

Copyright and Related Rights Law

Dr. Rohan Cherian Thomas

Faculty of Law

NALSAR University of Law, Hyderabad

WEEK - 09

LECTURE – 44

Reproduction, Issuance of Copies and Parallel Imports

Welcome back to this course on copyright and related rights law. In a few sessions starting today, we will be focusing on understanding the scope of the bundle of rights and its nature within section 14, which discusses copyright. We had seen in the last session that although copyright as a term is used in the singular sense, the rights provided to a copyright holder are in fact plural in nature. Today's session will focus on two specific types of copyright: the reproduction right and the issuance of copies. A connected topic with respect to the issuance of copies, which is parallel importation, is something that we will also explore today. Let us understand the basic meaning of reproduction.

Reproduction means the action or process of copying something. In the image, you can see a person using a photocopying machine. Whenever we think about making a copy, one of the first things that come to our mind is possibly a photocopy machine like a Xerox machine. Reproduction rights form the core of copyright.

As within the very term copyright is the usage of the word copy. In terms of the fencing that we discussed, copyright law provides rights to the right holder. Unauthorized copying forms the core of what the copyright holder has the right to guard against. Under section 14, we can see, in terms of any kind of importance that we can give to the listing of this bundle of rights, that the reproduction right falls at the very top. It is the first copyright expressed under section 14.

You can see the meaning of section 14. Where copyright is defined, it says that for the purposes of this Act, copyright means the exclusive right subject to the provisions of this Act to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely in the case of a literary, dramatic, or musical work not being a computer program, to reproduce the work in any material form, including, the storing of it in any medium by electronic means. What we can understand is that

reproduction, which is to create, as has been stated under section 14, is an act of copying where it is in a material form. It could be in physical form. Imagine a book.

A book is in physical form. In other words, it is a material form. But this provision also talks about the storing of, say for example, a literary work in a medium by electronic means, meaning thereby that a digital copy would also constitute reproduction. This scope of reproduction, therefore, is that it not only restricts itself to physical forms but also extends to digital forms. In this particular provision, we have seen that the reproduction right has been discussed with respect to literary works, dramatic works, and musical works.

Let us see what other works to which the reproduction right is made applicable. With respect to computer programs as well, it is stated that the reproduction right, just as it has been provided within 14(a) with respect to other literary works, will be applicable. Why then is the computer program provided as a different set? Because there are certain peculiarities with the commercial utilization of computer programs, such as the right to rental, which we will be discussing in a separate session later. But as you can see, a computer program like the source code is something that is a literary work. We understand that very clearly.

And this is also capable of being reproduced. With respect to artistic works as well, the right of reproduction is present under Section 14. But the wording is peculiar to the nature of artistic work. Let us understand what this provision says then. It states that in the case of an artistic work, it is permissible to reproduce the work in any material form, including storing it in any medium by electronic or other means, or depiction in three dimensions of a two-dimensional work or depiction in two dimensions of a three-dimensional work. So up until the first representation, it is similar to our understanding with respect to computer programs, other literary works, musical works, or dramatic works. But let us try to understand what is meant by reproduction in terms of two dimensions and three dimensions. What is meant by a two-dimensional artistic work? Two-dimensional means having or appearing to have length and breadth but no depth. Three-dimensional means having or appearing to have length, breadth, and depth.

What we draw on paper, say for example, if we draw a triangle on paper, is effectively a two-dimensional representation. But a prism, for example, is a solid object that would be a three-dimensional form. When you take a look at this particular image, you will see that it is essentially a sticker with a pattern. What do you think this is? Is this two-dimensional or three dimensional? The fact that art is not restricted only to paintings of abstract considerations, but can also extend to technical specifications and technical drawings. After all, what does an architect make if not a technical drawing? We had understood this in a lot of detail when we were considering the meaning of "artistic" in artistic work.

Because art is not limited to two-dimensional forms. Reproductions can effectively be in a separate dimensional format. But because a dimensional shift could possibly be, for the purpose of achieving a functional consideration that copyright cannot protect. Under section 52 of the Indian Copyright Act, which talks about certain acts that will not amount to infringement of copyright, We find that there is a specific provision, which describes the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of the industrial application of any purely functional part of a useful device. What we understand is that where function is wedded to expression, and the purpose of such a representation in three-dimensional form is, in fact utilitarian in nature, then such a reproduction would not be considered as infringement.

Please remember this. I have referred to this particular exception here only because it is very specific to this provision of reproduction. Otherwise, exceptions to copyright are something that we are yet to explore in much detail. Having understood the foundations of reproductions, let us now move to understand the issuance of copies. The background to the issuance of copies; let us look at and recall the doctrine of first sale understanding, which we explored in session 38.

Session 38, you may recall, was a discussion on resale royalty rights or resale share rights. We had discussed that upon the legitimate sale of a unit in which copyright is subsisting, As per the doctrine of first sale, the copyright holder can no longer control the further distribution of that unit. With that background in mind, let us take a look at the right to issue copies. The same provision is under section 14. I am not reading the main provision again.

You can just look at section 14(a), subclause 2, which says the copyright to issue copies of the work to the public is not for copies already in circulation. The same provision is applicable to computer programs and artistic works. In terms of an example we can consider, let us think about books. Since 14(a) talks about literary works, the issuance of copies would mean that copies of books and the issuance of these copies are within the exclusive control of the copyright holder. There is an explanation to section 14 which says that for the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

What we then understand is that the copyright holder, once he has engaged in the sale of a copy, Since we are considering books, since a unit book has been sold, now that unit is in circulation, and therefore under section 14, the copyright holder can no longer exert his right to issue copies. In other words, any reissue of that unit is out of the copyright holder's control. What should also be considered is an isolated loss of control. This is a very specific limitation that has been carved out specifically with respect to the issuance of copies. Always remember that just because the copyright holder has lost control over

the reissuance of that particular unit, he has still not lost other aspects of copyright, such as reproduction.

Meaning thereby, just because a person has bought a copy of a book from the shop does not mean that he can now engage in reproducing it. I hope this basic foundation is clear. Let us now move to a connected topic regarding the issuance of copies, which is parallel importation. Let us consider that the sale that has happened has happened in India. Then, as per the application of section 14 and its explanation, the sale of that unit and whoever has purchased that particular unit is now free to reissue that particular unit within the territory of India.

But what if a unit was bought in some other country? After all, is it not the case that the copyright holder will wish to exert his copyright in other parts of the world as well? Would his books be restricted only to India? Will they not be sold in other parts of the world? If it is indeed sold in some other part of the world, can such books be brought back to India and sold in India? Consider that the same book which has copyright in India also has copyright in the UK. Say the book has been bought in the UK through the legitimate distributor of the copyright holder. Then can such a book be brought to India and sold in India? Would section 14 also apply to a unit that has been bought in a foreign state? Parallel import is defined by the World Trade Organization as when a product made legally and not pirated abroad is imported without the permission of the intellectual property right holder. Some countries allow this; others do not. Let us understand that the World Trade Organization, within one of its constituent agreements, which is the TRIPS Agreement, or the Agreement on Trade-Related Aspects of Intellectual Property Rights.

An agreement we have also covered in passing in previous sessions. Provides discretion to member states to adopt a type of exhaustion as it is referred to, which can allow for parallel importation to take place. Which explains the last portion of this particular definition, which says that some countries allow this, others do not. So if you look specifically at Article 6 of this agreement, you will find this discretion. On the nature of a parallel import, you can see that there is legitimacy in the purchase.

Making it a legal purchase, and then it is brought into another country without the permission of the intellectual property holder. Therefore, this book, which has been bought in the UK, is being brought into India without the permission of the copyright holder. Now, in terms of whether there is something like a right of importation under section 14, we can see that under section 14, there is no right to import. Importation, therefore, does not prima facie appear to be something that the copyright holder is controlling. But as we can see under section 14, section 14 reads: "For the purposes of this Act, copyright means the exclusive right, subject to the provisions of this Act."

Where it states that this provision is subject to other provisions of the Act. We must look at other provisions that are affecting this particular type of importation. So just because there is no specific right to importation provided in section 14 does not mean that there is no such action that can be taken by the copyright holder against importations without his authorization. Let us consider that the Copyright Act of India is applicable only in its operation to the territory of India. Meaning that the issuance of copyright copies granted to authors under section 14 is only limited to the territory of India.

In terms of what a copy which is in circulation will mean, is that with respect to those copies which have been issued by the copyright holder or through his legitimate distributor, only those copies will be considered copies in circulation? In other words, an issuance of a copy that has happened in some other part of the world is not an operation of issuance of copies under Section 14. In that context, let us now understand what another provision is saying with respect to importations. Section 2(m) of the Copyright Act defines what an infringing copy is. It is said that if such reproduction, copy, or sound recording is made or imported in contravention of the provisions of this Act. Therefore, under the framework of the Copyright Act, importations can be in contravention of the provisions of the Indian Copyright Act, despite the fact that Section 14 does not explicitly provide for a right of importation.

We can see that under Section 51 of the Copyright Act, which specifically addresses infringing acts, It says that copyright in a work shall be deemed to be infringed when any person imports into India any infringing copies of the work. In its proviso, it states that nothing in subclause 4 shall apply to the import of one copy of any work for the private and domestic use of the importer. It often happens that when we travel abroad, we purchase books from airports or from distributors within the territory of a foreign state and bring them back to India. Because the purpose is for private and domestic use, this will not be covered as infringement. But where this is not the purpose, then it depends on the quantum that has been prescribed under 51 as a strict one copy.

It is potentially infringing. What we must understand is that even though, like I said, section 14 does not prescribe a right to importation as a copyright specifically, Other provisions of the Act, such as section 2(m) and section 51, suggest that importation can, in fact, be in contravention of the provisions of the Copyright Act. Let us then understand that this is an application of the right to issue copies. That a copy which has been bought in the UK was issued in the UK by the copyright holder operating under the issuance of copyright in the UK. That copy was not issued in India under Section 14. Therefore, unless there is an explicit provision within the Indian Copyright Act that allows for an exception against the application of the issuance of copyright, We cannot say that parallel importation is something that is allowed.

An insertion that was suggested by the Copyright Amendment Bill 2010 to section 2(m). Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country into India shall not be deemed to be an infringing copy. This particular proviso was not inserted into the 2012 amendment and therefore, as of this current time, does not form part of the Copyright Act. But let us examine this provision. It is simply saying that where legitimate copies are brought to India, the legitimacy here is in terms of, the legitimacy of sale that has happened in a foreign country.

What this proviso would have said then is that any such books, for example, that are being brought back to India will not be considered as infringing copies. But the only safeguard that such a proviso would have offered is that it would have made these copies non-infringing. It would not have allowed for an exception to the issuance of copies. In summary, we can say that the issuance of copyright in India is a right that operates within the territory of India. A copy that has been purchased in a foreign country, when it is brought into India, will be subject to other provisions of the Indian Copyright Act.

And such importations, when they are used for the purpose of issuance, will strike against the issuance of copyright. I hope this is understood. In the next session, we are going to take a look at another copyright, which is the right of adaptation. Thank you for joining me. See you all in the next session.