



## *IP Laws Declared by the Supreme Court*

### Copyright Law Declared by the Supreme Court of India

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The law declared by the Supreme Court of India (Supreme Court) is the law of the land by virtue of Article 141 of the Constitution of India. When the Supreme Court decides a *lis*, it not only decide for the parties to the case but also declares the law on a question that it decides to answer. There are only twenty-four reported decisions delivered by the Supreme Court in the last 72 years on the copyright law. Number of decisions per year is not even one. On an average, the Supreme Court has decided. 33 case in a year; or one copyright case in 1104.58 days; or in 3.02 years. These decisions of the Supreme Court on the copyright law are just double of the number of decisions on the patent law. A review of decisions on copyright law from 28 January 1950 to 28 August 2022, reveals that: (i) only in 20 decisions, the Supreme Court has declared copyright law which include 4 decisions from 20<sup>th</sup> century and 16 decisions from 21<sup>st</sup> century; (ii) the validity of The Copyright Act, 1957, was not challenged in any decision; (iii) only one case from the decision of the High Court involving the constitutionality of Rule 29 (4) of The Copyright Rules, 2013 where the High Court re-drafted the Rule, reached to the Supreme Court and the Supreme Court held the re-drafting by the High Court as unwarranted and shown deference to the legislative wisdom; (iv) No Constitution Bench or Single Bench decision is reported; (v) no Chief Justice of India was on the bench in any copyright decision; (vi) only 4 judges authored their separate but concurring judgments (3 from 20<sup>th</sup> century and 1 from 21<sup>st</sup> century) and no dissenting judgment was delivered; (vii) the Court has unanimously answered the questions of copyright law; and (viii) only some of the questions of copyright law have been answered unambiguously and unequivocally by the Supreme Court but some of the questions have been left open by the Court. This Paper seeks to cull out the principles of copyright law as declared by the Supreme Court in the last 72 years.

**Keywords:** Copyright Law, Supreme Court of India, Law Declared, The Constitution of India, Article 141, The Copyright Act, 1911, The Copyright Act, 1957, The Copyright Rules, 1958, The Copyright Rules, 2013, Principles, Bench, Infringement, Presumption of Constitutionality, Amendment, Copyright Board, Law-making, Craftsmanship

This Paper is in continuation to the paper '*Patent Law Declared by the Supreme Court of India*' published in the *Journal of Intellectual Property Rights (JIPR)*.<sup>1</sup> The First Paper has culled out the principles of patent law declared by the Supreme Court in the last 72 years. In this Paper, an attempt has been made to analyze the reported decisions<sup>2</sup> of the Supreme Court of India (*hereinafter*, the Court) relating to copyright from the date of its establishment *i.e.*, 28 January 1950. The Copyright Act, 1957<sup>3</sup> (*hereinafter*, The Copyright Act) is the first intellectual property (IP) legislation enacted in Independent India. Before coming into force of The Copyright Act, the cases relating to copyright were decided under the provisions of The Copyright Act, 1911.<sup>4</sup> Only one decision of the Supreme Court is reported on the interpretation-construction<sup>5</sup> of copyright under The Copyright Act, 1911.<sup>6</sup> The Supreme Court has

delivered a total of twenty-four decisions on The Copyright Act in the last 72 years (till 28 August 2022). The number of decisions on copyright law is not even one per year. Supreme Court has delivered one copyright judgment in 3.02 (point zero two) years or in 1104.58 (point five eight) days.

Out of twenty-four reported decisions on The Copyright Act, four decisions are from twentieth-century and twenty decisions are from twenty-first century. The twentieth-century decisions include two Full Bench and two Division Bench decisions; and the twenty-first century decisions include two Full Bench decisions and eighteen Division Bench decisions. In total, these twenty-four judgments of the Supreme Court include four Full Bench decisions and eighteen Division Bench decisions. No matter dealing with the interpretation or determination of question on The Copyright Act was placed before the Constitution Bench or the Single Bench. Hence, no decision from these two benches of the Court. All the twenty-four

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judgments of the Court are unanimous decisions. Only in three decisions, two from twentieth century (one Full Bench and one Division Bench), and one from twenty-first century (Division Bench), the judges have authored their separate but concurring judgment in agreement with the lead judgment. Hence, no dissenting opinion of the judges is reported. These twenty-four judgments delivered by the Court on the Copyright Act include three orders, one from twentieth century and two from twenty-first century.

In total, forty judges were on the bench in twenty-four decisions. No sitting Chief Justice of India was on the bench in any decision dealing with The Copyright Act. Maximum number of judgments was authored by Justice S. B. Sinha who was on the bench in four cases and authored four judgments. Justice Ranjan Gogoi was on the bench in four cases and authored two judgments and one separate but concurring judgment. In one case of which he was on the bench, the Court delivered a unanimous Order. Justice Rohinton Fali Nariman was on the bench in two cases and authored two judgments. Justices Raja Jaswant Singh, S. Murtaza Fazal Ali, O. Chinappa Reddy, S. Rajendra Babu, Ruma Pal, P. P. Naolekar, Surinder Singh Nijjar, S. A. Bobde, Prafulla C. Pant, Uday U. Lalit, Ashok Bhushan, Dr. D. Y. Chandrachud and M. R. Shah were on the bench in only one case and they authored one judgment each. Justices V. R. Krishna Iyer, Jaswant Singh and R. S. Pathak were on the bench in one case and they authored their separate but concurring judgment. Justice Navin Sinha was on the bench in three cases and B. V. Nagarathna was on the bench in two cases but without authoring any judgment. Justices K. Ramaswamy, G. B. Pattanaik, Altamas Kabir, Cyriac Joseph and N. V. Ramana were on the bench in only one case in which a unanimous order was passed. Justice L. S. Pant was on the bench in three cases and did not author any judgment. Justices E. S. Venkataramiah, R. B. Misra, Shivraj V. Patil, Venkatarama Reddy, B. P. Singh, B. N. Agarwal, B. Sudershan Reddy, A. K. Sikri, Madan Lokur, Mohan M. Shantanagoudar, Abhay Manohar Sapre, Hemant Gupta and B. R. Gavai were on the bench in one case each but did not author any judgment.

The first reported decision of the Supreme Court on The Copyright Act is *Indian Performing Right Society Ltd v Eastern India Motion Pictures Association*<sup>7</sup> and the latest decision is *KNIT Pro International v State of NCT of Delhi*.<sup>8</sup> In nineteen decisions, the Supreme

Court has declared copyright law of which four are 20<sup>th</sup> century decisions and fifteen are 21<sup>st</sup> century decisions.

### Copyright Law Declared in Twentieth Century

The Supreme Court has delivered a total of four decisions in twentieth century of which two are Full Bench decisions and two are Division Bench decisions. In all the four decisions, the Supreme Court has declared the principles of copyright law. Interesting thing about the first two reported decisions on The Copyright Act from this century is that the judges who were on the bench wrote their separate opinions. Though those opinions of the judges were in full agreement with the lead judgment but the readers of the judicial copyright history of India will remember them perhaps for reading their names twice in the text of the judgements. The trend of writing separate concurring opinions seems absent among the judges in the copyright decisions reported in the twenty-first century. The first reported decision of the Supreme Court from this century on The Copyright Act is *Indian Performing Right Society Ltd v Eastern India Motion Pictures Association*<sup>7</sup> and the latest decision is *State of Andhra Pradesh v Nagoti Venkataramana*.<sup>9</sup>

*Indian Performing Right Society Ltd v Eastern India Motion Pictures Association*<sup>7</sup> is a Division Bench decision of the Supreme Court. The lead opinion of the Court was delivered by Justice Raja Jaswant Singh and Justice Iyer wrote his separate but concurring opinion. From the language of his separate judgment, it seems that he was reluctant in authoring a dissenting judgment.

In this case, the Court declared that '[A]n existing and future right of music...composer and lyricist in their respective works as defined in the (Copyright) Act is *capable of assignment* subject to the conditions mentioned in Section 18 of the Act, as also in Section 19 of the Act which requires an assignment to be in writing, signed by the assignor or by his duly authorised agent.'<sup>10</sup>

The Court as to the cinematograph film under The Copyright Act, observed that: 'Section 13 recognises "cinematograph film" as a distinct and separate class of "work" and declares that copyright shall subsist therein throughout India...It also provides that *copyright in case of cinematograph film means among other rights, the right of exhibiting or causing the exhibition in public of the cinematograph film i.e., of causing the film in so far as it consists of visual images to be seen in public and in so far as it consists of sounds to be heard in public.*'<sup>11</sup>

The Court further resolved the conflict between Section 13(4), Section 14(1)(a)(iii) and Section 14(1)(c)(ii), by making the following observation:

*‘Though a conflict may at first sight seem to exist...a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of Section 14(1)(c) of the Act on completion of the cinematograph film a copyright which gives him the exclusive right inter alia of performing the work in public i.e., to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or a musical work for the performance of the work in public...[A] distinct copyright...comes to vest in the cinematograph film as a whole which in the words of British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public. Thus, if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound track of a cinematograph film, he cannot complain of the infringement of his copyright if the author (owner) of the cinematograph film causes the lyric or musical work recorded on the sound track of the film to be heard in public...nothing contained in Section 13(4) of the Act...can operate to affect the rights acquired by the author (owner) of the film by virtue of Section 14(1)(c) of the Act. The composer of a lyric or a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so.’<sup>12</sup>...*

‘[T]he author (composer) of a lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in

public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising; such sound track or from communicating or authorising the communication of the film by radio-diffusion, as Section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things.’<sup>13</sup>...‘Any other construction would not only render the express provisions of Clauses (f), (m), (y) of Section 2, Section 13(1)(b) and Section 14(1)(c) of the Act *otiose* but would also defeat the intention of the legislature, which in view of the growing importance of the cinematograph film as a powerful media of expression, and the highly complex technical and scientific process and heavy capital outlay involved in its production has sought to recognise it as a separate entity and to treat a record embodying the recording in any part of the sound track associated with the film by utilising such sound track as something distinct from a record as ordinarily understood.’<sup>14</sup>

The Court also made certain observations as to the exclusive right in the ‘cinematograph film’:

*‘On a conspectus of the scheme of the Act as disclosed in the provisions...particularly clauses (d), (v), (f), (m), (v) and (y) of Section 2, Sections 13(1) and 14(1)(c), provisos (b) and (c) to Section 17 and Sections 22 and 26 of the Act, it is therefore, abundantly clear that a protectable copyright (comprising a bundle of exclusive rights mentioned in Section 14(1)(c) of the Act) comes to vest in a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronized.’<sup>15</sup>*

As to the question whether the producer of a cinematograph film can defeat the right of the composer of music or lyricist, the Court observed that:

‘The key to the solution of this question lies in provisos (b) and (c) to Section 17 of the Act reproduced above which put the matter beyond doubt. According to the first of these provisos *viz.* proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric therefore *i.e.*, the sounds for incorporation or absorption in the sound track associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the

copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to aforesaid proviso (c) if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work...<sup>16</sup>

‘It is, therefore, crystal clear that the rights of a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of Section 17 of the Act.’<sup>16</sup>

Justice Krishna Iyer who authored his separate but concurring judgment<sup>17</sup> that under Section 16 of The Copyright Act, ‘strangely enough, “author”, as defined in Section 2(d) in relation to a musical work, is only the composer and Section 16 confines “copyright” to those works which are recognised by the Act. This means that the composer alone has copyright in a musical work. The singer has none. *This disentitlement of the musician or group of musical artists to copyright is “un-Indian”...both deserve to be recognised by the copyright law*’.<sup>18</sup> He specified that the Court must communicate to law-maker such infirmities as exist in the law extant.<sup>18</sup>

*RG Anand v Delux Films*<sup>19</sup> is a Full Bench decision. Justice Murtaza Fazal Ali delivered the judgment of the Court. Justices R. S. Pathak and Jaswant Singh wrote his separate but concurring opinion in agreement with Justice Murtaza Fazal Ali. In this case, the Court also referred to The Copyright Act 1911, an Act which was in force before coming into effect of The Copyright Act, 1957. The Court observed that the ‘[F]undamental idea of violation of copyright or limitation is the violation of the Eighth Commandment: “Thou shall not steal” which forms the moral basis of the protective provisions of the Copyright Act of 1911.’<sup>20</sup> In this case, the Court went deeper into the nature of copyright by making the following observations:

‘It is obvious that *when a writer or a dramatist produces a drama it is a result of his great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the copyrighted work, his act amounts to theft by depriving the original owner of the copyright of the product of his labour*. It is also clear that it is not necessary that the alleged infringement should be an exact or verbatim

copy of the original but its resemblance with the original in a large measure, is sufficient to indicate that it is a copy.’<sup>20</sup>

‘[L]aw does not recognize property rights in abstract idea, nor is an idea protected by a copyright and it becomes a copyrighted work only when the idea is given embodiment in a tangible form.’<sup>21</sup>

‘[L]aw does not recognize property rights in abstract ideas and does not accord the author or proprietor the protection of his ideas, which the law does accord to the proprietor of personal property.’<sup>21</sup>

‘In cases involving motion pictures or radio or television broadcasts, it is frequently stated that an idea is not protected by a copyright or under the common law, or that there is no property right in an idea, apart from the manner in which it is expressed.’<sup>21</sup>

‘*When an idea is given embodiment in a tangible form, it becomes the subject of common-law property rights which are protected by the courts, at least when it can be said to be novel and new.*’<sup>21</sup>

The Court further observed in detail as to the infringement of copyright:

‘Infringement involves a copying, in whole or in part, either in *haec verba* or by colorable variation...‘copy’ as used in copyright cases, signifies a tangible object which is a reproduction of the original work. The question is not whether the alleged infringer could have obtained the same information by going to the same source used by the plaintiff in his work, but whether he did in fact go to the same source and do his own independent research. In other words, the test is whether one charged with the infringement made an independent production, or made a substantial and unfair use of the plaintiff’s work.’<sup>22</sup>

‘Intention to plagiarise is not essential to establish liability for infringement of a copyright or for plagiarism of literary property in unpublished books, manuscripts, or plays. One may be held liable for infringement which is unintentional or which was done unconsciously.’<sup>23</sup>

‘Similarity of the alleged infringing work to the author’s or proprietor’s copyrighted work does not of itself establish copyright infringement, if the similarity results from the fact that both works deal with the same subject or have the same common source.... Nevertheless, it is the unfair appropriation of the labour of the author whose work has been infringed that constitutes legal infringement, and while identity of language will often prove that the offence was

committed, it is not necessarily the sole proof; on the other hand, relief will be afforded, irrespective of the existence or non-existence of any similarity of language, if infringement in fact can be proved.<sup>23</sup>

‘The appropriation must be of a ‘substantial’ or ‘material’ part of the protected work....*The test is whether the one charged with the infringement has made a substantial and unfair use of the complainant’s work. Infringement exists when a study of two writings indicates plainly that the defendant’s work is a transparent rephrasing to produce essentially the story of the other writing, but where there is no textual copying and there are differences in literary style, the fact that there is a sameness in the tricks of spinning out the yarn so as to sustain the reader’s suspense, and similarities of the same general nature in a narrative of a long, complicated search for a lost article of fabulous value, does not indicate infringement.*’<sup>23</sup>

‘[T]he position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Jullius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance, elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great play-wright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of the dramas constitutes a master-piece of English literature. It has been rightly

said that “*every drama of Shakespeare is an extended metaphor*”. Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant’s work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.’<sup>24</sup>

‘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 copyright work.’<sup>25</sup>

‘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 or not 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 limitation 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 a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.’<sup>25</sup>

‘One of the surest and the safest test to determine whether or not 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.’<sup>25</sup>

‘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.’<sup>24</sup>

‘Where however apart from the similarities 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.’<sup>25</sup>

‘As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.’<sup>25</sup>

‘Where however 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 a much broader prospective, a 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 copyrighted 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 the copyright may be said to be proved.’<sup>26</sup>

In *Gramophone Company of India Ltd v Birendra Bahadur Pandey*,<sup>27</sup> is a Full Bench decision of the Supreme Court. Justice O. Chinnappa Reddy delivered the unanimous judgment of the Court. The expression “import” has not been defined in the text of The Copyright Act. To the question what does the word “import” mean in Sections 53 and 54 of The Copyright Act, the Court answered that “import” in Sections 51 and 53 of the Copyright Act means “bringing into India from outside India”, that it is not limited to importation for commerce only but includes importation for transit across the country.’<sup>28</sup>

The Court also declared the following relating to the copyright law:

(i) *The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict.*<sup>29</sup>

(ii) *‘An artistic, literary or musical work is the brain-child of its author, the fruit of his labour and so considered to be his property.’*<sup>30</sup>

(iii) *‘The expression ‘literary and artistic works’ is defined to include every production in the literary, scientific and artistic domain whatever may be the mode or formation of its expression.’*<sup>31</sup>

(iv) *‘[O]rder under Section 53 may be made by the Registrar of Copyrights on the application of the owner of the Copyright, but after making such enquiry as the Registrar deems fit.’*<sup>32</sup>

(v) *‘One fundamental difference between the nature of a Notification under Section 11 of the Customs Act and an order made under Section 53 of the Copyright Act is that the former is quasi-legislative in character, while the latter is quasi-judicial in character. The quasijudicial nature of the order made under Section 53 is further emphasised by the fact that an appeal is provided to the Copyright Board against the order of the Registrar under Section 72 of the Copyright Act.’*<sup>33</sup>

(vi) *‘[T]he character of the order under Section 53 to indicate that the effect of an order under Section 53 of the Copyright Act is not as portentous as a notification under Section 11 of the Customs Act.’*<sup>33</sup>

(vii) *‘The Registrar is nor bound to make an order under Section 53 of the Copyright Act so soon as an application is presented to him by the owner of the Copyright.’*<sup>33</sup>

(viii) *‘Registrar has naturally to consider the context of the mischief sought to be prevented. He must consider whether the copies would infringe the Copyright; if the copies were made in India. He must consider whether the applicant owns the Copyright or is the duly authorised agent of the Copyright. He must hear these claiming to be affected if an order is made and consider any contention that may be put forward as an excuse for the import. He may consider any other relevant circumstance.’*<sup>33</sup>

*State of AP v Nagoti Venkataramana*,<sup>34</sup> is a unanimous Order of the Division Bench. In this case, to the question, ‘whether identification of the owner of the copyright is a pre-condition for violation of the provisions of Section 63 or 68A, as the case may be’, the Court answered that ‘The identification of the owner being an essential element to prove the offence of infringement of copyright.’<sup>35</sup> To another question, whether video film is a cinematograph, the Court answered:

*‘It is settled view that video tapes come within the expression “cinematograph” in view of the extended definition in Section 2 (c) which includes apparatus for the representation of moving pictures or series of pictures as copy of the video should be created in respect of a cinematograph under the Cinematograph Act which gives protection to the purchasers of the cinematograph if they are registered under Chapter X*

of the Act. Section 44 gives the right of registration and once the entries have been made by operation of Section 48 the entries in the register of copyrights shall be prima facie evidence of the copyright and the entries therein are conclusive without proof of the original copyright which must be taken to have been created in respect of the video tape.<sup>36</sup>

Referring to the Statement of Objects and Reasons of The Copyright Act, the Supreme Court also declared the following:

(i) *'The entries under Section 48 in the register of copyrights shall be prima facie evidence of the particulars entered therein a document purporting to be copies of such entries therein, or extracts therefrom certified by the Registrar of Copyrights and sealed with the seal of the Copyright Office shall be admissible in evidence in all courts without further proof or production of the original.'*<sup>37</sup>

(ii) *'[I]nfringement of a copyright or deemed infringement of a copyright or publication of a work without the permission of the owner are offences under the Act.'*<sup>38</sup>

### Copyright Law Declared in Twenty-first Century

The Supreme Court has delivered a total of twenty decisions in twenty-first century including two unanimous orders. Of these twenty-four decisions, two are Full Bench decisions and eighteen are Division Bench decisions. Only in one decision, one judge authored a separate but concurring judgment. Out of twenty decisions, the Supreme Court declare the copyright law in fifteen decisions — expressed the about the redrafting of the Copyright Rule by the High Court in one decision without going into the question of copyright law, and did not declare any law in four decisions. The first reported case from this century is *Gramophone Co. of India Ltd v Mars Recording (Pvt) Ltd*<sup>39</sup> and the latest decision is *KNIT Pro International v State of NCT of Delhi*.<sup>40</sup>

*Gramophone Co. of India Ltd v Mars Recording (Pvt) Ltd*,<sup>41</sup> is a Division Bench decision of the Supreme Court. The unanimous decision on behalf of the Court was delivered by Justice Rajendra Babu. The Court declared that *'[A] copyright in a sound recording cannot be infringed by the making of a "sound alike" recording. A close limitation of an existing recording using alternate performers is not a copyright infringement.'*<sup>42</sup>

*Exphar SA v Eupharma Laboratories Ltd*,<sup>43</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by

Justice Ruma Pal. The Court as to the word "include" in Section 62 of the Court held that *'[W]ord "include"...shows that the jurisdiction for the purposes of Section 62 is wider than that of the Court as prescribed under The Code of Civil Procedure, 1908.'*<sup>44</sup> The Court also declared the following copyright law:

(a) *'[T]he object and reason for the introduction of sub-section (2) of Section 62 was not to restrict the owners of the copyright to exercise their rights but to remove any impediment from their doing so.'*<sup>44</sup>

(b) *'Section 62(2) cannot be read as limiting the jurisdiction of the District Court only to cases where the person instituting the suit or other proceeding, or where there are more than one such persons, any of them actually and voluntarily resides or carries on business or presently works for gain. It prescribes an additional ground for attracting the jurisdiction of a Court over and above the "normal" grounds as laid down in Section 20 of the Code.'*<sup>44</sup>

(c) *'[A] "cease and desist" notice in a copyright action cannot, particularly in view of Section 60 of the Act, be termed to be a "mere" notice.'*<sup>45</sup>

*Dhodha House v S K Maingi*,<sup>46</sup> is a Division Bench decision of the Supreme Court. Justice S. B. Sinha delivered the unanimous judgment on behalf of the Court. In this case, the Court declared that:

(a) *'Cause of action, as is well-settled, is a bundle of facts which are necessary to be proved in a given case. Cause of action, it is trite, if arises within the jurisdiction of the court concerned empowers the court to entertain the matter. Determination of territorial jurisdiction of a civil court is governed by the provisions of the Code of civil Procedure.'*<sup>47</sup>

(b) *'The jurisdiction of the District Court to determine a lis under The Copyright Act, 1957, as also The Trade and Merchandise Marks Act, 1958, must, thus, be instituted where the whole or a part of cause of action arises.'*<sup>48</sup>

(c) *'It is trite law that a judgment and order passed by the court having no territorial jurisdiction would be nullity.'*<sup>49</sup>

(d) *'A judgment or order passed by a court lacking territorial jurisdiction, thus, would be coram non judge.'*<sup>49</sup>

(e) *'It is well-settled that a decision is an authority what it decides and not what can logically be deduced therefrom.'*<sup>50</sup>

(f) *'A corporation in view of Explanation appended to Section 20 of the Code would be deemed to be carrying on business inter alia at a place where*

it has a subordinate office. Only because, its goods are being sold at a place would thus evidently not mean that it carries a business at that place.<sup>51</sup>

(g) 'It may be so that in a given case if such label is registered, a violation thereof may give rise to cause of action under the said Act; but only because in a given case, the activities on the part of the defendant may give rise to a cause of action both under the 1958 Act as also under the 1957 Act, the same would not mean, irrespective of the nature of violation, the plaintiff would be entitled to invoke the jurisdiction of the court in terms of subsection (2) of Section 62 of the 1957 Act.'<sup>52</sup>

To the question whether causes of action in terms of both The Copyright Act, 1957, as also The Trade and Merchandise Marks Act, 1958, although may be different, would a suit be maintainable in a court only because it has the jurisdiction to entertain the same in terms of Section 62(2) of The Copyright Act, the Court answered:

'A cause of action in a given case both under the 1957 Act as also under the 1958 Act may be overlapping to some extent. The territorial jurisdiction conferred upon the court in terms of the provisions of the Code of Civil Procedure indisputably shall apply to a suit or proceeding under the 1957 Act as also the 1958 Act. Sub-section (2) of Section 62 of the 1957 Act provides for an additional forum. Such additional forum was provided so as to enable the author to file a suit who may not otherwise be in a position to file a suit at different places where his copyright was violated. The Parliament while enacting the Trade and Merchandise Marks Act in the year 1958 was aware of the provisions of the 1957 Act. It still did not choose to make a similar provision therein. Such an omission may be held to be a conscious action on the part of the Parliament. The intention of the Parliament in not providing for an additional forum in relation to the violation of the 1958 Act is, therefore, clear and explicit. The Parliament while enacting the Trade Marks Act, 1999 provided for such an additional forum by enacting sub-section (2) of Section 134 of the Trade Marks Act. The court shall not, it is well well-settled, readily presume the existence of jurisdiction of a court which was not conferred by the statute. For the purpose of attracting the jurisdiction of a court in terms of sub-section (2) of Section 62 of the 1957 Act, the conditions precedent specified therein must be fulfilled, the requisites wherefor are that the plaintiff

must actually and voluntarily reside to carry on business or personally work for gain.'<sup>53</sup>

*Entertainment Network (India) Ltd v Super Cassette Industries Ltd*,<sup>54</sup> is a Division Bench decision of the Supreme Court and Justice S. B. Sinha delivered the unanimous judgement of the Court. In this case, three questions were for consideration before the Supreme Court:

(i) Whether the Copyright Board has jurisdiction under Section 31(1)(b) of the Copyright Act, 1957 to direct the owner of a copyright in any Indian work or a registered copyright society to issue compulsory licences to broadcast such as works, where such work is available to the public through radio broadcast?

(ii) Whether in any event such a compulsory license can be issued to more than one complainant in the light of Section 31(2)?

(iii) What would be the relevant considerations which the Copyright Board must keep in view while deciding on:

(a) Whether to issue a compulsory license to a particular person; and

(b) The terms on which the compulsory license may be issued, including the compensation?

As to the first question, the Court observed that 'As it was a case of abuse, the Board had the jurisdiction to entertain any application for grant of compulsory licence. How far and to what extent appellant has infringed the right of the respondent is a matter which may be taken into consideration by the Board.'<sup>55</sup> Court further held that '*Communication to the public is possible by way of diffusion. Explanation appended to Section 2 (ff) clearly shows the extensive meaning of the said term. Publication and republication of a work in general may be different from communication of a work recording in sound recording. The use of words "such work" also assumes significance. The said words must be understood having regard to the fact that the sound recording is also a work. If it is accepted that voluntary licenses have been entered into by the owners with All India Radio and some other Radio Broadcasters, then it is sufficient for closing the doors on another person to approach the Copyright Board. One may as well say that if it is provided to a satellite channel or a space radio, the same also would subserve the purpose for refusing to grant an application under Section 31 of the Act.*'<sup>56</sup>

As to the second question, the Court held that '*Section 31 (2)...is attracted in a case where there are more than one applicants. The question of*

*considering the respective claim of the parties would arise if they tread the same ground. The same, however, would not mean that only one person is entitled to have a licence for all time to come or for an indefinite term even in perpetuity. A licence may be granted for a limited period; if that be so another person can make such an application. Sub-section (2) of Section 31 would lead to an anomalous position if it is read literally. It would defeat the purport and object of the Act. It has, therefore, to be read down. Purposive construction therefore may be resorted to.*<sup>57</sup>

As to the third question, the Court held that:

*'Sub-section (2) of Section 33 provides for that any association of persons who fulfils such conditions as may be prescribed may apply for permission to do the business specified in Subsection (1) to the Registrar of Copyrights who shall submit the application to the Central Government. Sub-section (3) of Section 33 empowers the Central Government to grant a licence having regard to the interest of the authors and other owners of rights under the Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association. Section 34 provides for administration of rights of owner by copyright society. The proviso appended thereto prohibit any discrimination in regard to the terms of licence or the distribution of fees collected between rights in Indian and other works.*<sup>58</sup>

The Court further held *'The concept of copyright society appears to be that the interest of the copyright holder can be protected by the said society while granting licence so as to enable all players to have the benefit of a single window'*.<sup>59</sup> The Court also interpreted-constructed certain expressions used under The Copyright Act:

*'[O]nly because the term for holding copyright (under Section 27) are different, the same would not mean that the right of the copyright owner in sound recording is somewhat inferior.*<sup>60</sup>

*'Royalty means the remuneration paid to an author in respect of the exploitation of a work, usually referring to payment on a continuing basis (e.g., 10 per cent of the sale price) rather than a payment consisting of a lump sum in consideration of acquisition of rights. May also be applied to payment to performers.*<sup>61</sup>

*'The word "compensation", however, must have been used keeping in view the fact that if it is a statutory grant; it is a case of statutory licence.'*<sup>61</sup>

*'In the context of the Act, royalty is a genus and compensation is a species. Where a licence has to be granted, it has to be for a period. A "compensation" may be paid by way of annuity. A "compensation" may be held to be payable on a periodical basis, as apart from the compensation, other terms and conditions can also be imposed. The compensation must be directed to be paid with certain other terms and conditions which may be imposed.'*<sup>62</sup>

Further, the Court declared that:

(i) *'Registration of copyright society is mandatory in character.'*<sup>63</sup>

(ii) *'There cannot be any doubt whatsoever that an artistic, literary or musical work is the brain-child of an author, the fruit of his labour and, so, considered to be his property. A copyright, however, unlike a trade mark is a right created under the Act as is evident from Section 16 thereof. When an author of a copyright and other claims a copyright, it is subjected to the provisions of the Act. The rights and obligations of the author ought to be found out within the four corners of the Act. It is not necessary to dilate more upon these aspects of the matter as the object behind enacting the Act is absolutely clear and explicit. It creates a monopoly in favour of the author. Copyright also creates a monopoly in favour of the copyright society. What requires protection is unlawful reproduction of the author's work by others. It is the long period which encourages the authors to create works of literature, music and art.'*<sup>64</sup>

(iii) *'A statute as is well known must be read in its entirety. It is required to be read chapter by chapter, section by section and clause by clause. The definitions of the term "broadcast" as also "sound recording" must be given a wide meaning. Clause (a) of Section 13 protects original work whereas Clauses (b) and (c) protect derivative works. It provides for commercial manifestation of original work and the fields specified therein. Clause (a) of Sub-section (1) of Section 14 deals with original work. It is extremely broad. In contrast thereto, the copyright on films or sound recording work operates in restrictive field; they provide for a restrictive right as would appear from the provisions contained in Section 14(1)(e) of the Act.'*<sup>65</sup>

(iv) *'For a proper construction of the provisions, will it be necessary to keep in mind the difference*

between the right of the original work and right of sound recording? Should we also bear in mind that there are various forms of intellectual property rights. Section 16 provides that a right, *inter alia*, in respect of any work must be claimed only under and in accordance with the provisions of the Act unlike Trade Mark and 'passing off rights' can be enforced even though they are not registered. It must also be noticed that whereas the term of a copyright in original literary, dramatic, musical and artistic works not only remains protected in the entire life time of the author but also until 60 years from the beginning of the calendar year next following the year in which the author dies, the term of copyright in sound recording subsists only for 60 years, but as indicated hereinbefore, 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>65</sup>

(v) 'If the right of an author/society is so pervasive, is it necessary to construe the provisions under Section 31 of the Act having regard to the International Covenants and the laws operating in the other countries? The answer to the said question must be rendered in affirmative. Interpretation of a statute cannot remain static. Different canons and principles are to be applied having regard to the purport and object of the Act. What is essential therefore is to see that the expanding area in which the copyright will have a role to play is covered. While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions vis-a-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.'<sup>66</sup>

(vi) '[A]pplicability of the International Conventions and Covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the Conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the International Covenants can be utilized.

Where International Conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof. Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible.'<sup>67</sup>

(vii) 'The Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works, on the other. The extent to which the owner is entitled to protection in regard to his work for which he has obtained copyright and the interest of the public is a matter which would depend upon the statutory provisions.'<sup>68</sup>

(viii) 'Whereas the Act provides for exclusive rights in favour of owners of the copyright, there are provisions where it has been recognized that public has also substantial interest in the availability of the works. The provisions relating to grant of compulsory license must be viewed having regard to the aforementioned competing rights wherefor an appropriate balance has to be struck. For the said purpose, we may notice the broad features of the Act.'<sup>68</sup>

(ix) '*The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licenses on terms mutually acceptable to him and the licensee.* The Act confers on the copyright owner the exclusive right to do the various acts enumerated in Section 14. An infringement of copyright occurs if one of those acts is done without the owner's license. A license passes no interest, but merely makes lawful that which would otherwise be unlawful.'<sup>69</sup>

(x) 'The Act also expressly recognizes the notion of an "exclusive license" which is defined in Section 2(j). But that does not mean, as would be noticed from the discussions made hereinafter, that it would apply in all situations irrespective of the nature of right as also the rights of others. It means a license which confers on the licensee, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work. An exclusive licensee has specific rights under the Act

such as the right to have recourse to civil remedies under Section 55 of the Act. This Scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.<sup>69</sup>

(xi) 'The scheme of the Act affirms the freedom to contract as being the primary machinery by which the copyright owner publishes his work through a voluntary license regime in terms of Section 30. Compulsory licenses are an exception to the general freedom of the copyright owner to contract.'<sup>70</sup>

(xii) 'Chapter VI relate to grant of licence, which can be divided into two parts; licences by owners of copyright and compulsory licenses. Compulsory licences can be granted by the Copyright Board subject to the limitations contained therein. It cannot be said to be an exception to the general rule in the strict sense of the term as the provisions relating to grant of license by owners of Copyright and compulsory licenses operate in different fields. It may be true that while passing an order for grant of compulsory licenses, the relevant factors as laid down therein must be kept in mind which would include the right of the owner of the copyright as a part of the right of property, but where a statute is to be construed as a balancing statute, the situation may be different.'<sup>71</sup>

(xiii) 'Significantly, in between the Clauses (a) and (b), the word "or" has been used. It must be read disjunctively and not conjunctively. Even otherwise, reading the said provision, conjunctively is not possible. Clause (a) refers to republication or allowing republication of the work, etc. Clause (b) refers to refusal to allow communication to the public in the case of a broadcast or in the case of the sound recording. What is the meaning of the word 'refusal'...The meaning of a word must be attributed to the context in which it is used. For giving a contextual meaning, the text of the statute must be kept in mind. An act of refusal depends upon the fact of each case. Only because an offer is made for negotiation or an offer is made for grant of license, the same per se may not be sufficient to arrive at a conclusion that the owner of the copyright has not withheld its work from public.'<sup>72</sup>

(xiv) 'When an offer is made on an unreasonable term or a stand is taken which is otherwise arbitrary, it may amount to a refusal on the part of the owner of a copyright.'<sup>72</sup>

(xv) 'When the owner of a copyright or the copyright society exercises monopoly in it, then the bargaining power of an owner of a copyright and the proposed licensee may not be same. When an offer is made by an owner of a copyright for grant of license, the same may not have anything to do with any term or condition which is wholly alien or foreign therefore. An unreasonable demand if acceded to, becomes an unconstitutional contract which for all intent and purport may amount to refusal to allow communication to the public work recorded in sound recording. A de jure offer may not be a de facto offer. Although the term 'work' has been used both in Clauses (a) and (b) of Sub-section (1) of Section 31, the same has been used for different purpose. The said term 'work' has been defined in Section 2(y) in different contexts. It enumerates the works which are: (a) a literary, dramatic, musical or artistic work; (b) a cinematograph film; (iii) a sound recording. Thus, a literary work ex facie may not have anything to do with sound recording.'<sup>73</sup>

(xvi) 'There are indications in the Act particularly having regard to Sections 14(1)(a) and 14(1)(e) thereof that they are meant to operate in different fields. They in fact do not appear to be operating in the same field. Clause (a) refers to publication or republication of the work. It may be in print media or other medias. Clause (b), however, refers to broadcast alone. Sound recording is a part of it. Sub-clauses (i) to (vii) of Sub-clauses (a) of Sub-section (1) of Section 14 and Sub-clauses (i) to (iii) of Sub-clause (e) conferred different meanings of the word copyright. Whereas Clause (a) refers to work in general, Clause (b) refers to work recorded in such sound recording, which in turn means the recording of sounds from which such sounds may be reproduced regardless of the medium on which such recording is made or the method by which the sounds are produced. Clause (b) ex facie does not fit in the scheme of Clause (a).'<sup>74</sup>

(xvii) 'Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster.'<sup>75</sup>

(xviii) 'An owner of a copyright indisputably has a right akin to the right of property. It is also a human right. Now, human rights have started

gaining a multifaceted approach. Property rights *vis-à-vis* individuals are also incorporated within the ‘multiversity’ of human rights. As, for example, any claim of adverse possession has to be read in consonance with human rights.<sup>75</sup>

(xix) ‘The right to property, therefore, is not dealt with its subject to restrict when a right to property creates a monopoly to which public must have access. withholding the same from public may amount to unfair trade practice.’<sup>76</sup>

(xx) ‘In our constitutional Scheme of statute monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.’<sup>76</sup>

*Eastern Book Company v DB Modak*,<sup>77</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice P. P. Naolekar. The Court observed as to the nature of protection of copyright:

*‘The copyright, protection finds its justification in “fair play”’. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make a profit but of the skill and labour of the original author and it is for this reason The Copyright Act gives to the authors certain exclusive rights in relation to the certain work referred in the Act. The object of the Act is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others.’<sup>78</sup>*

*‘Copyright is a right to stop others from exploiting the work without the consent or assent of the owner of the copyright. A Copyright Law presents a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute.’<sup>78</sup>*

‘One of the key requirements is that of originality which contributes, and has a direct nexus, in maintaining the interests of the author as well as that of public in protecting the matters in public domain. *It is a well-accepted principle of copyright law that there is no copyright in the facts per se*, as the facts are not created nor have they originated with the author of any work which embodies these facts. The issue of Copyright is closely connected to that of commercial viability, and commercial consequences and implications.’<sup>78</sup>

Two questions were for consideration before the Court. (i) What shall be the standard of originality in

the copy-edited judgments of the Supreme Court which is a derivative work and what would be required in a derivative work to treat it the original work of an author and thereby giving a protected right under the Copyright Act, 1957 to the author of the derivative work?; and (ii) Whether the entire version of the copy-edited text of the judgments published in the appellants’ law report SCC would be entitled for a copyright as an original literary work, the copy-edited judgments having been claimed as a result of inextricable and inseparable admixture of the copy-editing inputs and the raw text, taken together, as a result of insertion of all SCC copy-editing inputs into the raw text, or whether the appellants would be entitled to the copyright in some of the inputs which have been put in the raw text?

The Court answered the first question as:

‘The judicial pronouncements of the Apex Court would be in the public domain and its reproduction or publication would not infringe the copyright. The reproduction or publication of the judgments delivered by the Supreme Court by any number of persons would not be infringement of a copyright of the first owner thereof, namely, the Government, unless it is prohibited.’<sup>79</sup>

*‘The word “original” does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author; and as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation. The words “literary work” cover work which is expressed in print or writing irrespective of the question whether the quality or style is high. The commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection will not be entitled to copyright. The word “original” does not demand original or inventive thought, but only that the work should not be copied but should originate from the author. In deciding, therefore, whether a work in the nature of a compilation is original, it is wrong to consider*

*individual parts of it apart from the whole. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original. In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. In each case, it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation.*<sup>80</sup>

‘The creation of the work which has resulted from little bit of skill, labour and capital are sufficient for a copyright in derivative work of an author. Decisions propounded a theory that an author deserves to have his or her efforts in producing a work, rewarded. The work of an author need not be in an original form or novel form, but it should not be copied from another’s work, that is, it should originate from the author. The originality requirement in derivative work is that it should originate from the author by application of substantial degree of skill, – industry or experience. Precondition to copyright is that work must be produced independently and not copied from another person. Where a compilation is produced from the original work, the compilation is more than simply a re-arranged copyright of original, which is often referred to as skill, judgment and or labour or Capital. The copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his skill, labour and investment of capital, maybe it is derivative work. The courts have only to evaluate whether derivative work is not the end-product of skill, labour and capital which is trivial or negligible but substantial. The courts need not go into evaluation of literary merit of derivative work or creativity aspect of the same.’<sup>81</sup>

‘The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author.’<sup>82</sup>

‘The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author.’<sup>82</sup>

As to the second question, the Court observed:

‘Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity. Arrangement of the facts or data or the case law is already included in the judgment of the court. Therefore, creativity of SCC would only be addition of certain facts or material already published, case law published in another law report and its own arrangement and presentation of the judgment of the court in its own style to make it more user friendly. The selection and arrangement can be viewed as typical and at best result of the labour, skill and investment of capital lacking even minimal creativity. It does not as a whole display sufficient originality so as to amount to an original work of the author. To support copyright, there must be some substantive variation and not merely a trivial variation, not the variation of the type where limited ways/unique of expression available and an author selects one of them which can be said to be a garden variety. Novelty or invention or innovative idea is not the requirement for protection of copyright but it does require minimal degree of creativity.’<sup>83</sup>

*Dabur India Ltd v KR Industries*,<sup>84</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice S. B. Sinha. As to the text of Section 55 (1) of The Copyright Act, the Court observed:

‘Sub-section (1) of Section 55 of 1957 Act provides for the remedies in terms whereof the plaintiff shall be entitled to all reliefs by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right. It must be read as “*ejusdem generis*”. It must take its colour from the words, ‘any proceeding’ namely the right to obtain a decree by way of injunction, decree for damages, accounts or other incidental reliefs which can be granted by a civil court.’<sup>85</sup>

‘If a person is found to be guilty of violation of copyright, he will be bound to pay damages. For the purpose of quantification of damages, taking of the accounts may be necessary and it is in this behalf the Parliament thought it fit to use the word “otherwise”.

Thus, the power conferred by law within the meaning of Sub-section (1) of Section 55 of 1957 Act qualifies the power of the court to grant remedies as envisaged thereunder if any other cause of action arose under a different Act. An action for passing off is common law right but the same does not determine the jurisdiction of the court. For exercising such jurisdiction, the provisions of the Code would be applicable. 1957 Act being a special law would, thus, prevail over the general law, viz., the Code.<sup>86</sup>

Court also declared that:

‘There cannot be any doubt whatsoever that the Parliament having inserted Sub-section (2) in Section 62 of the 1957 Act, the jurisdiction of the Court thereunder would be wider than the one under Section 20 of the Code. The object and reasons for enactment of sub-section (2) of Section 62 would also appear from the report of the Committee, as has been noticed by this Court being a provision which has been specially designed to confer an extra benefit upon the authors who were not in a position to instate copyright infringement proceeding before the Courts. It is in the aforementioned context the law laid down by this Court in...*Dhoda House*<sup>46</sup> must be understood.’<sup>86</sup>

‘A composite suit within the provisions of the 1957 Act as considered in *Dhoda House*,<sup>46</sup> therefore, would mean the suit which is founded on infringement of a copyright and wherein the incidental power of the Court is required to be invoked. A plaintiff may seek a remedy which can otherwise be granted by the court.’<sup>87</sup>

*Academy of General Education, Manipal v B Malini Mallya*,<sup>88</sup> is a Division Bench decision of the Supreme Court. Justice S. B. Sinha delivered the unanimous judgment of the Court. The Court as to the “literary work” and “dramatic work” observed as under:

‘[P]rovisions(of) the Act make a distinction between the “literary work” and “dramatic work”. Keeping in view the statutory provisions, there cannot be any doubt whatsoever that copyright in respect of performance of “dance” would not come within the purview of the literary work but would come within the purview of the definition of “dramatic work”.’<sup>89</sup>

‘Decree for injunction is an equitable relief...The court while passing such a decree, is obligated to consider the statutory provisions governing the same...[I]t must be noticed as to what is a copyright and in respect of the matters the same cannot be claimed or otherwise the same is lodged by conditions and subject to statutory limitation.’<sup>90</sup>

As to “fair dealing”, the Court observed:

‘When a fair dealing is made, inter alia, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or dance is carried out within the purview of the said clause, the order of injunction shall not be applicable. Similarly, appellant being an educational institution, if the dance is performed within the meaning of provisions of clause (i) of Sub-section (1) of Section 52 of the Act strictly, the order of injunction shall not apply thereto also. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the purview of amateur club or society, the same would not constitute any violation of the said order of injunction.’<sup>91</sup>

*Phonographic Performance Ltd v Entertainment Network (India) Ltd*,<sup>92</sup> is a unanimous Order of the Court. The Court in this case did not declare any copyright law.

*Paragon Rubber Industries v Pragathi Rubber Mills*,<sup>93</sup> is a Division bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice Surinder Singh Nijjar. In this case the Court declared copyright law as:

‘[T]he jurisdiction cannot be conferred by joining two causes of action in the same suit when the court has jurisdiction to try the suit only in respect of one cause of action and not the other.’<sup>94</sup>

‘If the impediment is sought to be removed by inserting an incidental provision, there cannot be any doubt the court could be entitled to pass an interim order, but the same by no stretch of imagination can be extended to a cause of action which is founded on separate set of facts as also rights and liabilities of a party under a different Act.’<sup>95</sup>

The Court also settled a conundrum relating to copyright law:

‘Although, the 1999 Act was enacted on 30 th December, 1999, it came into force on 15<sup>th</sup> September, 2003 vide S.O. 1048(E), dated 15 th September, 2003, published in the Gazette of India, Extra., Pt. II, Section 3(ii), dated 15<sup>th</sup> September, 2003. Since the suit in this case was filed on 19<sup>th</sup> March, 2001, it would be adjudicated under the 1958 Act. The 1958 Act does not contain a provision similar to the provision contained in Section 62(2) of the 1957 Act. Parliament being aware of the provisions of the 1957 Act still did not incorporate the same in the 1958 Act.

Therefore, it can not be read into the 1958 Act by implication.<sup>95</sup>

*Krishka Lulla v Shyam Vithalrao Devkatta*<sup>96</sup> is a Division Bench decision of the Court. The unanimous decision of the Court was delivered by Justice S. A. Bobde. the Supreme Court declared that ‘A title by itself is in the nature of a name of a work and is not complete by itself, without the work.’<sup>97</sup> ...The mere use of common words, such as those used here, cannot qualify for being described as “literary”.<sup>97</sup> The Court finally declared the copyright law as:

‘[N]o copyright subsists in the title of a literary work and a plaintiff or a complainant is not entitled to relief on such basis except in an action for passing off or in respect of a registered trademark comprising such titles. This does not mean that in no case can a title be a proper subject of protection against being copied as held in *Dicks v Yates*<sup>98</sup> where Jessel MR said “there might be copyright in a title as for instance a whole page of title or something of that kind requiring invention”....’<sup>99</sup>

*RELX India Private Limited v Eastern Book Company*,<sup>100</sup> is a unanimous Order of the Supreme Court. No copyright law was declared in this case.

*Union of India v Board of Control for Cricket in India*,<sup>101</sup> is a Division Bench decision of the Supreme Court. No copyright law was declared in this case.

*International Confederation of Societies of Authors and Composers v Aditya Pandey*,<sup>102</sup> is a Division Bench decision of the Supreme Court of India. The unanimous judgment of the Court was delivered by Justice Prafulla C. Pant. Justice Ranjan Gogoi authored his separate but concurring judgment. The Court declared that:

(a) ‘In the assignment, normally, ownership of the copyright of the work is transferred but in the case of licence another person is allowed to use the work by the author.’<sup>103</sup>

(b) ‘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.’<sup>103</sup>

The Court reiterating the principle of law declared by the Court in *Entertainment Network (India) Ltd v Super Cassette Industries Ltd*<sup>54</sup> and *Indian*

*Performing Rights Society Ltd v Eastern Indian Motion Pictures Association*,<sup>10</sup> upheld the order passed by the Division Bench of Delhi High Court and also clarified that with effect from 21 June 2012 [The Copyright (Amendment) Act, 2012],<sup>104</sup> in view of sub-section (10) of Section 19, the assignment of the copyright in the work to make sound recording which does not form part of any cinematograph film, shall not affect the right of the author of the work to claim an equal share of royalties or/and consideration payable for utilization of such work in any form by the Plaintiff/Respondent.<sup>105</sup>

*B N Firoos v State of Kerala*,<sup>106</sup> is a Division Bench decision of the Supreme Court. Justice Ranjan Gogoi delivered the judgment of the Court. The Court declared that ‘[P]rovisions of Section 70(1) of the Income Tax Act has to be read conjointly with Section 2(k) and Section 17 of the Copyright Act, 1957 in order to give due effect to the related provisions of two different enactments made by the legislature.’<sup>107</sup> The Court further declared that:

(i) ‘Section 70 (1) of the Income Tax Act as in force at the relevant point of time (at the time when the matter was under consideration in the High Court) or even after its amendment in 2009 bars access to a person to the system declared as a “protected system” without authorization from the Appropriate Government. Plainly read, the power of declaration of a “protected system” may invade a copyright which may be vested in a private owner. However, such a situation is taken care of by the provisions contained in Section 2(k) of the Copyright Act, 1957 which defines “Government work” and Section 17(d) of the Copyright Act, 1957 which vests in the Government, copyright in a government work as defined by Section 2(k). The balance is struck by Section 17 between copyright pertaining to any other person and copyright vested in the Government in a “government work”. Section 70 of the Income Tax Act, therefore, cannot be construed independent of the provisions of the Copyright Act; if Section 70 of the Income Tax Act has to be read in conjunction with Section 2(k) and Section 17 of the Copyright Act 1957 the rigours that would control the operation of Section 70(1) of the Income Tax Act are clearly manifested.’<sup>107</sup>

(ii) ‘The only point for adjudication is the claim of the Appellant, as the developer of the application software, to be the first author of the said work so as to vest in him/it a copyright under the provisions of Section 17 of the Copyright Act, 1957, a claim which is palpably unfounded both on the basis of the

provisions of Section 17(a) of the Copyright Act and under Clause 10 (under the head “Role of Government of Kerala”) of the Memorandum of Understanding between Total Solution Providers for EGovernance and Government of Kerala.<sup>108</sup>

*Diyora and Bhandari Coroporation v Sarine Technologies Ltd*,<sup>109</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice Uday U. Lalit. The Court did not declare the patent law in this case as the issue in this case was related to the correctness of the order of Mr Zeidman as an expert in the matter.

*Star India Private Limited v Department of Industrial Policy and Promotion*,<sup>110</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice Rohinton F. Nariman. In this case, the validity of certain clauses of The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017<sup>111</sup> and The Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017<sup>111</sup> made under The Telecom Regulatory Authority of India Act, 1997 were challenged. The Court declared that:

‘[B]roadcasters may, in fact, be the owners of the original copyright of a work — for example, if they themselves have produced a serial. They may also be the copyright owners of the broadcast of this serial which is a separate right under the Copyright Act which they are able to exploit, and if there is a re-broadcast of what has already been copyrighted, this again is protected by Chapter VIII of the Copyright Act.’<sup>112</sup>

‘The tariff...may be charged under Section 33A of the Copyright Act read with Rule 56 of the Copyright Rules is nothing but compensation that is payable to broadcasters for parting with their copyright in the (prescribed) manner...’<sup>112</sup>

‘[W]hen TRAI fixes rates and/or interferes with content, it is trespassing into the exclusive domain set out by Parliament under the Copyright Act. Since the TRAI Act and the Copyright Act, both being Acts passed by Parliament, have to be harmonised, such harmony can only be maintained if TRAI is kept out altogether from the domain covered by the Copyright Act.’<sup>113</sup>

‘When the definitions of “broadcast” in Section 2(dd) of the Copyright Act and of “broadcasting services” in Clause 2(j) of the impugned Regulation

are compared, what is clear is that the words “intended to be received by the general public either directly or indirectly” are completely missing from the definition of “broadcast” contained in the Copyright Act. Also, Section 52(1)(b) of the Copyright Act indicates that transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public is not an act that would constitute infringement of copyright.’<sup>114</sup>

‘The picture that...emerges is that copyright is meant to protect the proprietary interest of the owner, which in the present case is a broadcaster, 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>115</sup>

‘[T]he Copyright Act will operate within its own sphere, the broadcaster being given full flexibility to either individually or in the form of a society charge royalty or compensation for the three kinds of copyright...TRAI, while exercising its regulatory functions under the TRAI Act, does not at all, in substance, impinge upon any of these rights, but merely acts...as a regulator, in the public interest, of broadcasting services provided by broadcasters and availed of by the ultimate consumer.’<sup>116</sup>

‘[I]f in exercise of its regulatory power under the TRAI Act, TRAI were to impinge upon compensation payable for copyright, the best way in which both statutes can be harmonized is to state that, the TRAI Act, being a statute conceived in public interest, which is to serve the interest of both broadcasters and consumers, must prevail, to the extent of any inconsistency, over the Copyright Act which is an Act which protects the property rights of broadcasters.’<sup>117</sup>

‘[T]o the extent royalties/compensation payable to the broadcasters under the Copyright Act are regulated in public interest by TRAI under the TRAI Act, the former shall give way to the latter. As there is no merit in these appeals, the same are, therefore, dismissed.’<sup>117</sup>

*Zee Telefilms Limited v Suresh Productions*,<sup>118</sup> is a Division Bench decision of the Supreme Court. The unanimous decision of the Court was delivered by Justice Ashok Bhushan. The Court expressed as to when a cause of action in a copyright suit accrues:

‘Cause of action to a plaintiff to file a suit accrues when there is a clear and unequivocal threat to infringe a right.’<sup>119</sup>

*Engineering Analysis Centre of Excellence Private Limited v Commissioner of Income Tax*,<sup>120</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice Rohinton F. Nariman. The Court expressed as to the author in relation to a literary work:

‘When an “author” in relation to a “literary work” which includes a “computer programme”, creates such work, such author has the exclusive right, subject to the provisions of the Copyright Act, to do or authorise the doing of several acts in respect of such work or any substantial part thereof.’<sup>121</sup> ... ‘[T]he right to reproduce a computer programme and exploit the reproduction by way of sale, transfer, license etc. is at the heart of the said exclusive right.’<sup>121</sup>

As to the ‘assignment of rights in copyright’ in a literary work and ‘infringement of copyright’ in relation to computer programme, the Court declared:

‘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>122</sup> ...

‘[M]aking of copies or adaptation of a computer programme in order to utilise the said computer programme for the purpose for which it was supplied, or to make up back-up copies as a temporary protection against loss, destruction or damage so as to be able to utilise the computer programme for the purpose for which it was supplied, does not constitute an act of infringement of copyright under Section 52(1)(aa) of the Copyright Act...[W]hat is referred to in Section 52(1)(aa) of the Copyright Act would not amount to reproduction so as to amount to an infringement of copyright.’<sup>122</sup> ...

‘Section 52(1)(ad) is independent of Section 52(1)(aa) of the Copyright Act, and states that the making of copies of a computer programme from a personally legally obtained copy for non-commercial personal use would not amount to an infringement of copyright.’<sup>122</sup> ...

‘Section 52(1)(ad) of the Copyright Act cannot be read to negate the effect of Section 52(1)(aa), since it deals with a subject matter that is separate and distinct from that contained in Section 52(1)(aa) of the Copyright Act.’<sup>122</sup>

On the question of transfer of copyright under The Copyright Act and with reference to the Copyright

Amendment of 1999, the Court declared:

‘[W]here...transfer is “in respect of” copyright, the transfer of all or any rights in relation to copyright is a *sine qua non* under explanation 2 to Section 9(1)(vi) of the Income Tax Act...[T]here must be transfer by way of licence or otherwise, of all or any of the rights mentioned in Section 14(b) read with Section 14(a) of the Copyright Act.’<sup>123</sup> ...

‘The transfer of “all or any rights (including the granting of a licence) in respect of any copyright”, in the context of computer software, is referable to Sections 14(a), 14(b) and 30 of the Copyright Act.’<sup>124</sup> ...

‘Like Section 14(d)(ii) of the Copyright Act, Section 14(b)(ii), has, after the 1999 Amendment, with effect from 15 January 2000, also deleted the words “regardless of whether such copy has been sold or given on hire on earlier occasions”, thereby making it clear that the same tilt that had been made in Section 14(d)(ii) of the Copyright Act vide the amendment in 2012 in favour of the purchaser, is also to be found post the 1999 Amendment, in Section 14(b)(ii) of the Copyright Act.’<sup>125</sup>

‘The language of Section 14(b)(ii) of the Copyright Act makes it clear that it is the exclusive right of the owner to sell or to give on commercial rental or offer for sale or for commercial rental “any copy of the computer programme”. Thus, a distributor who purchases computer software in material form and resells it to an end-user cannot be said to be within the scope of the aforesaid provision. The sale or commercial rental spoken of in Section 14(b)(ii) of the Copyright Act is of “any copy of a computer programme”, making it clear that the Section would only apply to the making of copies of the computer programme and then selling them, *i.e.*, reproduction of the same for sale or commercial rental.’<sup>125</sup>

The Court also declared that the ‘[O]bject of Section 14(b)(ii) of the Copyright Act, in the context of a computer program, is to interdict reproduction of the said computer programme and consequent transfer of the reproduced computer programme to subsequent acquirers/end-users’<sup>125</sup> and clearly ruled that the ‘[A]mounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the

persons referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS Under Section 195 of the Income Tax Act.<sup>126</sup>

*Saregama India Limited v Next Radio Limited*,<sup>127</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice Dr. D. Y. Chandrachud. In this case, an appeal was preferred against the Division Bench judgment of the Madras High Court in a writ petition filed under Article 226 of the Constitution of India challenging the validity of Rule 29 (4) of the Copyright Rules, 2013.<sup>128</sup> 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 Court reiterated that the power of judicial review is entrusted by the Constitution to the court. '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 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>129</sup> Court further 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>129</sup> As to the re-drafting of the rule by the High Court, the Court observed that '[A]n exercise of judicial re-drafting of Rule 29(4) was unwarranted, particularly at the interlocutory stage...[A]n exercise of judicial rewriting of a statutory Rule is unwarranted in the exercise of the jurisdiction under Article 226 of the Constitution, particularly in interlocutory proceedings. 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>130</sup>

*KNIT Pro International v State of NCT of Delhi*,<sup>131</sup> is a Division Bench decision of the Supreme Court. The unanimous judgment of the Court was delivered by Justice M. R. Shah. The nature of offence under Section 63 of The Copyright Act was for consideration before the Court. The Court held that the 'offence under Section 63 of the Copyright Act is a cognizable and nonbailable offence.'<sup>132</sup>

### Conclusion

An analysis of the above copyright decisions reveals that: (i) the Supreme Court through its law-declaring and interpretation-construction powers has not only answered the questions of copyright law but has also resolved some of the conundrums relating to the meanings of the expressions used under the provisions of the Copyright Act; (ii) the Court has in some decisions gone into the scheme of copyright while answering the copyright questions; (iii) while deciding the questions and declaring copyright law, the Court has also touched upon the constitutional scheme of statute to assert that monopoly is not encouraged and knowledge must be allowed to be disseminated;<sup>75</sup> (iv) despite having the opportunity to deal with the constitutionality of a Copyright Rule, the Court refrained itself from going into such question; and (v) the judgment delivery rate of the Supreme Court in copyright cases is only .14 (point one four) higher than the patent cases decided in a year.

It was expected from the Supreme Court that in *Saregama India Limited v Next Radio Limited*,<sup>127</sup> it will go into the question of constitutionality of the

Rule but instead the Court showed deference to the legislative wisdom of the Parliament. Had this not been the case, it would have been the first case with a law on the question of constitutionality of a Rule, if not The Copyright Act. The bench which decided this case was a Division Bench and not a Constitution Bench. It was also expected that the case will be decided by a Constitution Bench in the light of the provisions of Clause (3) of Article 145 of the Constitution of India. Had the Court gone into such question, a clear law on the question what is presumption of constitutionality when the constitutionality of a Rule enacted in furtherance to a principal statute is challenged was also expected.

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- 3 Act 14 of 1957.
- 4 1 & 2 Geo. 5, CH. 46.
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