

GUEST POST

Section 52 of the Copyright Act, 1957: An Analysis of Fair Dealing Doctrine

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The frequency of copyright infringement claims in the various dimensions of the industry have been rising gradually ever since the dawn of fair dealing doctrine. It is an exception in copyright law which is founded on the principle of disseminating creations. Fair dealing is the advanced/custom version of fair use that developed in American Courts of various circuits and Article 13 of the TRIPS Agreement. In India, fair dealing stems from Section 52 of the Copyright Act, 1959 and has seen a set of amendments until the very recent one in 2012. Fair dealing encompasses the scenarios in which reproduction of the work can be permitted adhering to standards/tests affirmed in the provisions. Indian judges have repeatedly interpreted such works and attempted to decipher the ambit of fair dealing. The presently evolved jurisprudence of fair dealing in India is conservative and inconsistent; these hurdles disable a standard mechanism of copyright claims for parodies. This article examines Section 52 of the Copyright Act, 1957 and the fair dealing doctrine in India.

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TRIVIA

CASE NAME	DATE DECIDED	HOLDING
Blackwood and Sons Ltd and Ors. v A.N. Parasuraman and Ors.	1958	To be eligible for invoking the doctrine of fair dealing, substantial taking of the original work is an essential check. The purpose of commercialization is another check which shall not compete or infringe the creator's right for mere profiteering.
Zee Telefilms v Sundial Communications	2003	To test the similarity between two works, the substance, foundation, kernel, and the test of substantiality of reproducing the work are essentials. Nevertheless, where the rest of the content cannot stand independent of the similar work, mere existence of several dissimilarities would still amount of infringement of copyright.
Saregama India Ltd. v Viacom 18 Motion Pictures and Ors.	2013	If the words are narrated in a particular melody of original song, there stands no infringement of copyright. Moreover, mere use of some words is not bound by copyright infringement, hence, invoking de minimis rule as the use of the words were for less than 7 seconds and not worthy of a legal claim.
R.G. Anand v Delux Films	1978	There is a substantial resemblance between the original work and the alleged copy, which in this case are play and the movie, in terms of scenes, incidents and treatment, and similarity between two is so much that a reasonable man would consider the 'copy' to be more less imitation of the original, an infringement of copy cannot have been said to be taken place.
Civic Chandran v Ammini Amma	1996	The defence of fair dealing was allowed by the court as the counter drama was just a parody of the original drama for critiquing the ideas portrayed in the original drama.
Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House.	2008	Four Factor Test Include: 1.Purpose of copyrighted work. 2.Nature of copyrighted work. 3.Amount and substantiality of the portion used. 4.The impact it has on potential market for or value of the copyrighted work.
M/S Super Cassettes Industries Private Ltd v Nandini Chinni Kumar and Ors.	2020	While addressing the issue of real-life events copyrights, court held that where distinct similarities in the plot, depiction and the life and story of the protagonist to another script, to whom the rights have been already sold via the person on whom the plot is made would amount to infringement.

INTELLECTUAL PROPERTY RIGHTS



ITAT examines difference between Right to use Copyright against Transfer of Copyright to determine liability to pay tax on Royalties

In the matter titled *Citrix Systems Asia Pacific vs The Income Tax Officer*, the Assessee approached the Income Tax Appellate Tribunal (ITAT) for setting an order passed by the Commission of Income Tax appeal CIT(A) wherein it was observed that the agreement undertaken by the assessee by virtue of which it received some income, and such income shall be considered as Royalty and therefore the

assessee is liable to pay tax on it. The Income Tax Appellate Tribunal consequently by interpreting the India Australia Double Taxation Treaty allowed the appeal on the grounds that the CIT(A) overlooked the difference between the right to use a copyright as against the transfer of the copyright and therefore the arrangement agreed upon by the parties concerned shall not be liable to a royalty

Madras High Court | Court allows Parties to amend Relief in a Trade-mark Infringement matter

In the case titled *ITC Limited vs Maurya Hotel (Madras) Pvt Ltd* the question is whether the plaintiff could amend the claims during ongoing proceedings between the parties. The Plaintiff had initially instituted a suit of passing off against the defendants for using the name 'Maurya International' which was claimed to be deceptive since the Plaintiff's internationally recognized luxury hotel was also named 'Maurya'. During the proceedings, the Defendant registered its trademark. Subsequently, the plaintiff wished to amend its claims from

passing off to an infringement action.

The Hon'ble Madras High Court opined that amendment of pleadings is an essential rule of justice, equity, and good conscience and therefore the alternative plea that is sought to be raised by the plaintiff in the amendment petition is only by way of expatiating his rights which he has secured by statute, whilst at the same time asking for the same relief originally prayed for namely, a permanent injunction against the defendant restraining him from imitating his trademark. Additionally, they observed that the courts have inherent powers to adjust the rights of parties based on events happening after the starting of action.

Amul's Victory over Trademark Infringement in Canada

In January 2020, Amul learnt that a group had blatantly copied their trademark 'AMUL' as well as the logo

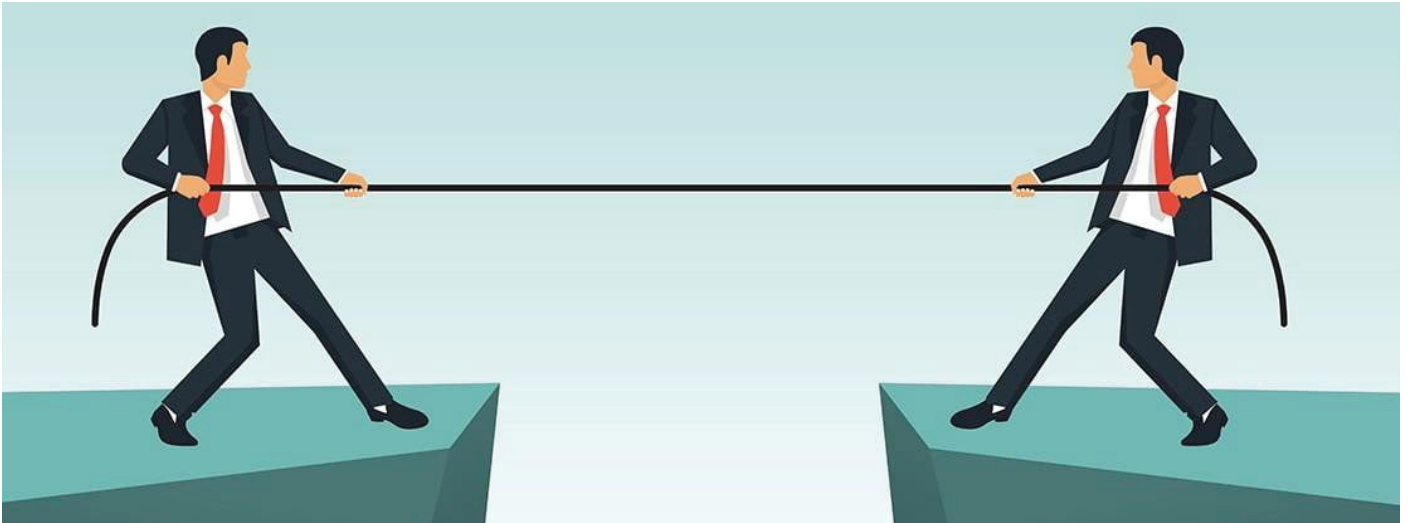
'Amul- the taste of India' along with creating fake profiles on social platforms like LinkedIn. Amul further claimed that they had never licensed to Amul Canada. The Federal Court of Canada recognized the trademark status of Amul in India since they satisfied all elements for establishing "passing off" i.e., goodwill of the brand, deception due to misrepresentation, actual, potential damages caused. The Federal Court of Canada held in favor of Amul and issued an order permanently restraining the Defendants from infringing the trademark and copyright of Amul along with damages for the said infringement.

Delhi High Court refused to interfere with order denying injunctions to AstraZeneca

In the case titled ***AstraZeneca AB & Anr Vs INTAS Pharmaceuticals Ltd***, the Delhi High Court refused to

interfere with the order denying interim relief filed by the Appellants AstraZeneca for permanent injunction against the Respondents due to alleged Patent infringement for the invention of "DAPAGILIFLOZIN." The Court held that even though the genus patent covered a Markush Structure, the same did not disclose "DAPAGILIFLOZIN." Thus, the Appellant's claim that the same was covered by the Markush claim patent IN'147 was not accepted as the same was specifically disclosed in patent IN'625. The respondents claimed that the appellant's sale and manufacture of DAPA was in infringement on IN 147 and since the Appellants agreed to the term of US Patent equivalent of in 625 to be the same as that of US Patent equivalent of IN 147, they cannot make a contrary case in India.

COMPETITION LAW



Uber not in a dominant position in the radio taxi market

On 14th July, The Competition Commission of India (CCI) observed that in the highly competitive radio-taxi market, Uber has not secured a dominant position in India due to a strong competitor like Ola. Meru, the petitioner in this case, had similarly accused Bengaluru based Ola of being dominant player back in 2015 but that case was decided in favor of Ola and a similar thing happened with Uber. It was alleged by Meru that Uber is using abusive marketing technique to dominate the market and eventually eliminate the competitors in the market. CCI found that Uber had been

in losses till 2018 due to humungous discounts offered by them. The same was done to establish a position in the market against the rival Ola and Meru. Eventually, in October 2017 the discounts and various other incentives were reduced to have a positive per trip margin. The investigation also revealed that drivers faced no restriction in joining any of the ride hailing networks they want. Therefore, due to stated reasons Uber was considered to not be a dominant player in the market.

Goa Taxi Unions do not resort to any anti-Competitive Practices

The case taken by Competition Commission of

India (CCI) on its own, alleging Goa Taxi Drivers Union to be resorting to anti-competitive practices was dismissed due to lack of substantial proofs. Section 3 of the Competition Act, 2002 (hereafter referred to as act) which states the anti-competitive agreements via dominant position in the market were not violated by the drivers. CCI took suo moto cognizance of the case in 2018, ordering Director General to investigate and prepare a report. The report alleged that the unions are not permitting other app-based taxi services in Goa. Also, exorbitant prices were charged to the passengers, no fare meters were installed, and the unions protested repeatedly which caused inconvenience

to the tourists. All these practices were said to be a violation of section 3(1) and 3(3) of the Act. CCI found that the Government of Goa has formulated rules for regulation of taxi services which cleared allowed business model like-wise Ola and Uber to enter in Goa. The strikes alleged were just a few posts over various social media platforms which were well within the democratic rights of the drivers. Henceforth, the case was dismissed.

Karnataka High Courts rejects Amazon-Flipkart plea to restrict investigation by CCI

On 23rd July, Karnataka High Court dismissed the plea by Flipkart and Amazon to restrict the probe by Competition Commission of India (CCI) against them for anti-competitive deals offered in the sale of smartphones. CCI was informed by Delhi Vyapar Mahasangh (DVM) that these online sites offer predatory pricing, preferential listing of sellers and deep discounts. DVM consists of many micro and small and medium scale enterprises

(SMSE) which are dependent on the sale of smartphones and accessories. Due to preferential listing of sellers their goods are not given equal chances to sell their products. These anti-competitive practices alleged were ordered to be investigated by the Director General, but Amazon and Flipkart challenged such an investigation. The representative of CCI argued that if the model did not discriminate as alleged by DVM then they should not shy away from an investigation. The High Court ruled that the investigation cannot be quashed at this stage as it involves two e-commerce giants and a possibility of various micro and SMSEs being affected by anti-competitive practices.

CCI approves Softbank's Investment in the food delivery giant, Swiggy

On 12th July, Competition Commission of India approved Softbank's investment of \$450 million in the food delivery giant Swiggy. This information was made public via a tweet-

ter post (tweet) which stated, "Commission approves the proposed acquisition of certain stake in Bundl Technologies (Swiggy) by SVF II Songbird (SoftBank Group entity)." Softbank, which has already invested in e-commerce platforms like Lenskart, Oyo and Flipkart, has now entered in food delivery too. Both the parties i.e. Swiggy and Softbank in the official submission to CCI state the same that Softbank is new player in food delivery market henceforth the proposed agreement will not alter the competition landscape or cause any adversity to the competition regulations/practices in India. The funding by Softbank was followed by the \$800 million investment by Amansa Capital, Falcon Edge, Carmignac, Think Investments, and Goldman Sachs. Total funds raise of Swiggy in 2021 is 1.2 billion now. These funds might also be utilized to expand Swiggy and start with delivery of groceries.

ARBITRATION, MEDIATION AND CONCILIATION



IRB Pathankot Toll Road Ltd Wins Arbitration award against the NHAI (National Highways Authority of India)

IRB Infrastructure Developer was acting as the EPC Contractor of IRB Pathankot Toll Road Limited (IPATRL). The EPC Contractor raised a claim on IPATRL for time and cost overrun during construction for reasons not attributable to them. Subsequently, IPATRL initiated arbitration proceedings against NHAI for an additional 518 days (about 1 and a half years) as the concession period and a compensation to the tune of 252 crore along with interest incurred due to the delay in completion of construction for reasons not attributable to them. The arbitration led to a favorable outcome for IPATRL.

Delhi High Court | Arbitral Award liable to be set aside when notice of institution of Arbitral Proceedings not duly served

In the case titled *Komal Narula Vs DMI Finance P Ltd & Anr*, the petitioner filed the case under Section 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996 claiming that a proper notice of appointment of the Arbitral Tribunal and arbitration proceedings had not been provided. The court observed that the arbitral record did not indicate any notice regarding appointment of the arbitrator sent to the petitioner. It also recorded that the notice was sent to two addresses. It was further noted that the petitioner's name indicating that she had refused service of the notice

could not be seen at the second address. The Tribunal proceeded on the assumption that the petitioner refused the service of the notice, however there was no evidence to prove the same. The Court thus, opined that the petitioner did not get a fair opportunity to defend herself and the impugned order of the tribunal was set aside.

Gujarat High Court | Arbitration Clause to be interpreted to be given effect rather than invalidating the same

In *Alphard Maritime Pvt. Ltd. v. Malara Enterprises*, the respondents had a contract with petitioners for dry docking services. The petitioner had sent a notice for the respondents to pay damages arising out of breach of contract. The petitioner

also invoked the arbitration clause, however, the existence of the contract itself was refuted. The court held that a commercial document with an arbitration clause had to be interpreted in a manner to give effect to the agreement rather than to invalidate it. The court held that the documents on record such as

the quotation of the respondents and the purchase order of the petitioner were clear that both parties intended to refer the dispute to arbitration with the agreed authority being Gujarat High Court. The Court also noted that the parties had failed to appoint an arbitrator for the proceedings. It was

held that in absence of procedure to appoint the arbitrator and failure to appoint an arbitrator the court within 30 days from the receipt of the request made by one party to the other could appoint the arbitrator as specified under Section 11(5) of the Act.

COMPANY LAW AND INSOLVENCY BANKRUPTCY CODE



NCLT approves resolution plan by Kalrock Capital and Murari Lal Jalan for Jet Airways

The National Company Law Tribunal (NCLT) Mumbai has recently approved the resolution plan for the revival of Jet Airways Airlines. The Successful bidders who have planned for a total cash inflow of Rs. 1375 Crore for the revival of

the company. Additionally, they have also planned to state operation within six months from the approval of resolution plan by NCLT.

NCLAT stays Vedanta's takeover of Videocon

A Two Judge Bench of National Company Law Appellate Tribunal (NCLAT) maintained the implementation of the

Resolution plan approved by the NCLT of Videocon Industries Limited after a few dissenting creditors approached the NCLAT claiming to be unhappy with the contours of the deal. Twin Star Technologies had approached the committee of creditors with a resolution plan which provided for issuing Non-Convertible Debentures instead of

paying cash to the creditors. The NCLAT has adjourned the matter till September 07, 2021.

NCLAT declines plea of Prudential International Insurance challenging approval of Piramal's bid for DHFL

The NCLAT rejected a plea by International Holding Ltd challenging the resolution plan of debt-ridden Dewan Housing Finance Corporation Ltd (DHFL). The

NCLAT observed that the appellant cannot challenge the resolution plan without existence of any rights as the matter is still being decided by the Adjudicating authority.

Supreme Court junks (PIL) Public Interest Litigation to declare that NCLT cannot act as appellate authority

The Hon'ble Supreme Court rejected to entertain a Public Interest

Litigation filed by one Ashok Surana seeking to declare that the NCLT cannot override the matters which have already been dealt with by the Supreme Court, which as per the Petitioner would lead to "overriding of rule of law" laid down by the Apex Court. The two-judge bench of the Supreme Court opined that the petition under Article 32 is not maintainable.

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