

Legal Remedies under Copyright Act: A comparison between India and Australia

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There is a very famous latin maxim i.e. ubi jus ibi remedium. It means where there is a right, there is a remedy. Why there is need for remedies or why there is a need for reliefs? In today's world, cheating is very common. One can cheat and can violate others rights as easily as one can blink his eyes. Everyone wants fame and name in short span and no one bothers to follow rules and regulations. Plagiarism is very common under theoretical work. Just copy other's work and pastes it, without any giving recognition to the original author. If others will enjoy by violating the rights of others then no one come up with unique ideas. So there is a need to stop or put restrictions upon these violations. However, plagiarism becomes a very common thing in these days. Every university, college, educational institutions etc. is effected because of plagiarism.

The Merriam-webster Online Dictionary defines plagiarism as to steal and pass off (the ideas or words of another) as one's own to use (another's production) without crediting the source.

According to the Oxford English Dictionary, plagiarize is defined as take and use (another's writing's etc) as one's own.

Every sector is affected because of plagiarism. Plagiarism has very bad impact upon copyright. copyright is covered under intellectual property rights i.e. depend upon our intellect. . The object of copyright is to encourage authors, composers and artists etc. to create a original or unique work with ultimate protection..but infringement cases of copyright violation are increases day by day. In layman language, infringement means using other's work without permission. If there is a violation then there should be some laws, punishments, rules and regulations so that there should be a fear in other's mind not to violate others work. That fear may be in the shape of civil remedy or criminal remedy. In criminal remedy, there is a concept of punishment. Normally

punishments are based on the theories i.e. Retribution, Deterrence, Incapacitation, Rehabilitation and Restoration.

Retribution:- This punishment can be link up with the tag of 'tit for tat' means crime must be balanced with crime.

Deterrence:- It means to set an example for others by giving a harsh punishment to violators.

Incapacitation:- It means segregate the violators from the society by giving punishment of imprisonment.

Rehabilitation:- It means the acts of person can be reformed by giving proper education. There is no need to give any harsh punishment if person is not habitual offender.

Restoration:- This punishment is based upon victim oriented theory. It means to restore back on the same position where they were stand before the violation.

Existence of rights without remedies has no importance at all. Remedies are sine qua non for rights. If we are talking about rights then we have to talk about their effective implementation otherwise no one will bother about other rights. Rights and duties are correlated. There is no existence of one without the other. One's right is other's duty and people at present follow their duties only when there punishments are attached with it.

This research paper deals with different types of remedies available for copyright violation in India and Australia.

India

Under Indian Copyright Act, various remedies have been provided in case of violation of copyright. Remedies in case of violation of copyright, which are as under:-

- i. Civil Remedies
- ii. Criminal Remedies

I Civil Remedies:- Civil remedies are covered under sections 54 to 62 of Copyright Act. This includes claiming authorship of work, injunction, damages, compensation and accounts of profits. Injunctions are also known as stay orders. Injunctions can be divided into two permanent and temporary. For injunction, plaintiff has to prove that there is a prima facie case in his favour, balance of convenience in his favour and irreparable loss would be caused by plaintiff in the case of refusal of injunction. Declaratory suit can also be filed. Plaintiff can file declaratory suit even against the groundless threat of legal proceedings even if there is not actual infringement. Damages can be claimed by plaintiff in the case of infringement, conversion, distortion, modification and for any prejudicial work. However, if defendant proves that defendant has no knowledge about the existing of copyright then only injunction can be passed. Plaintiff is also entitled to account of profits as an alternative to damages. These are those profits which the defendant wrongly earned by sale of infringing copies.

Jurisdiction:- District Court has the jurisdiction to deal with the cases.

II Criminal remedies:- Aggrieved person has criminal and administrative remedies. He can initiate criminal proceedings against an infringer. Chapter XIII, sections 63 to 72 of the Copyright Act deal with the offences in relation to violation of copyright. No court inferior to Metropolitan Magistrate or Judicial Magistrate First Class has a jurisdiction to try the case. Infringer is liable for criminal offences which are as under:-

1. For knowingly infringes or abets the infringement of copyright. Person is liable for minimum six months imprisonment and Rs.50,000/- as fine and maximum 3 years imprisonment and Rs.2 lakh as fine. For subsequent conviction, a person is liable for minimum one year imprisonment and Rs.1 lakh as fine and maximum 3 years punishment and Rs.2 lakh as fine.
2. For knowingly use of infringing copies of computer programme. Then person is liable for minimum 7 days imprisonment and Rs.50,000/- fine and maximum 3 years and Rs.2 lakh as fine.
3. For possession of plates for purpose of making infringing copies. Person is liable for maximum 2 years imprisonment with fine.

4. For violation of technological measures. Person is liable for maximum 2 years imprisonment with fine.
5. For removing, altering, distributing, imports for distribution, broadcast any information without any authority. Person is liable for maximum 2 years imprisonment with fine.
6. For making false statements for the purpose of deceiving or influencing any authority or officer. Person is liable for maximum imprisonment of one year or fine or both.
7. For making false entries. Person is liable for maximum imprisonment of one year or fine or both.
8. For making false statements to cheat any authority and officer. Person is liable for maximum imprisonment of one year or fine or both.
9. For violation of 52-A Person is liable for maximum imprisonment of three years with fine.

Remedies in Australia.

Remedies are provided by each and every country regarding the violation of copyright. International law can be divided into two parts Public International Law and Private International Law. Public International Law is same for all and Private International Law can be differed like domestic law of country. Domestic laws of countries always differ from one to another according to their prevailing circumstances of the country. The Act prevailing in Commonwealth of Australia is Copyright Act, 1968. The Act of 1968 repealed various Acts before coming into operation and many amendments were also made in the Act. This Act has been divided into 12 Parts and having 249 sections. In the case of violation of copyright, civil and criminal remedies are covered under this Act. Both the remedies have been provided under Part V of the Act. Proceedings of civil nature between the parties have been called as an action and Criminal remedy has been called as an offence.

1. Civil remedy:-

The owner of copyright may bring an action for infringement of copyright and section 115, Division 2, Part V deals with action for infringement. The court has power to provide the reliefs of injunction, damages and accounts of profit to the owner. However, the court cannot grant the relief of damages, in case the defendant was not aware and he has no reasonable ground that the act tantamount to an infringement. Owner of copyright may bring an action for conversion or detention in relation to infringing copy or a device used or intended to be used for making infringing copies. On action under section 116, the court can grant all the reliefs to the owner of

copyright as the owner of copyright had been owner of infringing copy at the time when it was made and the owner of copyright had been owner of the device. Court shall consider various factors while granting the relief of damages under this section. The exceptions have also been provided under which defendant can escape from his liability like he is not aware about the fact that these are not infringing copies etc. Under Division 4, Part V, 12 presumptions have been given from section 126 to section 131 to proof of facts in civil matters such as subsistence and ownership of copyright, authorship of work, publisher of work, where author has died, relating to computer programs, relating to sound recording, relating to films etc.

There is very famous saying that no one is liable for those acts regarding which there is no knowledge and intention behind the wrongful act. A person is liable only for those wrongful acts where there is a bad intention or knowledge regarding infringement of copyright work.

Injunctions relating to online location outside Australia¹:-

The owner of copyright may apply to Federal Court of Australia to grant an injunction that requires a carriage service provider to take such steps as the court considers reasonable to disable access to an online location outside Australia that infringes or facilitate an infringement and has primary purpose or effect of infringement of copyright, whether or not in Australia. The owner can also seek injunction against Online Search Engine Provider. The owner can apply for the relief of block domain name URL & IP addresses and court can also direct online search engine provider to not to provide such results that include domain names, URL & IP addresses that provide online location and that are specified in injunction. But the owner has to make carriage service provider, online search engine provider and the person who operated the online location as party to the proceedings. In case the owner of copyright unable to trace the address and address of the person who operated the online location, inspite of his best efforts in that eventuality the court can dispense the notice to that person. However before granting the injunction the court will consider various factors as detailed in section 115A (5). The court shall presume that online location is outside Australia. In case, carriage service provider and online search

¹Section 115A

engine provider does not appear before the Hon'ble Court and does not take part in the proceedings of the case, then they are not liable for the cost of proceedings.

Criminal Remedy

The offences under the division i.e. Division 5 have been divided into three types i.e. indictable offences, summary offences and strict liability offences. Indictable offences are those offences which are serious in nature. Prosecution for the offences under this division may be brought in the Federal Court of Australia or in any other competent court of jurisdiction. However, Federal Court of Australia cannot hear or determine the prosecution of indictable offences. As such, Federal Court of Australia has the jurisdiction with regard of offences i.e. summary offences and offences of strict liability.²

The courts have power to deals with the offences under this division with regard to the acts done in Australia.³

Normally, in indictable offences, the penalty has been prescribed as a fine of not more than 550 penalty units or imprisonment for not more than 5 years or both. In summary offence, penalty has been prescribed as a fine of not more than 120 penalty units or imprisonment for not more than 2 years or both. In strict liability offences, there is only a penalty i.e. 60 penalty units. There is no imprisonment in strict liability offences.

Sub-division B, C & D provide various offences which areas under:-

1. Commercial scale infringement prejudicing copyright owner [section 132AC]
2. Making infringing copy commercially [section 132AD]
3. Selling or hiring out infringing copy [section 132AE]
4. Offering infringing copy for sale or hire [section 132AF]
5. Exhibiting infringing copy in public commercially [section 132AG]
6. Importing infringing copy commercially [section 132AH]
7. Distributing infringing copy [section 132AI]
8. Possessing infringing copy [section 132AJ]
9. Making or possessing device of making infringing copy [section 132AL]

²Section 133A

³Section 132AB

10. Causing the work to be performed publicly [section 132AN]
11. Causing recording or film to be heard or seen in public [section 132AO]
12. Advertising supply of infringing copy [section 132AM]

However, under sections 132AN & 132AO, the punishment is only as mentioned in indictable & summary offences, not under strict liability offences and under section 132AM, the punishment is 30 penalty units or imprisonment for not more than 6 months or both.

In case, the offender is a corporation, in that eventuality the fine is upto 5 times of the amount of maximum fine.

If a person is charged before the court with an offence against division, whether or not the person is convicted of the offence, the court may order that article be destroyed or delivered upto the copyright owner or dealt with the same as court think fit.

Seizure of imported copies of copyright material:-

Division 7 of Part V deals with seizure of imported copies of copyright material. The owner of copyright in copyright material can inform through written notice to the Comptroller General of Customs that the person is owner of copyright in copyright material and he objects to the importation into Australia the copies of copyright material. The notice should be accompanied with the prescribed documents and fees.⁴ The said notice shall remain enforce till end of period of 4 years commencing on the day on which the notice was given or end of the period till copyright subsists, whichever is earlier.

The word 'owner' and 'copy' has been defined in section 134B. The Comptroller General of Customs can by notice in writing to the person declare that notice to be ineffective. However, if notice has not been declared to be ineffective or revoked and during that time, any person imports copies of copyright material into Australia, the Comptroller General of Customs can seize those copies. The Comptroller General of Customs may decide not to seize the copies unless the objector gives undertaking to repay the expenses of seizing the copies or instead of undertaking, security in an amount that Comptroller General of Customs considers sufficient to repay the expenses of seizing the copies.

⁴Section 135

After the seizure of copies, the proper procedure as per section 135AC of the Act shall be followed.

The importer may by written notice to Comptroller General of Customs consent to seized copies being forfeited to the Commonwealth and on notice the copies will be forfeited to the Commonwealth. However, notice must be given before any action for infringement of copyright in relation to the copies is instituted.⁵

The importer can also make a claim to the Comptroller General of Customs for the release of seized copies before the end of the claim period for the copies.⁶ In case, claim is not made within the claim period for the copies, then seized copies are forfeited to the Commonwealth. However, the Comptroller General of Customs can allow the late claim for the copies if an action for infringing of copyright in relation to the copies has been instituted and considers it reasonable in the circumstances and copies have not been disposed off.⁷ On making the claim, notice in writing shall be given to the objector.

Various powers have been given to the Comptroller General of Customs to deal with the seized copies like release of copies, if there is no court order within 20 working days on an action instituted for preventing release of copies, written notice by the objector for release of copies, forfeit the copies if released copies are not being taken by the importer within 90 days of the release, forfeited to the Commonwealth and dispose of the forfeited copies. However, under section 135AI(4), a person may apply to the court of competent jurisdiction for compensation for disposal of the copies and court must order the payment by Commonwealth to the person of an amount equal to the market value of the copies at the time of their disposal.

Reference

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⁵Section 135AE

⁶Section 135AEA

⁷Section135AEC