

Evolution of the Digital Copyright Industry: Are We Ready to Face Dynamic Changes?

DSR Jayawardena¹, MAN Chandratilaka²

¹ *Verite Research (Pvt)Ltd. 5A, Police Park Place, Colombo.05, Sri Lanka*

² *Legal Studies Unit, Faculty of Management Studies & Commerce, University of Sri Jayewardenepura, Nugegoda, Sri Lanka*

#For correspondence; <supunkck@gmail.com>

Abstract—New digital technology enables people to access multiple forms of creative work regardless of the geographical location of origin. It expands the areas of human creativity from mere literary, scientific and artistic works; up to the multitude of computer based creations including computer software, mobile applications and three dimensional creations etc. Through the lens of copyright law, this approach sets novel form of avenues for the users to participate in the consumption, distribution and creation of content in a way which is revolutionary for both the culture and the industry. However, from the authors and the point of view of the copyright owner, this development urges a set of new protections to prevent their rights from being violated (infringed). The main research problem of this paper is explaining whether the existing Sri Lankan copyright law is adequate to protect the rights of the copyright holder and copyright user from the evolving challenges in digital world or should a new piece of legislation be enacted to clearly define their rights in order to prevent digital copyright infringements? The research was conducted following qualitative research method, thus the number of books, journal articles and internet articles were used to gather secondary data on this area. This research presents an analysis about the existing Sri Lankan law relating to copyright and related rights by examining its adequacy to meet the challenges evolving in the digital world and recommends to adopt new piece of legislation to protect the rights of the whole society to enjoy the benefits derived from day today creations including digitized works, while mitigating unlawful behaviour which hinder effective enjoyment of the fruits acquired by the copyright holders through their legitimate.

KEYWORDS—COPYRIGHT, ENTERTAINMENT INDUSTRY, DIGITAL ECONOMY, DIGITAL WORLD

I. INTRODUCTION

The law of copyright establishes bundle of protections granted over the literary, scientific or artistic works created by the author to ensure further control of his creation (McName J, 2011, P7). One objective of this protection is to safeguard the ideological integrity of the work. These are so-called moral rights. By following the view of utilitarianism, copyright entrenches economic

rights which allow author/copyright owner to reap the economic benefits flow from his or her work (Abeysekera TB, 2013). With the evolution of market economy, copyright took the monopoly approach to serve the growing investment relating to creative industry (Karaganis J, 2015) and its disadvantages were logically justified by the argument that it will serve the society by increasing innovation and competition.

In Sri Lanka, copyright is enshrined in the chapter two of Intellectual Property Act (herein after I.P Act, 2003) and is not the fundamental right guaranteed by Constitution as United States (United State Constitution, Article I, Section 8, Clause 8). Sri Lankan copyright law grants its protection from the moment which the work has been created and cover the wide range of literary, artistic and scientific works including works generated in a digital format; if it is an original work of authorship fixed in a tangible medium (IP Act, section 6). However, when speaking about the digital rights within the scope of Intellectual Property Law, problem is whether Sri Lanka has the potential to face the evolving conditions put by unpredictable technological growth.

From 1990s, intellectual community started to utilize the evolving information and communication technology to sell, freely distribute and make their works available in the internet (Gunasekera D, 2010). After the period of two decades, fastest growth of communication presents us the millions of online information stores as borderless platforms that can be accessed from any part of the world. On one hand, those platforms introduced novel experience to the intellect community by exchanging information across the world in a greater speed. On the other hand, it expanded the potential of ignoring the fundamental rights of the creator, to have their work honored and not changed or distorted and to receive their appropriate economic return. However, it is essential to understand about the conceptual mismatch between tangible work and its digital environment, in order to recognize the ever fluctuating nature of internet related copyright law.

Methodology and Experimental design

The research methodology of this work will be mainly a qualitative one and a number of books, journal articles

and internet articles were used to gather secondary data on this area. The experts from both the fields of law and information and communication technology were interviewed with a view to get their view points in order to see a possible expansion of the definitions and the interpretations of the terminology involved in this research.

II. RESULTS AND DISCUSSION

Present Sri Lankan copyright law reflects most of the "Berne Doctrinal" values and limits. The scope of its protection to the original face of expression, but Setup Avenue for the rest of the community to build upon the idea and information conveyed by the work (Kumarasena v. Data Management System, 1987 2 Sri L R 190). However, it provides grater monopoly to the copyright owner to reap the economic benefits flow from his investment and provides exclusive rights to carry out or authorize another party to carry out commercial activities in relation to the copyrighted material. On one hand, some of this represents the right of copyright owner to protect technical integrity of his or her creation. These include right to reproduction (I P Act, Section 9(1)(A)), translation I P act section 9(1)(B)), adaptation, arrangement or other form of transformation (I P Act, Section 9(1)(C)), of the work. On the other hand, copyrights embodied set of rights which avail to limit widespread copying of the work and its unauthorized public usage (Princeton University Press v. Michigan Document Services, Inc. (6th Cir. 1996)). This includes right of public distribution(I P Act, Section 9(1)(D)), public display(I P Act, Section 9(1)(G)), public performance(I P Act, Section 9(1)(H)), and right to authorize or prohibit commercial rental to the public of their original or a copy of the copyrighted work(I P Act, Section 9(1)(E)).

Referring to the aforementioned purposes, Sri Lankan law defines reproduction as, "making of one or more Copies of a work fixed to any tangible medium, and include even any permanent or temporary storage of a work or sound recording existing in electronic form"(I P Act, Section 5). Therefore, it shows that our law considers even a temporary copy of an electronically formed material as reproduced and it becomes a violation unless it conducts either with prior authorization or non-commercial purposes. In Internet language, any upload, download or peer to peer transfer of data fulfils the test of reproduction, and it creates a violation unless the activity is authorized by license agreement. Unlike the general prohibitions bearing on works fix to the tangible medium, in digital copyright schemes, ancillary rights entrench with Digital Rights Management(DRM) techniques play a vital role by allowing copyright owner to continuously impact on the content which has being already sold. For an example, e-books contend DRM which prevents reader from copying or sharing the e-books even for non-commercial purposes. Furthermore,

such measures can limit the number of computers onto which a particular file can be copied. In United Kingdom, when 3GA introduced digital music player with internal storage, the Advertising Standard Authority(ASA) ask 3GA to change the way it advertises and ordered to inform people about the copyright infringement if they make unauthorized copy without appropriate permission. More clarifications with regarding the unauthorized digital copying was given in UMG Recording Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000), there the U.S Southern district Court of New York held that while creation of MP3 files violating the reproduction rights, posting of them on an electronic media violates public performance rights and allowing people to listen to the files violates the distribution rights either (Steetle S, 2000). These examples clearly shows that DRM could impede users from moving music or audio visual work from one device to another even after having been payed. This novel existence of digital rights create direct clashes with Sri Lankan copyright law which well establishes the right of physical owner[user] of the copy of copyrighted material to sell, lend or give away the copy to someone else 'first-sale doctrine' (I P Act, Section 9(4)) as a fence between copyright user and the owner to prevent user from being unnecessarily controlled. Kirtsaeng v. John Wiley and Sons 568 U.S. (2013).

Nevertheless, DRM measures also somewhat justified by two evolving factors. On one hand, those exclusively deal with right of copyright owner to involve in legitimate business. And on the other, DRM retaliate against copyright pirates and provide delightful platform to mitigate uncertainty built by the practices in the digital environment. However, as pointed out by Lawrence Lessig, in order to promote free copyright culture, deviate from traditional battle of copyright user v. copyright owner, the DRM measures should have interplay with existing legal developments (Lessig L, 2010). Such a system would be strengthen by enabling simpler and clearer path from all rights reserved system to some rights reserved system, which is somewhat similar to the existing creative commons and free art license that offer creators a wide range of permissions that they can allow on reuse of their work. The Attachment of this license lets anyone who sees it know immediately his rights regarding use and copy of the work, and which simply refrain authors from taking any action against content users based on copyright infringement. For an Example, jamendo.com (<https://www.jamendo.com/Result> details, accessed 03-11-2017) is an online music platform where all the works are covered by either a creative commons or a free art license. It has a repertoire of over 55000 albums, offering artists the opportunity to share their art with the world.

Apart from the issues pertaining to the user's right to access the content, again a problem arises about the extent which he/she is allowed to reuse the copyrighted work. In United States, Legal scholars define this as the right of derivation (Gervise D, 2013), But Sri Lankan copyright law address it as three separate rights as the right to translation, adaptation or any other arrangement or formation of copyrighted materials(I P Act, Section 7(1)). Simply, right to derivation allow people to go for their own creation based on the work existing in the society, but the ultimate work must show minimum level of creativity and originality in comparison to the form of pre-existed work (Feist Publications v. Rural Telephone Service Co. (6th Cir. 1996)). In Sri Lanka, originality concept based on substantive test and similarity test which preliminarily examine whether the substantial way of expression attached to the work is copied or not (Vasantha Obeysekera v. A.C. Alles, C.A. no 370/92(F) unreported). United State copyright act (17U.S.C. 101(2006)) applies rather strong solution to the issue and define derivative rights very broadly as a right to prevent the making of any work based upon a pre-existing work. Nevertheless, by extending its protection up to the non-literal parts of the creation, U.S copyright law creates complete overlap with the "idea-expression" dichotomy and leave very little portion of the work to the rest of the society to develop upon its emergence. French law in this context is slightly different and it enshrine the rights of the author and believes that their property is mostly justified, since it flows from their intellectual creation (Mazeh, Y). However, unlike the Sri Lankan and U.S copyright laws, French legal approach to the copyright provide notable value to the human creativity, but again become futile in balancing the rights of the Author, Copyright owner, and the content User as the three pillars of the existing copyright sphere(Jayawardena D.S.R, 2014). As Gervais precisely noted, as the right lay on the essential border between infringement and inspiration, there is a need for inevitable steps to clarify derivative rights within the doctrinal and normative context in emerging digital economy (Gervais D, 2013). More specifically, here the fundamental challenges are two-fold. First, it requires good understanding about the existence of derivation in internet sector to define the derivative right properly, and secondly to develop the test to implement the right thus delineated.

In order to get ready to prepare for the aforesaid dialectical challenges, present law relating to translation and adaptation must have to be carved out (Gervise D, 2013). Otherwise, the legislative definition of derivative work and the inclusion of a derivative right become meaningless

Furthermore, under the Intellectual Property Act, copyright owner is granted the right to authorize or

prohibit commercial rental to the public, of original or copy of his work (I P Act, Section 9(1)(E)). Even TRIPS constricts its scope in to the computer software and the works relating to cinematography in this respect (Agreement of Trade Related Aspect of Intellectual Property (TRIPS agreement) Article 11),, our copyright law stand one step forward and extends right to prohibition of a commercial rental up to the audio visual works and the works embodied in a sound recording.

In order to further compliance with TRIPS, Act leaves computer programs otherwise the program is itself is not the essential object of the rental (I P Act Section 9(3)). US copyright law was entrenched similar protection since the period prior to the TRIPS agreement and therefore, if any transfer of phono record evident (I) unauthorized disposal , (II) commercial advantage and (III) disposed by rental or any such other mean, considered as infringement (17 U.S.C. 109(B)(1)(A)). However, exemptions were granted for educational institutions 17 U.S.C. 109(B)(1)(B)(II) and non-profit libraries (17 U.S.C. 109(B)(2)(A)). Further, the computer program embodied in conjunction with limited purpose computer that is designed only for playing video games or such preliminary purposes are also exempted (17 U.S.C. 109(B)(1)(B)(I)). In 1992, European Union adopted a Rental Right and Lending Right Directive regulating the rental, lease or lending of all types of copyrighted works. The directive established exclusive right on copyright owners to authorize or prohibit rental of all works except buildings and works of applied arts (Council Directive 92/100 of 19 November 1992 O.J (L346)61). However, the right to control the rental of computer programs and regulations relating to further activities were prescribed under the E.C. software directive (E.C. Software Directive, article 4).

In comparison to the other forms of copyrighted works, it is unarguably accepted that computer programs need considerable protection due to the possibility to reproduce and the cost and difficulty involved in detecting and bringing legal action. However, here the industries relating to e-books, mobile applications, audio/video musical creations and even phonograms cannot be disregarded, as the works subject to the similar threat of piracy when available online. In this respect, wording of the TRIPS agreement is important which oblige particular members to consider evidence of widespread piracy before granting the exclusive rental rights under their respective copyright laws(TRIPS Agreement, Article 4). However, no international treaty still being able to prevent trans-boundary copyright violations that often takes place via the internet.

In this context, it is interesting whether the Internet Service Providers (ISP) are liable or not, for the violations

conduct by their customers upon their internet systems (Fernando R, 2015, P8). Speaking very simply, ISP is the public or private entity (Sri Lanka Computer Crimes Act 2007, Section 38) who provides internet access to the subscribers (Religious Tech. CTR. V. Netcom On-line Communication Serves., INC907F. Supp. 1361). They work as an intermediaries and facilitate senders and receivers to exchange their information. When the information transmitted from one place to another or publicly available, the ISP is involved. Since all the data transmissions exclusively deal with their involvement, arguably no violation could also be occurred without their representation. Therefore, one controversial proposal to mitigate unlawful distribution of copyrighted materials via the internet has been to hold ISP's liable for the copyright violations committed by their subscribers. Yan, offer plausible support for the aforesaid argument standing on three copyright doctrines. First, their ownership of the equipment that stores, makes and transmits copies of copyrighted material, their control of such ownership may be enough to make them directly liable as copyright infringers. Second, the relationship between an ISP and its customers may be close enough to make them vicariously liable. Third, ISP might face contributory liability if they knowingly provide services to a subscriber who is committing copyright infringement (Yan A, 2000). The aforesaid three counts were logically applied at courts in various jurisdictions. Fin-reactor case in Finland (Manner, 2009) and Loki -Torrent and Elite-Torrent cases in United States (Enigmax, 2008) are traveling jurisprudence. Generally in all three aforesaid cases, defendants were ISP's and they were held guilty on facilitating for illegal file sharing, pre-commercial release work and ultimately for setting platform for the copyright infringement. In last December, in Pirate Bay case, while delivering rather strong judgement, Swedish court of appeal ordered ISP's (Bredbandsbolaget's) to block some of the file sharing web sites which give access to the pirating users(Sanches, 2017). However, reference to the Sri Lankan context, all three of the aforesaid arguments become invalid, hitherto the Electronic Transactions Act shield ISPs from any criminal or civil liability for the infringement committed by a third party through their operation systems(Sri Lanka Computer Crimes Act 2007, Section 16). However, Act setouts possibility for make contractual parties liable for the direct consequence of their mutual transactions and for the violations occurred to the third party, if those transactions attached the content held in copyright by another.

However, regarding the violations pertaining to the digitized works, those have become complex, volatile and hard even for specialists to understand completely (Palfrey J Et.Al, 2009). Sometimes those infringements occur because many internet users are ignorant of copyright law(Palfrey J Et.Al, 2009, P5). Other users

deliberately infringe and hope that they will be not discovered (Hartman J and Stubenrauch E 1999). Furthermore, the youth community which represents most of the digital consumers largely confused about whether it is lawful to upload, download, stream and remix the content. Student community believes that they have exclusive right to use copyrighted materials for educational purposes contrary to the rights of the other parties (McCullom K, 1999). In order to prevent such uncertainties, it is essential to rewrite the fair use doctrine by copying its requirements with the competing interests of the modern digital world (Abeysekara TB, 2013). In accordance with Palfrey et.al, presently fair use operates as a check on the monopoly powers that copyright holders would otherwise enjoy over their creative output (Palfrey J Et.Al, 2009, P6). This power is intended to enable the public to learn, criticize, parody and otherwise reuse copyrighted materials when the circumstances surrounding the use make it fair (Fisher W, 1988). However, when considering the entire emerging internet related copyright issues as a whole, it can be simply define as a disconnection between technological and the legal allowances, in combination with a lack of knowledge about copyright law in the general public. This resulted the environment which unpredictable for creators, unmanageable for innovators and impossible for citizens. Therefore, in order to prevent mounting confusions, the modern copyright law ought to be reformed, so as to promote the culture which protects creator, investor and the user as well.

III. CONCLUSION

Present controversies involving copyright and digital technology open us a new opportunity for reassessment of how we apply the law for copyright infringements. Today, millions of users navigate the online milieu with varying degrees of ignorance and diverse range of misunderstandings about copyright law. Apart from that, almost all kind of web based platforms impose relatively high barriers upon user's accessibility and those are passage to become copyright violations legitimize in the society. Furthermore, existing doctrinal approach to derivative rights create overlap in the "idea/expression" dichotomy and require new approach which has the ability to cope with evolving digital environmental conditions. Similar issues arise when applying the rental rights and related rights in respect of copyrighted works. However, law fails to provide justification for the additional protection provided to the computer programs in comparison to other creative works. At the end of the day, liability of internet service providers in whole context is a problem unsolved.

Recommendations

- Amend the Intellectual Property Act with new piece of legislation.

Sri Lankan Intellectual property Act needs an amendment in order to face the evolving challenges in the digital era. The legislation must encompass new interpretations to the rights that come under the copyright law, and liabilities and exemptions of related parties for the prescribed activities.

- Promoting education instead of litigation is also recommended.

It is essential to introduce copyright curriculum into the school and university system in order to promote awareness among student community about copyright violations. The process should be enhanced with audio tutorials, interactive activities, legal seminars etc.

BIBLIOGRAPHY

Abeysekera TB, A Proposal for the Protection of Digital Databases in Sri Lanka (PhD Thesis, University of Exeter-UK 2013) available at

<<https://ore.exeter.ac.uk/repository/handle/10871/14172>> visited on 14/04/2017.

Fernando R.,2015. Copyright Infringement on the internet and internet service Provider Liability...the Sri Lankan law in the Context of English law. Bar Association Law Journal 2015(Vol 21), P8

Fisher W., 1988. Reconstructing the fair uses doctrine. Harvard Law Review, 101: 1659,

Gervise D., 2013. The Derivative Right, or why Copyright law protects Foxes better than Hedgehogs. Vanderbilt Journal of Entertainment law

Enigmax., 2008. How the FBI dismantled a bitTorrent community. Available at. <https://torrentfreak.com/how-the-fbi-dismantled-a-bittorrent-community-080630/>Result details. Accessed 30-03-2016

Gunasekera D., 2010. Copyrights Protection and Distance Librarianship: Provisions and Constrains observed in Copyright law of Sri Lanka. Journal of the University Librarians Association of Sri Lanka, Vol. 14 issue 1,June 2010

Hartman J and Stubenrauch E., 1999. I want my MP3: New Technology Sparks, 1999 the Debate, the Post (Ohio University; Athens, Ohio), (May 27 1999)

<<http://thepost.baker.ohiou.edu/archives2/052799/>

Jayawardena D.S.R.,2014. Protection of the Rights of Copyright users with special attention to visually handicapped people under Sri Lankan Intellectual Property Regime, Proceedings Law, International Research Conference, General Sir John Kotelawala Defense University Sri Lanka, available at www.kdu.ac.lk,

Karaganis J., 2015. "Piracy in emerging economies" <http://piracy.americanassembly.org/the-report/>

McName J., 2011. Copyright Challenges in the Digital Era, European Digital Rights(EDRI) Papers, issue 07,P1, available at

https://edri.org/files/paper07_copyright.pdfResult details

McCullom K., 1999. How Aggressively Should Universities Enforce Copyright Law on Audio Files?, Chron. Of Higher Educ. Nov 19 1999

Mazeh, Y, Modifying Fixation: Why Fixed Works Need to be Archived to Justify the Fixation Requirement, 8. LOY L& TECH. ANN. 109, 113

Mikko Manner., 2009. "A Bittorrent P2P Network Shut Down and Its Operation Deemed Illegal in Finland" (2009) Ent. L.R. 20(1), 21–24.

Palfrey J Et.Al.,2009. Youth, Creativity and Copyright in the Digital Age, Int'l J.Learning & Media, Spring 2009, available at, [https://dash.harvard.edu/.../Palfrey%20-%20Youth,%20Creativity,%20an...Result details](https://dash.harvard.edu/.../Palfrey%20-%20Youth,%20Creativity,%20an...Result%20details)

Reis S., 2015. Notes and Comments toward a Digital Transfer Doctrine? The First Sale Doctrine in Digital Era, U.S.A Vol 109 no 1, available at, scholarlycommons.law.northwestern.edu > ... > Vol. 109 > Iss. 1 (2015) Result details,

Steele S.,2000. UMG Recordings, Inc. v. MP3.com, Inc.: Signaling the Need for a Deeper Analysis of Copyright Infringement of Digital Recordings, 21 Loy. L.A. Ent. L. Rev. 31 (2000).

Yen A.,2000. Internet Service Provider Liability for Subscriber Copyright infringement, Enterprise Liability, and the First Amendment, the Georgetown Law Journal [Vol 88], available at, <https://www2.bc.edu/~yen/ISPLiab.pdf>Result details,it.

Author.1



Mr. D S R Jayawardena has obtained his LL.B with First class from the Faculty of Law University of Colombo and presently reading for his LL.M in the same university. Also he is an attorney-at-law. Currently he is working as an assistant analyst-legal, Verite Research (Pvt) Ltd.

Author.2



Mr. M.A.N. Chandratilaka, obtained his LLB from the faculty of Law University of Colombo, LLM from UK and MPhil from university of Colombo. Also he is an Attorney-at-Law. Currently he is a senior lecturer, Head of Legal Studies Unit, Dept. of Commerce, Faculty of Management Studies & Commerce, and University of Sri Jayewardenepura.