

# **Copyright and Related Rights Law**

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**WEEK - 11**

**LECTURE – 55**

**Infringement Part I**

Welcome back to this course on copyright and related rights law. In this session and the following few sessions, we are going to understand what amounts to infringement of copyright under the Indian Copyright Act, and we will also understand how the courts are assessing infringement. Let us look at the meaning of infringement. Infringement simply refers to the action of breaking the terms of a law or an agreement, and in effect, an infringement can be used interchangeably with violation. Let us then see what section 51 is saying about the kinds of acts that will amount to a violation of copyright. Section 51, clause a, subclause 1 states that copyright in a work shall be deemed to be infringed when any person, without a license granted by the owner of the copyright, for the registrar of copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act Does anything confer the exclusive right to do that which is conferred upon the owner of the copyright by this Act? Let us first recall what the exclusive rights are that would be violated under section 51.

This is in reference to section 14, which we understood as a reference to a bundle of rights connected to subject matters. Therefore, for a particular subject matter like a literary work, an act of reproduction would amount to a violation of copyright if it is not authorized by the copyright holder. Let us also recall who the owner of a work is. The owner of a work, as we had understood, is ordinarily the author.

But there are certain circumstances that have been provided within Section 17 of the Indian Copyright Act in which the first owner need not be the author of the work. An example that we had considered was that of a contract of service wherein there is an assignment by the author to another person. There is a transfer of ownership, and this ownership, mind you, need not be over the entire copyright; it could only be with respect to part of such copyright. How can a competent authority authorize? We had discussed, in relation to compulsory licensing, for example, that a license could be granted on

conditions that are determined by the Commercial Court. and based on which the registrar will issue a license.

Therefore, wherever there is a clear authorization with respect to what copyright can be used, in what duration, and in what territory, for example, if there is a violation of these conditions, then it will amount to infringement. When we then look at 51(a) subclause two, we see that there is a different facet of what amounts to copyright violation that is covered. It says, copyright in a work shall be deemed to have been infringed. It says the same thing as what is said in the earlier provision and then proceeds to say, Permits for 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 unaware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright. This provision tells us that a person has allowed his premises to be used for the communication of the work. wherein the person whose premises were being used was not aware that such communication was, in fact, infringing in nature. In what situations can such acts occur? Imagine a concert. In a concert, the permission to use the premises may be given to, for example, a band.

But among the songs communicated by such a band, one particular song was unauthorized, belonged to a certain copyright holder, and therefore was unauthorized. Where there is a clear violation of copyright, as far as the owner of the premises is concerned, It might be that he was completely unaware, and what section 51, clause A, sub-clause 2 is saying is that even though such a place was provided for the purpose of profit, Because the person was unaware and had no knowledge, it would not be possible for there to be an infringing action against such individuals. Another interesting consideration that we must make is whether any place is restricted to physical platforms under this provision. Could it not also include digital platforms? For example, many of us use YouTube. Isn't YouTube a platform that permits the use of works uploaded onto YouTube for the purpose of profit? And therefore, can we not say that something like YouTube can also be covered within 51 clause A sub-clause 2? In that case, if there is infringing activity on YouTube's platform, would YouTube also be considered an infringer? Or can YouTube say that it had no knowledge of such infringing activity because there are millions of users who are using YouTube? They are uploading infringing activities.

And even if the technological development is allowing YouTube to flag many of these videos as infringing, If, in fact, some do get uploaded and they do not have actual knowledge of such uploads, then would YouTube not be held as an infringing entity under clause 51, subclause 2? This interesting question was considered by the Delhi High Court in the case of MySpace versus Super Cassette Industries. Let us see what the court is saying. Section 51, clause a, subclause 2, in the case of internet intermediaries,

contemplates actual knowledge and not general awareness. It contains an exception in the second part. That is, a lack of knowledge or a reasonable belief.

What do we understand? That In fact platforms such as YouTube can take advantage of such an exception. And the Court explains that this is because we cannot equate situations that occur in the real world with how they occur in the digital world. Where millions of uploads could happen on such a platform, it would be impossible with the technology that is presently available to identify each and every violation. It would be possible for platforms to flag possible violations, but this could not be done with respect to all works. It is then pertinent that the fixation of liability with respect to such platforms be limited to only those circumstances where actual knowledge can be proved.

And how will actual knowledge arise? Where it has been brought to their attention. Where the rights holder has brought the infringing activity on the platform to the notice of such platform, Then they will not be able to take recourse to the exception provided under section 51, clause (a), sub-clause (2). As the Court says, knowledge has a definite connotation that is a consciousness or awareness, and not mere possibility or suspicion of something likely. Before looking at section 51, clause b, let us understand what an infringing copy means. Infringing copy has been defined under section 2, clause m of the Indian Copyright Act, in which it is stated that, In relation to a literary, dramatic, musical, or artistic work, a reproduction thereof otherwise than in the form of a cinematograph film.

Meaning that any reproduction which isn't a visual recording of what a cinematograph film is, any such form of expression would be considered an infringing copy. But wouldn't a visual recording of such a work also be an infringing copy? This clarification can be found under section 51. Wherein the explanation reads that, for the purposes of this section, the reproduction of a literary, dramatic, musical, or artistic work in the form of a cinematograph film shall be deemed to be an infringing copy. The provision further reads that in relation to a cinematograph film, a copy of the film made on any medium by any means in relation to a sound recording. Any other recording embodying the same sound recording made by any means in relation to a program 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 cinematograph film of such program or performance, if such a reproduction, copy, or sound recording is made, or imported in contravention of the provisions of this Act. What Section 2 Clause m is saying is that when we are considering the specific unit that is an alleged infringement, in what way will we categorize that unit as an infringing copy? What is it a copy of that infringes? And Section 2(m), for example, says that if there is a sound recording of a performer singing, then such a sound recording is to be considered an infringing copy of the performer's right. That is how we need to look at infringing copies. In another

example, we can consider that if the alleged infringing unit is a visual recording, then it is a cinematograph film, which is an infringing copy of another cinematograph film. Let us then see what Section 51 Clause b is saying.

Section 51 Clause b talks about certain situations in which there is dealing with infringing copies. This kind of infringement is also referred to as secondary infringement because, as you would note, the copy is being called infringing because infringement has occurred. Let us then see what is 51 clause b subclause 1. It states that when any person makes for sale or hire, sells, or lets for hire, or displays or offers for sale or hire any infringing copies of the work in their way of trade. So where infringing copies are available to such a person, and such a person is engaging in their sale or is engaging in the hiring of such infringing copies, He is offering it for sale; then, in such situations, such a person is considered to be infringing the copyright.

Similarly, clause 51(b)(2) talks about how the distribution of infringing copies is also something that will be covered within an infringing act. It states that when any person distributes either for the purpose of trade or to such an extent as to prejudicially affect the owner of the copyright any infringing copies of the work. We can clearly make a distinction between the first and second provisions. The first one talks about sale or hire; the second provision talks about distribution. Clause 3 talks about exhibitions where infringing copies are exhibited to the public; then such exhibitions or the act of exhibiting would be considered as infringement as well.

Imagine a gallery where infringing copies are exhibited. And clause 4, which says that when any person imports into India any infringing copies of the work. You will recall that this is the discussion we had earlier when we discussed parallel importation. In that line, we also discussed how there is a proviso within Section 51 that permits the import of one copy of any work for the private and domestic use of the importer. With this, I hope you have understood what Section 51 states about infringement.

But when an infringement action comes before the court, does the court restrict itself to this very aspect of what is mentioned within 51, or does it bring in its own sense of inquiry, assessment, and analysis? This is something that we will take forward in our next discussion. Thank you for joining me. See you all in the next discussion. Thank you.