Time-Shifting, Audio-Visual Recordings and the Broadcast Reproduction Right

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Introduction

Many countries across the world have explicit provisions which deal with audio, visual and audio-visual recordings to allow for fair use of such recordings in certain ways in conjunction with 'new' technologies. In India, the position is not entirely clear because the Copyright Act, 1957, does not explicitly allow copies of copyrighted works being made. This paper, however, argues that it is, to an extent, possible to read such provisions into Indian copyright law.

US: AHRA and Somy Betamax

In the US, AHRA, 1992 (i.e. the Audio-Home Recording Act) amended Title 17 of the US Code which deals with copyright by incorporating into it *Chapter 10: Digital Audio Recording Devices and Media*. This Chapter balances the rights of copyright owners (who are, in this context, primarily music companies) with the interests of consumers and companies which manufacture, distribute and sell electronic equipment which enables private recording to consumers. This has been achieved by granting immunity from (contributory) copyright infringement claims to companies which manufacture electronic equipment for recording on one hand, while on the other, by requiring such electronics companies to pay royalties to music companies to compensate them for the losses which private home recording causes them to incur. The Chapter, *inter alia*, also lays down mechanisms to ensure that copying is not entirely unrestrained (such as the Serial Copyright Management System[1]), criteria to determine who is entitled to royalties and who is required to pay royalties, and procedures to settle disputes.

[1] § 1001(11), Chapter X, Title 17, USC: The term "serial copying" means the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording. The term "digital reproduction of a digital musical recording" does not include a digital musical recording as distributed, by authority of the copyright owner, for ultimate sale to consumers.

Section 1008 of Chapter X which prohibits certain infringement actions reads as follows:

> *No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.*

It is this provision which grants immunity in two sets of circumstances. Firstly, it grants immunity from allegations of copyright infringement based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium. And secondly it grants immunity from allegations of copyright infringement based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

In addition to this, the Sony Betamax case,[2] clearly established the legality of time-shifting in the US. In this case, the Supreme Court of the United States upheld the legality of making individual copies of entire television shows for purpose of time-shifting, and ruled that that the manufacturers of home video recording devices cannot be held liable for copyright infringement. In reaching this conclusion, the court considered the noncommercial and nonprofit nature of time-shifting, and held that time-shifting is fair use.

UK: CDPA and Amstrad

The Copyright, Designs and Patents Act of 1988, the CDPA, does not provide for a general exception for copyright for the purpose of private use. The law does, however, provide for a

[2] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

limited exception which allows private copies of to be made specifically for the purpose of time-shifting in Section 70 of the CDPA, 1988.

Under this Section, the making of a copy of a broadcast in private premises and for domestic use solely for the purpose of time shifting would not result in copyright having been infringed although, if such a copy were subsequently sold or let for hire, offered or exposed for sale or hire or communicated to the public, it would be treated as an infringing copy. Thus, under UK law, provided a copy conforms to the requirements of Section 70, CDPA, it would not constitute copyright infringement, and making available technology to enable end users to exercise the 'right' of time-shifting granted by the Section would also not constitute copyright infringement. Many technologies which enable time-shifting, however, also enable other forms of copying which are illegal. Nonetheless, this possibility of illegal use is not, in itself, sufficient for liability for copyright infringement attaching.[3]

The Indian Position

The Indian position is similar to the UK position although the Indian Copyright Act, 1957 does not explicitly state that time-shifting is legal, and, more problematically, it does not appear to include time-shifting of audio-visual broadcasts within its scope. The Act contains a Chapter, Chapter VIII, which, *inter alia,* deals with the rights of broadcasting organisations in respect of their broadcasts. Section 37(3)(c) of the Indian Copyright Act, 1957 which speaks of the broadcast reproduction right states:

> *37. Broadcast Reproduction Right*
>
> *(3) During the continuance of a broadcast reproduction right in relation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof,—*
>
> *(c) makes any sound recording or visual recording of the broadcast; or .....*
>
> *shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right.*

[3] CBS Songs v. Amstrad (1988) RPC 567

Further, Section 39(a) which enumerates those acts which would not infringe the broadcast reproduction right states:

> *No broadcast reproduction right or performer's right shall be deemed to be infringed by—*
>
> *(a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of bona fide teaching or research.*

Both Sections 37(3)(c) and 39(a) use the phrase "any sound recording or visual recording". Clearly, this works perfectly in the context of, say, radio broadcasts, which comprise only sound. However, it does not work quite as well in the case of, say, Cable TV which comprises audio-visual broadcasts. Ideally, the phrase "any sound recording or visual recording" should have been "any audio-visual recording, sound recording or visual recording", or at the very least, have said "any sound recording and/or visual recording".

The problem with the phrase "any sound recording or visual recording" in the current law appears to be that while a conjoined reading of the two Sections along with the proviso to Section 39A allows for a recording of a broadcast to be made for private use, it does not clearly allow for an audio-visual recording to be made.

With regard to the interpretation of the words 'and' and 'or' in statutes, the judiciary has held:

> "Depending on the context 'or' may be read as 'and' but the Court would not do so unless it is so obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'." *[R. S. Nayak v. A. R. Antulay; (1984) 2 SCC 183]*
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> "You do sometimes read 'or' for 'and' and 'and' for 'or' in a statute. But you do not do it unless you are obliged to do so, because ordinarily, 'or' does not mean 'and' and vice versa. Such a reading for one for the other is permissible only when the

clear import of the language requires it." *[(a) Gopalan v. State of Madras AIR 1950 SC 27; (b) Shambhu Nath Sarkar v. State of West Bengal (1973) 1 SCC 856; (c) Manmohan Das Shah v. Bishun Das AIR 1967 SC 643; (d) Gopinder Singh v. Forest Department of H.P. 1990 Supp SCC 272]*[4]

Somehow, it is not inconceivable to imagine it being argued that making a recording of an episode of a TV serial for private use is not allowed by the law because the exception to the broadcast reproduction right in Section 39(a) does not speak of an audio-visual recording; it speaks of 'sound recordings' or 'visual recordings'.

However, the broadcast reproduction right itself 'defines' the right and the manner in which it would be deemed to be infringed in exactly the same terms in Section 37(3)(c), and it is difficult to imagine that anyone would argue that the broadcast reproduction right does not apply to audio-visual broadcasts (of, for example, TV programmes), or that making a copy of an audio-visual broadcast which copy does not fall within the scope of Section 39(a) would not be an infringement of the broadcast reproduction right.

As such, and considering the fact that Section 39(a) effectively culls out an exception to Section 37(3)(c), it would be hard to argue that the two Sections should be interpreted in an entirely different manner.

This is probably a case where the word 'and' should be read in place of the word 'or' in the phrase "any sound recording or visual recording". Case law clearly says that this may be done in circumstances where it is necessary to do so, and, in this case, it should be possible to argue that not doing so would, in fact, lead to an anomalous situation: the legislature must have intended for audio-visual recordings to be included within the scope of the broadcast reproduction right. After all, excluding them would seem to be entirely incongruous with the concept of the broadcast reproduction right itself.

[4] Case law taken from 'Interpretation of Statutes' by Vepa Sarathi [EBC]

The time-shifting exception to copyright in India is currently extremely unclear, and so far, the there is no Indian case law which elucidates the relevant provisions in this context. The Act should probably amended so that it accurately reflects the intention of the legislature, and such an amendment would probably need to do significantly more that substitute ‘or’ with ‘and’ lest mere substitution in itself lead someone to argue that both audio and visual recordings within the scope of the time-shifting exception, but not simultaneously, as in the case of an audio-visual recording.

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