



## Theoretical Underpinnings of IP Laws

### Theoretical Underpinnings of Copyright and Design Laws Post-*Krishika Lulla* and *Godrej Sara Lee*: Decisions of the Supreme Court of India

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This Paper seeks to build upon the method and findings of '*Theoretical Underpinnings of Copyright and Design Laws: Decisions of the Supreme Court of India*'<sup>1</sup> with a view to examine the theoretical underpinnings of copyright law post *Krishika Lulla*<sup>2</sup> and design law post *Godrej Sara Lee*<sup>3</sup> as discovered or constructed in the decisions of the Supreme Court of India (Supreme Court). An analysis of the reported decisions on copyright law reveals that: (i) validity of The Copyright Actor of any provisions of the Act was not in question in any of the decisions; (ii) constitutional validity of Rule 29 (4) of The Copyright Rules, 2013 was in question in one of the decisions in which the Supreme Court showing deference to the legislative wisdom reversed the decision of the High Court on the ground that the High Court has overreached its remit and has re-drafted the rule; (iii) both Labour and Utilitarian Theories, and not any other theory, have been simultaneously invoked by the Supreme Court; and (iv) on an average, the Court has decided 1.66 copyright cases in a year; or one copyright case in 251 days, or in .68 (point six eight) years. It appears that the Supreme Court was invoking both Labour and Utilitarian Theories mechanically without going into the clear differences between the two. It has been previously<sup>4</sup> argued that the Court should have applied judicially manageable standards to rigorously scrutinize the theoretical underpinnings of copyright law from all possible angles. This Paper reiterates this argument for nothing seems to have changed in the judicial approach when it comes to theoretical underpinnings of copyright law. An analysis of decisions on design law reveals that: (i) only one decision has been reported on design law and the Court has not gone into the question of theoretical underpinnings; (ii) in four decisions there is only a reference to The Designs Act but these decisions have not decided any question of design law; and (iii) on an average, the Court has decided .08 (point zero eight) design cases in a year; or one design case in 4,595 days, or in 12.58 years.

**Keywords:** Labour Theory, Utilitarian Theory, Natural Right Theory, The Copyright Act, 1957, The Copyright Rules 1958, The Copyright Rules 2013, The Designs Act, 2000, *Per Incuriam*, Theoretical Underpinnings, The Constitution of India, Article 145(3), Supreme Court of India, Presumption of Constitutionality, Social Planning Theory, Ratiocination, Intellectual Property, *Publici Juris*, Draftsmanship, Craftsmanship, Amendment, Exclusive Right, Negative Right

This Paper is in continuation to the Paper '*Theoretical Underpinnings of Copyright and Design Laws: Decisions of the Supreme Court of India*'<sup>1</sup> (First Paper) published in the *Journal of Intellectual Property Rights (JIPR)*. First Paper has covered all the reported decisions of the Supreme Court of India (Supreme Court) on The Copyright Act, 1957,<sup>5</sup> till *Krishika Lulla v Shyam Vithal rao Dev katta* (2015)<sup>2</sup> and on The Designs Act, 2000,<sup>6</sup> till *Godrej Sara Lee Limited v Reckitt Benckiser Australia Pty Ltd* (2010).<sup>3</sup>

First Paper covered the copyright and design laws together for the simple reason that both the statutes name the right as "copyright". This paper examines the theoretical underpinning of copyright and design

laws post *Krishika Lulla* and *Godrej Sara Lee* decisions. A sequel to the First Paper '*Theoretical Underpinnings of Patent Law: Decisions of the Supreme Court of India*'<sup>7</sup> was published in *JIPR*, and the third paper '*Theoretical Underpinnings of Trademark Law: Decisions of the Supreme Court of India*'<sup>8</sup> was published in Volume 27 (5) of *JIPR*. This is the Fourth Paper on the theme of theoretical underpinnings of different types of intellectual property rights.

There is only one reported Full Bench decision<sup>9</sup> of the Supreme Court on designs law and the Court did not go into the question of theoretical underpinnings of design law in that case. Hence, this Paper will focus only on the theoretical underpinnings of copyright law and will cover all the reported decisions

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of the Supreme Court on The Copyright Act post-*KrishikaLulla* till 28 August 2022. Though the Supreme Court has deployed only the Labour and Utilitarian theories, yet the Paper refers to other theoretical frameworks<sup>10</sup> which explain, justify or question IP to provide a wider perspective.

Several legislative developments have taken place in copyright law in the last ten years of twenty-first century. Furtherance to Section 78 of The Copyright Act, The Copyright Rules of 1958<sup>11</sup> enacted by the Government of India was repealed after a period of fifty-four years by The Copyright Rules, 2013 (2013 Rules).<sup>12</sup> The 2013 Rules were further amended in 2021 by The Copyright (Amendment) Rules, 2021.<sup>13</sup>

In 2022, the Supreme Court delivered a judgment in an Appeal from the Division Bench judgment of the Madras High Court in which the validity of Rule 29 (4) of The Copyright Rules, 2013<sup>12</sup> was challenged on two grounds. First, that it violates Article 19 (1) (a) of the Constitution of India and second, that it is *ultra vires* Section 31D of The Copyright Act. This case was heard and decided by a Division Bench of the Supreme Court and not by a Constitution Bench as required under clause (3) of Article 145 of the Constitution of India. Clause (3) of Article 145 of the Constitution of India reads as:

*'145. Rules of Court, etc.— ...*

(3) The *minimum number of Judges* who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion.'...

This departure from the rule by the Supreme Court has raised a question whether it is constitutional for the Supreme Court to constitute a bench consisting of less than 5 judges to hear and decide a constitutional question?

A total of ten decisions on The Copyright Act have been delivered by the Supreme Court between 2015 to

28 August 2022, of which six decisions were delivered between 2015–2019 (Second Decade) and four decisions between 2020 to 28 August 2022 (Third Decade). Of these 10 decisions, nine are Division Bench decisions and one Full Bench decision. No Single Bench or Constitution Bench decision is reported.

In total, fourteen judges were on bench in ten decisions on the copyright law. Justice Rohinton Fali Nariman was on the bench in two cases and authored two judgments. Justice Ranjan Gogoi was on the bench in four cases (including one Order) and authored only two judgments and one separate but concurring judgment. Justices Prafulla C Pant, Uday U Lalit, Ashok Bhushan, Dr D Y Chandrachud and M R Shah were on the bench in one case each and authored one judgment each. Justice Navin Sinha was on the bench in three cases but did not author any judgment. Justice BV Nagarathna was on bench in two cases but he didn't deliver any judgment. Justices N V Ramana, Mohan M Shantanagoudar, Abhay Manohar Sapre, Hemant Gupta and BRGavai were on the bench in one case each but did not author any judgment. No Chief Justice of India was on the bench in any of the decisions. Also, no dissenting opinion has been delivered in any decisions.

The Designs Act, 2000<sup>6</sup> has been blessed with *S D Containers Indore v Mold Tek Packaging Ltd*,<sup>9</sup> a Full Bench decision of the Supreme Court but the decision did not involve any discussion on the theoretical underpinnings of the design law.

The first reported decision on The Copyright Act (post-*KrishikaLulla*) from the second decade of this century is *RELX India Private Limited v Eastern Book Company*<sup>14</sup> and from third decade the decision is *Zee Telefilms Limited v Suresh Productions*.<sup>15</sup> And the latest decisions from both the decades are *Star India Private Limited v Department of Industrial Policy and Promotion*<sup>16</sup> and *KNIT Pro International v State of NCT of Delhi*.<sup>17</sup>

#### **Second Decade Decisions on The Copyright Act, 1957: Theoretical Underpinnings**

Between 2015 to 2019, Division Benches of the Supreme Court has delivered only six reportable decisions including one Order and including one separate but concurring opinion authored by a judge.

*RELX India Private Limited v Eastern Book Company*,<sup>14</sup> is a unanimous Division Bench decision of the Supreme Court. The Court did not express any opinion as to the theoretical underpinnings of copyright law.

Another Division Bench in *Union of India v Board of Control for Cricket in India*,<sup>18</sup> the Court speaking through Justice Ranjan Gogoi didn't express any opinion as to the theoretical underpinnings of copyright law.

In *International Confederation of Societies of Authors and Composers v Aditya Pandey*<sup>19</sup> Justice Prafulla C Pant delivered the judgment of the Division Bench. Justice Ranjan Gogoi wrote his separate but concurring judgment in agreement with the judgment of Justice Prafulla C Pant. The Court as to the theoretical underpinning of copyright law, observed that:

‘A conjoint reading of various provisions of the Act leaves no doubt that though each of the seven sub-clauses of clause (a) of Section 14 relating to literary, dramatic or musical work, are independent of one another, “but reading these sub-clauses independently cannot be interpreted to mean that the right of producer of sound recording, who also comes under definition of author under Section 2 (d) (v), and has a right to communicate his work to the public under Section 14 (e) (iii) of the Act is lost.” It is nobody’s case that the defendant/respondents had stolen the lyric or that sound recording is made without licence from the lyricist or musician.’<sup>20</sup>

Had producer sound recording not been recognized as the author, the Court had been without any statutory basis to emphasize the right of the author. Subtext of the above observation of the Court is clearly invoking the Labour Theory recognizing the author’s rights.

Court also referred to its earlier judgment in *Entertainment Network (India) Ltd v Super Cassette Industries Ltd*<sup>21</sup> to emphasize that ‘[T]erm of a copyright in original literary, dramatic, musical and artistic works not only remains protected in the entire lifetime of the author but also until 60 years...in which the author dies, the term of copyright in sound recording subsists only for 60 years, but...the same would not mean that the right of an owner of sound recording is in any way inferior to that of right of an owner of copyright on original literary work, etc.’<sup>22</sup>

Justice Ranjan Gogoi who wrote his separate but concurring judgment made the following observation:

‘Suffice it to notice that three classes of works in which copyright subsists under Section 13 (1) of the Act are (a) original literary, dramatic, musical and artistic works, (b) cinematograph films, and (c) sound recording. A reading of the provisions of the Act show that such copyright co-exists.’<sup>23</sup>

It seems from the above observation that the Supreme Court has invoked the theories of Locke and Hegel to justify copyright. The observation made by the Court cannot be extended to invoking Bentham’s Theory or Social Planning Theory.

*B N Firos v State of Kerala*,<sup>24</sup> is a Division Bench decision of the Supreme Court. Justice Ranjan Gogoi penned down the lead judgment. No opinion as to the theoretical underpinnings of copyright law was expressed by the Court in this case.

*Diyora and Bhandari Corporation v Sarine Technologies Ltd*,<sup>25</sup> is a Division Bench decision of the Supreme Court. Justice Uday U Lalit authored the lead judgment. No opinion as to the theoretical underpinning was expressed by the Court.

*Star India Private Limited v Department of Industrial Policy and Promotion*,<sup>26</sup> is a Division Bench decision of the Supreme Court. The unanimous decision of the Court was delivered by Justice Rohinton Fali Nariman. As to the theoretical underpinning of copyright law, the Court observed that:

‘[C]opyright is meant to protect the proprietary interest of the owner...in the “work”, i.e., the original work, its broadcast and/or its re-broadcast by him. The interest of the end user or consumer is not the focus of the Copyright Act at all.’<sup>27</sup>

Emphasis on ‘proprietary interest’ is clearly Locean. Had the Court stopped here, there may have been a room for accommodating utilitarian justification. But the observation, ‘The interest of the end user or consumer is not the focus of the Copyright Act at all’ categorically denies utilitarian justification. A logical extension of ‘at all’ principle will render the provisions of Section 52 of The Copyright Act otiose and meaningless. There will not be any justification of exclusive monopoly for copyright. The question that arises from ‘at all’ principle is: why should we have copyright at all, if the end user and consumer or the society is not the focus of copyright law at all. It is also clear that the Supreme Court in this case has ignored its earlier decision<sup>28</sup> in *Entertainment Network (India) Ltd v Super Cassette Industries Ltd*,<sup>29</sup> where the Court cited from Skone James on Copyright<sup>30</sup> that ‘[I]t is considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large.’ ...<sup>31</sup> ‘The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because

it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest.<sup>31</sup>

The benches in *Entertainment Network (India) Ltd*<sup>29</sup> and *Start India Private Ltd*,<sup>26</sup> were coordinate benches but it seems that the ruling in the latter decisions has brought itself the question of *per incuriam*. The Constitution Bench of the Supreme Court in *Rupa Ashok Hurra v Ashok Hurra*,<sup>32</sup> ruled that '*The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India.*'<sup>33</sup> Also, in *Bengal Immunity Company Limited v State of Bihar*,<sup>34</sup> the Constitution Bench of the Supreme Court observed that: '[I]t is important in public interest that the law declared "should be certain and final" rather than that it should be declared in one sense or the other...The object of Article 141 is that the "decisions of this Court on...questions should settle the controversy", and that they should be followed as law by all the Courts, and if they are allowed to be reopened because a different view appears to be the better one, then the very purpose with which article 141 has been enacted will be defeated, and the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive Benches in the hope that with changes in the personnel of the Court which time must inevitably bring, a different view might find acceptance.'<sup>35</sup> The judicial discipline demands that the earlier decision should not be ignored.

The observation of the Court that interest of the end user or consumer is not the focus of the Copyright Act at all leaves no scope of invoking the Utilitarian or Social Planning Theory in this case.

Unlike the decisions analyzed in the First Paper, where the Supreme Court initially invoked only the Labour Theory but in later decisions it also invoked Utilitarian Theory for justifying copyright, the Supreme Court in post-*Krishika Lulla* decisions started with Labour Theory and invoked only the Labour theory in all the copyright decisions in the second decade. This clear departure from the established judicial approach cannot be understood from post-*Krishika Lulla* decisions. Why should we tolerate copyright if the society is not the focus of it?

### Third Decade Decisions on The Copyright Act, 1957: Theoretical Underpinnings

Between 2020 to 28 August 2022, Supreme Court has delivered a total of four decisions on the copyright law which include 1 Full Bench decision and 3 Division Bench decisions.

*Zee Telefilms Limited v Suresh Productions*,<sup>36</sup> is a Division Bench decision. The judgment of the Court was delivered by Justice Ashok Bhushan. The Court did not go into the question of theoretical underpinning of copyright law in this case.

*Engineering Analysis Centre of Excellence Private Limited v Commissioner of Income Tax*,<sup>37</sup> is a Full Bench decision of the Supreme Court. The judgment of the Court was delivered by Justice RohintonFali Nariman. The Court made following observations relating to theoretical underpinning of copyright law:

*[N]o copyright exists in India outside the provisions of the Copyright Act or any other special law for the time being in force, vide Section 16 of the Copyright Act. When the owner of copyright in a literary work assigns wholly or in part, all or any of the rights contained in section 14 (a) and (b) of the Copyright Act, in the said work for a consideration, the assignee of such right becomes entitled to all such rights comprised in the copyright that is assigned, and shall be treated as the owner of the copyright of what is assigned to him.*<sup>38</sup>

....

*'Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.'*<sup>39</sup>

....

'The object of Section 14 (b) (ii) of the Copyright Act, in the context of a computer program, is to interdict reproduction of the said computer program and consequent transfer of the reproduced computer program to subsequent acquirers/end-users. By way of contrast, once a book is sold, on further resale of the same book, the purchaser loses the material book altogether, as such purchaser has, for consideration, parted with the book once and for all.'

It would have been appropriate had the Court explained the distinction between 'assignment' and 'licence' for computer programs are generally licensed and not assigned. If copyright in computer program is assigned, the assignor ceases to be the owner of copyright therein and cannot restrict or prevent the assignee from assigning or licensing the same. Further, the analogy from sale of book to computer program is clearly non-sequitur because 'sale' is a concept of 'property' and 'assignment' is a concept of 'intellectual property' – though not only of intellectual property.

It seems that the Court has invoked Labour Theory for its emphasis that copyright is an exclusive and negative nature of the copyright.

*Saregama India Limited v Next Radio Limited*,<sup>41</sup> is a Division Bench decision. The unanimous judgment of the Court was delivered by Justice Dr DY Chandrachud. The Copyright Rules, 1958<sup>11</sup> enacted by the Government of India under Section 78 of The Copyright Act, 1957, was repealed by The Copyright Rules, 2013<sup>12</sup> (2013 Rules). The validity of Rule 29 (4) of the 2013 Rules was challenged before the High Court of Judicature at Madras. The Rule was challenged on the ground that it violates Article 19 (1) (a) of the Constitution and is ultra vires Section 31D of The Copyright Act. The High Court in an interim order re-drafted the Rule 29 (4).

Rule 29 (4) of the Copyright Rules, read as:

- '29. Notice for Communication to the Public of literary and musical works and sound recordings.—.....*
- (4) The notice under sub-rule (1) shall contain the following particulars, namely:—
  - (a) Name of the channel;
  - (b) Territorial coverage where communication to public by way of radio broadcast, television broadcast or performance under sub-rule (3) is to be made;
  - (c) Details necessary to identify the work which is proposed to be communicated to the public by way of radio broadcast, television broadcast or performance under sub-rule (3);
  - (d) Year of publication of such work, if any;
  - (e) Name, address and nationality of the owner of the copyright in such works;
  - (f) Names of authors and principal performers of such works;
  - (g) alterations, if any, which are proposed to be made for the communication to the public by way of radio broadcast, television broadcast or performance of the works, reasons thereof, and the evidence of consent of the owners of rights, if required, for making such alteration;
  - (h) Mode of the proposed communication to the public, i.e., radio, television or performance;
  - (i) Name, if any, of the programme in which the works are to be included;
  - (j) Details of time slots, duration and period of the programme in which the works are to be included;
  - (k) Details of the payment of royalties at the rates fixed by the Board; and
  - (l) Address of the place where the records and books of account are to be maintained for inspection by the owner of rights.'

The Division Bench of the Madras High Court directed that:

- (i) No copyrighted work may be broadcast in terms of Rule 29 without issuing a prior notice;<sup>42</sup>
- (ii) Details pertaining to the broadcast, particularly the duration, time slots and the like, including the quantum of royalty payable may be furnished within fifteen days of the broadcast or performance;<sup>43</sup>
- (iii) Compliance be effected with a modified regime of post facto, as opposed to prior compliance mandated by Rule 29 (4) and the statutory mandate of a twenty four hour prior notice shall be substituted by a provision for compliance within fifteen days after the broadcast;<sup>43</sup> and
- (iv) The interim order will be confined to the Petitioners before the High Court and the copyrighted works of the second and third Respondents which are sought to be exploited.<sup>43</sup>

An Appeal was preferred to the Supreme Court against the judgment of the High Court. The Supreme Court did not go into the question of theoretical underpinning of the copyright law in this case but made certain observations as to the re-drafting of the Rule by the High Court which are as follows:

"The court is entrusted by the Constitution of the power of judicial review. In the discharge of its mandate, the court may evaluate the validity of a legislation or rules made under it. A statute may be invalidated if it is ultra vires constitutional guarantees or transgresses the legislative domain entrusted to the enacting legislature. Delegated legislation can, if it results in a constitutional infraction or is contrary to the ambit of the enacting statute be invalidated. However, *the court in the exercise of judicial review cannot supplant the terms of the provision through judicial interpretation by re-writing statutory language. Draftsmanship is a function entrusted to the legislature. Craftsmanship on the judicial side cannot transgress into the legislative domain by re-writing the words of a statute.* For then, the judicial craft enters the forbidden domain of a legislative draft. That precisely is what the Division Bench of the High Court has done by its interim order."<sup>44</sup> (*Emphasis added*)

As to the decision of the Madras High Court on Section 31D of The Copyright Act, the Supreme Court observed that:

'Section 31D (2) speaks of the necessity of giving prior notice, in the manner as may be prescribed, of the intention to broadcast the work stating the duration and

the territorial coverage of the broadcast, together with the payment of royalties in the manner and at the rates fixed by the Appellate Board. While the High Court has held the broadcasters down to the requirement of prior notice, it has modified the operation of Rule 29 by stipulating that the particulars which are to be furnished in the notice may be furnished within a period of fifteen days after the broadcast. The interim order converts the second proviso into a “*routine procedure*” instead of an exception (as the High Court has described its direction). This exercise by the High Court amounts to re-writing. Such an exercise of judicial redrafting of legislation or delegated legislation cannot be carried out. The High Court has done so at the interlocutory stage.<sup>44</sup> (*Emphasis added*)

The Supreme Court further held that ‘The High Court was also of the view that the second proviso may be resorted to as a matter of routine, instead of as an exception and that the ex post facto reporting should be enlarged to a period of fifteen days (instead of a period of twenty-four hours). Such an exercise was impermissible since it would substitute a statutory Rule made in exercise of the power of delegated legislation with a new regime and provision which the High Court considers more practicable.<sup>45</sup>

Supreme Court finally held that ‘We are, therefore, clearly of the view that *an exercise of judicial redrafting of Rule 29 (4) was unwarranted*, particularly at the interlocutory stage...’<sup>45</sup> (*Emphasis added*)

It may be said that the Supreme Court did not go into the question of constitutionality of the Rule which was challenged before the High Court. Also, the Court simply moved ahead showing a deference to the domain of legislature without expressing any opinion why that Rule is constitutional or unconstitutional. In a sense, it may be said that the Supreme Court upheld the constitutionality by observing that the re-drafting of the rule is unwarranted and if done so it will amount to entering a forbidden domain. There is a strong presumption of constitutionality of a statute but the Court did not express any opinion as to the presumption of constitutionality when the constitutional validity of a rule enacted under a statute is challenged. Also, it may be noted that clause (3) of Article 145 provides that ‘*The minimum number of Judges who are to sit for the purpose of deciding any case “involving a substantial question of law as to the interpretation of this Constitution”...shall be five*’. The matter before the Supreme Court was in furtherance to the judgment of the High Court in which the constitutionality was

challenged and is conclusively presumed that it must have involved a substantial question of law. But this case was heard and decided by a Division Bench of the Supreme Court and not by the Constitution Bench.

*KNIT Pro International v State of NCT of Delhi*,<sup>46</sup> is a Division Bench decision of the Supreme Court. The unanimous decision of the Court was delivered by Justice M R Shah. The Court did not go into the question of theoretical underpinning of copyright law but observed that ‘offence under Section 63 of the Copyright Act is a cognizable and non-bailable offence.’<sup>47</sup>

Also, in the third decade of this century, the Supreme Court invoked only the Labour Theory in copyright decisions.

#### **Post-Godrej Sara Lee Decisions on The Designs Act, 2000: Theoretical Underpinnings**

Post *Godrej Sara Lee Limited v Reckitt Benckiser Australia Pty Ltd*,<sup>3</sup> there is only one direct decision of the Supreme Court on The Designs Act, 2000. The Court has used the name of The Designs Act in one order<sup>48</sup> and three<sup>49</sup> decisions but they are only just a reference to the name of the Act as used in the text of the other statutes.

The only direct decision on The Designs Act is *S D Containers Indore v Mold Tek Packaging Ltd*,<sup>50</sup> a Full Bench decision. Justice Hemant Gupta delivered the judgment of the Court. The case was related to the jurisdiction of the court over infringement suits in which cancellation of registration of design has been sought by the defendant. The Court explained the independent remedies provided under the Designs Act but did not go into the question of theoretical underpinnings.

Hence, no theoretical underpinning of Design Law has been enunciated post *Sara Lee*.

#### **Conclusion**

An analysis of the decisions of the Supreme Court reveals that like the pre-*KrishikaLulla* position, the constitutional validity of The Copyright Act was not challenged in any decision. But in one case in which the constitutional validity of Rule 29 (4) of The Copyright Rules, 2013 was challenged before the Madras High Court, The High Court re-drafted the Rule. When the case reached the Supreme Court, it was expected that it will go into the question of theoretical underpinnings of copyright but the Court refrained itself from engaging in the theoretical discourse and showed a deference towards the

legislature by holding that that the law making is the prerogative of the legislature and the re-drafting of the Rule by the High Court was unwarranted as it amounted to entering into the domain of legislature. The Supreme Court while dealing with the matter in appeal did not express any opinion as to the presumption of constitutionality in cases when the constitutionality of a rule enacted in furtherance to a statute is challenged. Also, the case was heard and decided by the Division Bench of the Supreme Court and not by the Constitution Bench. Had it been the Constitution Bench, it could have been expected that the Court will express its opinion on the constitutionality of the Rule. When the constitutionality of The Copyright Act was not challenged — but even after having an opportunity to decide on the constitutionality of The Copyright Rule, the Supreme Court did not go into the question of constitutionality, and perhaps the Court missed an opportunity to provide a constitutional justification of copyright law. But when the Court was involved in the philosophical discourse, it was expected that the Court would apply judicially manageable standards of fairness and reasonableness to rigorously scrutinize theoretical underpinning of the copyright law from all possible angles to construct a sound justification of copyright instead of mechanical application of the theoretical frameworks.

Following justifications may be culled out from the above analysis of judicial decisions on copyright:

- (i) Copyright is meant to protect the proprietary interest of the owner in the “work”.
- (ii) The interest of the end user or consumer is not the focus of the Copyright Act at all.
- (iii) The right of an owner of sound recording in no way is inferior to that of right of an owner of copyright on original literary work, etc.
- (iv) Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts.

Unlike the pre-*KrishikaLulla* decisions, where the Supreme Court invoked both the Labour and Utilitarian justifications for copyright, the Court has invoked only the Labour Theory in post-*Krishika Lulla* decisions. The approach of the Supreme Court in invoking Labour Theory seems to be unsound and unreasonable. It also seems that the focus of the Supreme in the two decades of the twenty-first century has been on the proprietary right, owner of copyright and exclusive nature of the copyright. Also, neither a new justification of the copyright law was

developed by the Supreme Court nor it evolved a new theory of IP. Since there is no direct decision of the Supreme Court on The Designs Act, so the position on the Designs Act remains the same as discussed in the first paper. IP is a species of property with only one common attribute of “right to exclude others”. The nuances of IP in tangibles and intangibles are different. The wholesale import and mechanical extension of theoretical frameworks of property rights in tangibles cannot fully explain the nuances of IP in intangibles. Paper reiterates the suggestion that there is a need to construct a theory of IP which can provide a reasonable and convincing explanation making out a strong case for a fair and equitable regime of IP in general and the two copyrights in particular.

In the end, analysis of the post-*KrishikaLulla* decisions reveals that the judgment delivery rate of the Supreme Court on the copyright law has increased as compared to the pre-*KrishikaLulla* decisions. In post-*KrishikaLulla*, the Supreme Court has decided on an average 1.66 (one point six six) copyright cases in a year, or in 251 days or in .68 (point six eight) years, one copyright case has been decided. Whereas, on the design law, post-*Godrej Sara Lee*, on an average .8 (point eight) case has been decided in a year, or one case in 4595 days or 12.58 (twelve point five eight) years. But what is missing in the Supreme Court decisions is the absence of the number of concurring and dissenting judgments authored by the judges who are part of the bench. Unanimity in judicial decisions brings about certainty but does not provide other side of the story.

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