or Recitation in Public,\(^ {362}\)

(ix) Anthologies for Educational Use,\(^ {363}\)

(x) Use of copyright material in the course of Education,\(^ {364}\)

\(^{357}\) Copyright Act 1957.

\(^{358}\) Copyright Act 1957, sec 52(1) (b)(i)

\(^{359}\) Ibid, sec 52(1) (c) & 52 (2).

\(^{360}\) Ibid, sec 52(1) (c).

\(^{361}\) Ibid, sec.52 (1)(e).

\(^{362}\) Ibid, sec.52(1)(f).

\(^{363}\) Ibid,.sec.52(1)(g).
It was held in Syndicate of Press of University of Cambridge &
Another v. Kasturi Lal & Sons.\textsuperscript{365}

(xii) Performance of a work in course of Education,\textsuperscript{366}

(xii) Making Sound Recordings in respect of Literary, Dramatic or
Musical works in certain cases,\textsuperscript{367}

(xiii) Causing a Recording to be heard in Public,\textsuperscript{368}

(xiv) Performance of a work by Amateur Club or Society,\textsuperscript{369}

(xv) Reproduction of Articles on Current Topic in Periodicals, etc.\textsuperscript{370}

In a recent case of Periyar Self Respect Propaganda Institution v. Periyar Dravidar Kazhagam\textsuperscript{371} the Madras High court examined the applicability of the scope of clause (m) of sub section (1) of section 52 in the context of re-publication of the articles of a particular magazine and held that unless the author has expressly reserved his right of reproduction, no copyright will vest with any one as reproduction of such articles can not constitute an infringement of copyright as per section 52(1)(m).

\begin{itemize}
\item \textsuperscript{364}Copyright Act 1957, sec.52(1)(h) & 52(2).
\item \textsuperscript{365}(2006) 32 PTC 487 (Del)
\item \textsuperscript{366}Copyright Act 1957, sec.52(1)(i)
\item \textsuperscript{367}Ibid, sec.52(1)(j).
\item \textsuperscript{368}Ibid,sec.52 (1)(k)
\item \textsuperscript{369}Ibid,sec.52(1)(l)
\item \textsuperscript{370}Ibid, sec.52(1)(m)
\item \textsuperscript{371}2009 (41) PTC 448 (Mad).
\end{itemize}
(xvi) Publication of Report of a Lecture in Periodicals,\textsuperscript{372}

(xvii) Reproduction for use of Libraries,\textsuperscript{373}

(xviii) Reproduction or Publication of Unpublished Works,\textsuperscript{374}

(xix) Reproduction or Publication of any matter in Official Gazette, Act of Legislatures, Judgments of Courts, etc.\textsuperscript{375}

In Eastern Book Company v. Navin J Desai\textsuperscript{376} the Delhi High Court held that there was no copyright in judgments, and they were in public domain once published.

(xx) Publication of Translation of Acts of Legislatures\textsuperscript{377}

(xxi) Making or Publishing of a Painting, Photograph, etc of a work of Architecture,\textsuperscript{378}

(xxii) Making or Publishing of a Painting, Photograph, etc of a Sculpture or other Artistic work,\textsuperscript{379}

(xxiii) Incidental inclusion of Artistic work in Cinematograph Film,\textsuperscript{380}

It was discussed by Court in In Suneet Verma Design Pvt Ltd v. Jas Kirat Singh Narula.\textsuperscript{381}

\textsuperscript{372} Copyright Act 1957, sec 52(1)(n).
\textsuperscript{373} Ibid, sec.52(1)(o)
\textsuperscript{374} Ibid, sec52(1)(p)
\textsuperscript{375} Copyright Act 1957, sec 52(1)(q).
\textsuperscript{376} (2001) PTC 57 (Del)
\textsuperscript{377} Copyright Act 1957, sec 52(1)(r).
\textsuperscript{378} Ibid, sec.52(1)(s).
\textsuperscript{379} Ibid, sec.52
\textsuperscript{380} Ibid,sec.52(1)(u).
(xxiv) Use of Artistic work by the Author himself in certain circumstances\textsuperscript{382}

(xxv) Reconstruction of a Building in accordance with Architectural Drawings,\textsuperscript{383}

(xxvi) Exhibition of Cinematograph Film after the Expiration of Copyright term in Literary, Dramatic or Musical work,\textsuperscript{384}

(xxvii) Performance or Communication of a work in Official Ceremony,\textsuperscript{385}

In Super Cassette Industries v. Nirulas corner House (p) Ltd.\textsuperscript{386}, the Delhi High Court stated that, section 52(1) (za) is an exception to section 51. Such an exception involving the communication of a work to the public or of a sound recording in the course of any bona fide religious ceremony is not a public performance.

(xxviii) Ephemeral Recording for the purpose of Broadcast.\textsuperscript{387}

In Video Master v. Nishi Productions\textsuperscript{388}, the Bombay High Court reflected the argument of the plaintiff that the preparation of the

\textsuperscript{381} (2007) 34 PTC 81 (Del).
\textsuperscript{382} Copyright Act 1957, sec 52(1)(v)
\textsuperscript{383} Ibid, sec 52(1)(x).
\textsuperscript{384} Ibid, sec 52(1)(y).
\textsuperscript{385} Ibid, sec 52(1)(za) & 52(2).
\textsuperscript{386} (2008) PTC 237 (Del.)
\textsuperscript{387} Copyright Act 1957, sec 52(1)(z).
\textsuperscript{388} (1998) (23) IPLR 388.
Betachem cassettes by the defendants for the purpose of satellite broadcasting, infringed his copyright.

4.12 Remedies against Infringement:
There are three types of remedies available against infringement of copyright:
(1) Civil
(2) Criminal, and
(3) Administrative
All the three remedies are independent and can be pursued simultaneously or separately.

4.12.1 Civil remedies:- The civil remedies for infringement of copyright are of two kinds: (a) preventive civil remedies, and (b) compensatory remedies.

(a) Preventive civil remedies:
Interlocutory Injunction
In order to secure immediate protection from a threatened infringement or from the continuance of an infringement, a plaintiff may apply for an interlocutory injunction pending the trial of the action or further orders. An application for such relief is made along with the plaint supported by affidavit evidence.
For obtaining an interlocutory injunction the plaintiff has to establish a prima facie case and that the balance of convince is in his favour and that if the interim order is not granted it will cause irreparable injury to the plaintiff.\(^{389}\)

The defendant if injured as a result of the injunction, will be entitled to compensation by virtue of an undertaking as to damages by the plaintiff which is an invariable condition of the granting of such an injunction. An interlocutory injunction will not be granted where the defendant might suffer irreparable injury from an injunction pending trial and the plaintiff can be protected by the defendant being ordered to keep an account, nor will it normally be granted where a bona fide defence of fair dealing has been pleaded, or if the plaintiff has been guilty of undue delay in coming to the court or his conduct amounted to acquiescence in the infringement or if there is any substantial doubt as to the plaintiff’s right to succeed. It has been held that in considering whether to grant an interlocutory injunction the court must look at the whole case. It must have regard not only to the strength of the claim, but also to the strength of the defence and then decide what is best to be

done. The remedy by way of interlocutory injunction must not be made the subject of strict rules.

**Permanent Injunction**

If the plaintiff succeeds at the trial in establishing infringement of copyright, he will normally be entitled to a permanent injunction to restrain future infringements. This injunction will operate only during the unexpired term of the copyright.

For the entitlement of the permanent injunction, the plaintiff need not prove actual damage. If the plaintiff proves that his copyright has been infringed, the court will grant an injunction without proof of actual damage. But at the same time the plaintiff must show that there is a probability of damage, that the defendant is likely to continue his infringement and that this is not simply trivial.\(^{390}\)

Permanent injunction was also granted in Himalaya Drug Co. V. Sumit\(^{391}\) to the plaintiff for the infringement of his copyright in the herbal database, as well as each herbal write up / description that comprised the herbal database. The court stated that the plaintiff has expended considerable time, labour, skill and money in preparing this database of ayurvedic herbs, and since the defendants have chosen not to


\(^{391}\) (2006) 32 PTC 112 (Del).
appear or controvert any of these statements, the same stands established.

**Anton Pillar Order**

The procedure of law always provides equal opportunities to both the parties to present their case. However, in certain cases the court may, on an application by the plaintiff, pass an ex-parte order requiring the defendant to allow the plaintiff accompanied by attorney to enter his premises and make an inspection of relevant documents and articles and take copies thereof or remove them for safe custody. Such an order is called Anton Pillar Order.

Such orders are necessary when there exists an apprehension in the mind of the plaintiff and the court that following the regular procedure would give time to the defendant to destroy relevant documents and (copies of) the articles, defeating the ends of justice.\(^{392}\)

Such an order is, however, passed very cautiously by the court, only when the plaintiff in his application makes the fullest possible disclosure of all material facts within his knowledge and the court is convinced thereby.

\(^{392}\) Dr. B.L.Wadehra, Law relating to Intellectual Property , (fourth ed.) p.336.
(b) **Compensatory Civil Remedies:**

**Damages**

The purpose of an award of damages is to restore the plaintiff to his position before the infringement.

Copyright infringement is a tort, and the overriding principle in tort law is that damages should be compensatory.\(^{393}\) Damages in tort aim to put the victim back to his position before the court. If infringement is established, damages are presumed.\(^{394}\) Nominal damages are always awarded where a legal right has been infringed, irrespective of the actual damage.

In *Microsoft Corporation v. Deepak Raval*\(^ {395}\) the Delhi High Court stated that the courts in India were becoming sensitive to the growing menace of piracy, and have started granting punitive damages even in cases where due to absence of the exact figures of sales by the defendants under the infringing copyright, exact damages were not available.

**Damages for Conversion / Delivery up**

The Copyright Act provides that all infringing copies of any work in which copyright subsists and all plates used or intended to be used for production of such copies shall be deemed to be the property of the

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\(^{394}\) Moore v. Clarke (1842) 11 L J Ex 286.

\(^{395}\) (2007) 1 MIPR 0072.
owner of the copyright. It then entitles him to take proceedings for the recovery of possession of the infringing copies and plates or in respect of the conversion thereof. \(^{396}\) In *Microsoft Corporation v. Yogesh Papat & Another* \(^{397}\) Delhi High Court held that the plaintiff was entitled to an order for the delivery up of the infringing copies of the software.

The remedies of claiming recovery of possession of infringing copies or damages for conversion there of are not available in respect of the construction of a building or structure which infringes or which, if completed, would infringe the copyright in some other work. \(^{398}\)

**Account of Profits**

A plaintiff is entitled to opt for damages or for an account of profits. He cannot obtain both an account of profits and damages. The basis on which an account is ordered is that there should not be any enrichment on the part of the defendant, and that the defendant should be deprived of any profit which he earned by wrongful acts committed in breach of the plaintiff’s rights. \(^{399}\)

The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to

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\(^{396}\) Copyright Act 1957, sec.58.

\(^{397}\) (2005) 30 PTC 245 (Del).

\(^{398}\) Copyright Act 1957, sec 59.

the party whose rights he has infringed, whereas by the latter he is required to compensate the party wronged for the loss he has suffered.\textsuperscript{400}

**Jurisdiction of the Court**

Every suit or other civil proceeding for the civil remedies in respect of infringement of copyright in any work or for the infringement of any other right is to be instituted in the district court having jurisdiction.\textsuperscript{401}

**4.12.2 Criminal Remedies:** The Infringement of copyright has been declared as an offence punishable with imprisonment which may extend from a minimum period of six months to a maximum of three years and with a fine of the order of Rs. 50,000 to Rs. 2 lakhs.\textsuperscript{402}

The owner of copyright and also any other person can initiate criminal proceedings, by filing a complaint before the competent First Class Magistrate\textsuperscript{403} within whose jurisdiction, the plaintiff resides or the infringement takes place or deemed to have taken place. Only those who are affected by the infringement can initiate prosecution.

**4.12.3 Administrative remedies:**

Administrative remedies consist of moving the Registrar of Copyrights to ban the import of infringing copies into India when the infringement is by

\textsuperscript{400} Arvind Laboratories v. VA Samy Chemical Works (1994) 14 PTC 223 (Mad.)

\textsuperscript{401} Copyright Act 1957, sec.62.

\textsuperscript{402} Ibid, sec.63.

\textsuperscript{403} Ibid sec.70
way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright and seeking the delivery.\textsuperscript{404}

We have seen in the foregoing discussion that creative works produced by the authors have been recognized and protected by the state by making the law relating to copyright. The copyright law not only identifies the protectable subject-matter but also grants to the creative authors various rights in order that the authors may economically exploit their works and gain from such exploitation. This also shows that any person making an unauthorized use of the copyrighted work can be prosecuted for infringement under the law.

There are many remedies such as- civil, criminal and, administrative are available to the owners & authors of copyrighted works in case of infringement of their works. However this or these remedies are available to the copyright owners subject to the limitations of fair dealing or fair use of their works by the members of public.

\textsuperscript{404} Copyright Act 1957, sec.53.