

Sri Lanka

A right to original expression: the role of copyright law in modern industry

Copyright law has a significant role to play in industry today, having developed from a legal concept to one which affects nearly every area of business. Justice Sandra Day O'Connor summed up this progression in the US case of *Feist Publications Inc v Rural Telephone Service Co*: "Copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."

New IP Act

The IP Act (36/2003) brought about several changes to the Sri Lankan copyright legislation. The changes were principally based on the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights.

Under the act, a copyright lasts for the lifetime of the author plus 70 years from the date of the author's death. The previous legislation – the IP Code Act (52/1979) – set the duration of a copyright as the lifetime of the author plus 50 years. Therefore, the new act has further strengthened the rights of copyright owners.

The act broadly examines the area of fair use. It permits the fair use of a work for the purpose of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.

The act provides that to determine whether use of a work is fair use, the following factors should be considered:

- the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the part used in relation to the copyrighted work as a whole; and
- the effect of the use on the potential market for or the value of the copyrighted work.

Subject to limitations, the act permits the private reproduction of a published work in a single copy without the authorisation of the copyright owner where the reproduction is made by a physical person exclusively for his or her personal purposes from a lawful copy of such work.

However, the fair use exception does not extend to cover the reproduction of:

- a work of architecture in the form of a building or other construction;
- the whole or a substantial part of a book or a musical work in the form of notations;
- the whole or a substantial part of a database;
- a computer program, except as provided in Subsection 7; and
- any work if the reproduction would conflict with the normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the copyright owner.

The IP Act protects the following as copyrighted works:

- books, pamphlets, articles, computer programs and other writing;
- speeches, lectures, addresses, sermons and other oral works;
- dramatic works, dramatic musical works, pantomimes, choreographic works and other works created for stage productions;
- stage productions of works specified in Paragraph (c) and expressions of folklore that are apt for such productions;
- musical works, with or without accompanying words;
- audiovisual works;
- works of architecture;
- works of drawing, painting, sculpture, engraving,

- lithography and tapestry and other works of fine art;
- photographic works;
- works of applied art; and
- illustrations, maps, plans, sketches and three-dimensional works related to geography, topography, architecture or science.

A salient feature of the new act is the introduction of a section on enforcement and dispute resolution. The director general of intellectual property is now empowered to conduct an infringement inquiry upon application by an aggrieved party. A decision given by the director general will be binding on the parties and a person aggrieved by such a decision may make an appeal to the courts. This provision is a favourable option for many as it provides an alternative to litigation, which can take a considerable period of time to reach a conclusion.

The key aspect of this provision is the opportunity for an aggrieved party to appeal to the courts against a decision of the director general.

Case law

Assignment of rights

In a recent copyright case before the Commercial High Court, the plaintiff claimed damages from the defendant alleging that a film which had been televised by the defendant's television channel had violated the plaintiff's copyright in respect of the film. Denying the allegation, the defendant stated that the film was broadcast and/or exhibited under the copyright which had been legally obtained by the defendant from the owner of the film; therefore, it did not violate any rights belonging to the plaintiff.

In terms of an agreement between the owner of the copyright and the plaintiff, the plaintiff had been assigned only the theatrical and video rights by the owners of the film. Therefore, the plaintiff had no right to exercise any other economic rights, such as televising the film. Under the circumstances it was clear that the plaintiff could claim only the rights specifically assigned to it by the agreement. On the other hand, the defendant had televised the film according to the rights assigned to it by the agreement with the owner. This action did not violate the plaintiff's copyright as the rights assigned to the defendant by virtue of the agreement between the defendant and the owner of the copyright did not fall into the categories of video recording or theatrical screening.

The Commercial High Court held that the defendant had not violated the plaintiff's copyright and that the parties were exercising the rights which they each held.

In regard to the assignment or licensing of authors'

rights, the act provides that the copyright owner may:

- grant a licence to a physical person or legal entity to carry out all or any acts relating to the economic rights; and
- assign or transfer all or part of the economic rights.

The act states that the owner of copyright in a work shall have the exclusive right to carry out or authorise another party to carry out the following acts in relation to the work:

- reproduction of the work;
- translation of the work;
- adaptation, arrangement or other transformation of the work;
- the public distribution of the original and copies of the work by sale, rental, export or otherwise; and
- rental of the original or a copy of an audiovisual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned.

The act sets out in detail the rights of a broadcasting organisation. The relevant section enumerates that a broadcasting organisation shall have the exclusive right to carry out or to authorise another party to carry out the following acts:

- the re-broadcasting of a broadcast or a substantial part thereof;
- the communication to the public of a broadcast or a substantial part thereof;
- the fixation of a broadcast or a substantial part thereof; and
- the reproduction of a fixation of a broadcast or a substantial part thereof.

Accordingly, in this case it was decided that the respective parties had obtained completely different copyrights from the bundle of copyrights relating to the film. Thus, the defendant had not violated the plaintiff's copyright as only specific rights had been given to the plaintiff. In these circumstances, the judge dismissed the action in favour of the defendant.

In regard to moral rights, the act provides that the author of a work shall, independently of his or her economic rights and even where he or she is no longer the owner of those economic rights, have the right to:

- have his or her name indicated prominently on the copies and in connection with any public use of the work, as far as practicable;

- use a pseudonym and not have his or her name indicated on the copies and in connection with any public use of the work; and
- object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to his or her honour or reputation.

These rights are not transmissible during the lifetime of the author; however, upon the author's death the rights shall be transmissible by testamentary disposition or by operation of law.

Rights of film producer

In another matter which is pending before the courts, the plaintiff filed an action on the grounds that the broadcast of a particular film by the defendant had violated the copyright which belonged to the plaintiff as the producer of the film.

The defendant argued that it had broadcast the film under the ownership rights which had been transferred to it from a third party. Under the act a copyright owner may assign or transfer economic rights in whole or in part.

The plaintiff disagreed on the grounds that, as the author and owner of economic and moral rights in the audiovisual work, it was entitled to the protection guaranteed by the law. At the time of writing a decision is awaited.

Rights in work created in the course of employment

Under the new act the property rights in a work created by an employee belong to the employer. The rules governing copyright in such cases were analysed in an interesting case which was instituted under the provisions of the previous act. However, the provisions

of the new act are also applicable to this action. The plaintiff instituted an action against the defendant for acts of unfair competition and infringement and to obtain a declaration of nullity.

The dispute arose in respect of the ownership of a trademark. The defendant had registered the trademark he had created while he was an employee of the plaintiff. The plaintiff argued that the trademark had been created by the defendant while he was an employee of the plaintiff and was privy to sensitive information in respect of the company's future activities. However, the defendant claimed that he had created the word itself and thus the property rights in the trademark belonged to him.

Although the plaintiff was using the trademark for commercial purposes, the defendant had not used the trademark at any stage.

In these circumstances, the court held that the defendant had committed several violations and issued a restraining order against the defendant.

Rights in published work

A settlement was reached in a recent case involving copyright law. The plaintiff instituted an action against the defendant for violating her economic and moral rights by publishing a book similar to a work created by her late husband. She argued that upon the death of her husband, his rights devolved to her and the publication of the new book violated the property rights of her late husband, who was a prominent writer and dramatist. The defendant argued that its book was designed for students for academic purposes. However, on reaching an out-of-court settlement, the defendant undertook to refrain from further publication of the book and agreed to pay the plaintiff approximately \$7,500 in compensation.

Sudath Perera founded the law firm in 2002. He is also chairman of SPA Global IP Solutions (Pvt) Ltd, which handles matters related to trademarks, patents, industrial designs and copyrights, and SPA Recovery Services (Pvt) Ltd and SPA Tax Consultancy Services (Pvt) Ltd, which handle debt recovery and taxation respectively. Among other areas, Mr Perera specialises in administrative and IP law, with an emphasis on brand protection and anti-counterfeiting work.

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