

Copyright and Related Rights Law

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WEEK - 11

LECTURE – 53

Compulsory Licensing

Welcome back to this course on copyright and related rights law. In the previous two sessions, we discussed fair use, fair dealing, and permitted acts, which are exceptions to copyright. In today's session, we are going to look at what compulsory licensing is, and we will look at two specific provisions within the Indian Copyright Act that provide for such types of compulsory licensing. Let us remember that when we discussed Section 14, it discusses the meaning of copyright and provides for the bundle of copyright, which we had discussed as A reproduction right, issuance of copies right, adaptation right, translation right, right to make a sound recording, right to make a cinematographic work, public performance right, communication to the public right. All of these rights under Section 14 have to be authorized by the copyright holder.

Therefore, to illustrate, if the reproduction of a work had to be carried out, if the issuance of copies of a work had to be carried out, then there had to be a license that had to be obtained from the copyright holder, or there could be another kind of transaction such as an assignment. But under section 14, one thing is very clear: without the authorization of the copyright holder, any action that falls within the purview of section 14 would be a violation. But can there be uses of the work without authorization from the copyright holder? Indeed, there can be. It is just that what we discussed in our previous two sessions when we talked about Fair Use, Fair Dealing, and Permitted Acts.

What did we see in these exceptions? We saw that in the Campbell versus Acuff Rose case, 2 Live Crew, the rap group, had sought permission from Acuff Rose, the copyright owner, and upon being denied permission, had used that work in their expression anyway. What resulted was a copyright infringement claim. What you see is that in non-authorized usage, the result is an infringement or a violation of copyright. But because the U.S. Supreme Court had considered the parody by 2 Live Crew to be transformative, as something that would satisfy the four-factor test under fair use. It would not be an infringement. We had understood that, with respect to fair dealing and permitted rights as

well, We are to look at the purpose of the expression, and depending on that purpose, Along with other factors in fair dealing and in fair use, it could be whether a particular usage is a valid usage or a violative one. Let us then look at another manner in which usage can be permitted, but in this case, this is not usage without authorization. It is a kind of usage in which the authorization is compelled.

We are referring to compulsory licensing. It is clear from the literal usage of this particular term that had the licensor been left to his free will, The license would not have been given, and therefore such an authorization is a compelled authorization. In what manner would such a compulsion take effect, or in other words, what could be the possible grounds on which a compulsion such as this would be needed at all? It is in that context that we are looking at two provisions of the Indian Copyright Act. The first provision we will see is Section 31. Section 31 considers the issuance of compulsory licensing in cases where a work is withheld from the public.

Section 31 explains in what manner a work is considered to be withheld from the public. It says that where a work has been published or performed in public. By now, all of you understand these terms very clearly. So I am not explaining them individually. What section 31 says is that if a work has been published or performed in public, But its republication is being refused by the owner of the work, or its performance in public is being refused.

The communication to the public by way of broadcast of the work, or if it's a sound recording, then the recording of the work in the sound recording, is not allowed to be communicated. Then, in such scenarios, the work is withheld from the public. What does this mean? When a work is published, it means that there has been either an issuance of copies or communication of the work to the public. We have understood this. When a work is published, it generates demand within the public.

And we have understood that the grant of copyright is, in fact, connected to the benefit that is accruing to society. Therefore, where a demand for a work exists and the demand is not being met, it would mean that the work is being withheld from the public. The foundation then is that the complainant must have requested the right holder to issue a license on terms and conditions that the complainant felt were reasonable. It was the rights holder who had refused to grant a license. On the basis of such a refusal, whether a complaint is preferred by such a person to the commercial court, the court upon enquiry will see whether the grounds on which the license was rejected were in fact reasonable or not.

If they are found to be unreasonable, then a direction can be issued by the court to the registrar of copyright for the issuance of the concerned license. But we must consider that any license that is issued, even though it is compelled, involves the work of the right

holder. And therefore, fairness dictates that a portion of the revenue from such usage must come to the right holder. And therefore, upon a determination of what share of revenue must come to the right holder, the registrar of copyrights, based on such a direction or on such other terms as the court may have directed, shall provide the license. Let us recall an earlier discussion that we had.

This discussion was about moral rights. With respect to moral rights, we discussed a particular type of moral right in France that does not exist under the Indian Copyright Act. What was this right? This was the right of withdrawal of the work from the market. Let us look at the French IP code article L121-4 once again. This article says that, notwithstanding the assignment of his right of exploitation, the author shall enjoy a right to reconsider or withdraw even after the publication of his work with respect to the assignee.

However, he may only exercise that right on the condition that he indemnifies the assignee beforehand for any prejudice the reconsideration or withdrawal may cause him. This provision further stated that if the author decides to have his work published after exercising his right to reconsider or withdraw, He shall be required to offer his rights of exploitation in the first instance to the assignee he originally chose and under the conditions originally determined. What is it that we are observing from the right of withdrawal? The author, despite having assigned his rights away, meaning that although the owner has control over the distribution of the work, is withdrawing it from the market. We see that, from the Indian perspective, firstly, there is no such right of withdrawal provided under section 57. And even furthermore, if the owner is not allowing republication and is withholding the work from the public, then a compulsory license can be issued against such an owner.

Therefore, we see a distinct approach being followed in both France and India. Let us then consider the next provision, which is section 31A. Section 31A is also a provision concerning compulsory licensing. In this provision, it concerns unpublished works or published works in scenarios where the author of the work is dead, unknown, or cannot be traced. The owner cannot be found either.

Then, in such a case, an application for a compulsory license can be submitted to the court. As you can see, the similarity between section 31 and section 31A is that there is a commonality of effort. There has been an effort taken by such prospective users to get a license. In the first scenario, which is under Section 31, the license was refused. In this particular scenario under 31A, although the license is sought, the right holder cannot be found.

Because the right holder cannot be found, the work that is withheld from the public can be taken as a cause for the issuance of a compulsory license from the court. Just like we

considered how the court would go about directing the registrar of copyright to issue a license in such a case. Under Section 31A, even though the owner cannot be found, the author cannot be traced, and the right holder cannot be found, the court will still direct the payment of a certain amount of royalty. There could also be other terms that the court may determine. Based on these considerations, the registrar can issue a license.

For such publication of the work that is withheld from the public. This provision also provides that a translation of the work can be published. That is, a work that is withheld from the public can also have a license issued for the translated version to be published. The terms would be something that would be decided by the court. As you would realize, the author is dead, unknown, or cannot be traced to the rights holder, which means the owner cannot be found.

It is possible that they will emerge after publication. And even though this emergence is delayed, it doesn't take away the fact that they have copyright in the work that is being used. Which is the very reason why the court had directed the deposit of an amount of royalty. This amount of royalty will then be deposited in the public account of India as per section 31A. or in any other account as the court may direct, such that as and when there is a claim made by the right holder, they can do so from that account.

Another significant provision that we find under section 31A is that if the author is dead and the work that the author created is considered to be in the national interest by the central government. Then the central government may request the heirs or the executor of such copyrighted work to publish the work in such time as the central government decides. Please note that this is for a specific consideration that the work is considered by the government to be in the national interest. Where the work is not published by such heirs or such executor within the prescribed time period as provided by the central government, Then the court can decide upon the publication of such work, and it will be done on the basis of an application that will be filed by any person for such publication. On the basis of the similar kind of conditions that the court may place on other publications, as we have considered similarly in this case as well.

Let us consider: Can an author be compelled to publish his work? We have seen that Section 31A talks about a situation where the author is dead. But what if the author is alive? Can such an author be compelled to publish their work? Let us consider and recall whether an unpublished work has copyright subsisting in it. You would recall that we have discussed that under section 13 of the Indian Copyright Act, it is very clearly provided that unpublished works will have copyright subsisting in them. In fact, the role of publication that we had discussed - What does that publication comprise? Issuance of copies and communication of work to the public. The role of publication that we had discussed was in determining the term of protection of copyright.

You would recall that where the author publishes a work during his lifetime, the copyright protection or the term of protection It is for his lifetime plus a period of 60 years beginning from the calendar year next, from the date on which the author dies. But in terms of copyright protection, an unpublished work definitely has copyright. There is nothing in the Indian Copyright Act that can compel such an author to publish his work. What we see then in section 31 is that, where the author has published his work, he is the first owner, or where the first owner is someone else, or there has been a transaction and the assignee has published the work. Upon such publication, and subsequently, if there is a situation where the work is withheld from the public, Then that situation is one where there can be a compulsion for publication under 31A, where the author is dead and the work is in the national interest.

In all other situations, such a compulsion to publish a work cannot occur. In the next session, we are going to take a look at statutory licensing. We are going to consider whether the effort that seems to be made by a person to get a license from the right holder is sufficient. Is that something that can be done away with if a clear framework for the grant of a license is provided by the statute itself? Thank you for joining me.

See you all in the next session. Thank you.