

The First Sale Doctrine in the Copyright Law

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Abstract

The system of copyright seeks to encourage progress, although the capability of law to define the substance of progress runs deeply within copyright system itself, it should make sure that new works should be produced while guaranteeing protection to the creators or authors of the already prevailing works. Copyright law considers and encourages progress in two following ways: Firstly, the system pursues to increase both the quality and quantity of ingenious output. Secondly, it seeks to widen public access to ingenious works. In furtherance of these goals the First Sale Doctrine has been evolved through passage of time.

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“What is common to many is taken least care of, for all the men have greater regard for what is their own than for what they possess in common with others.”

-Aristotle

1. Introduction

This study tries to outline the necessity of the First Sale Doctrine in Copyright law. It does so by giving a glimpse of copyright law and the limitations to the special rights of the copyright owner, the concept of the First Sale Doctrine has been elaborated as one of these limitations. Further, it traces the origins of First Sale Doctrine and discusses how it evolved over the years through judicial intervention. The study then reflects on the various challenges which are faced by the copyright owner in the present scenario. Firstly, an emphasis has been made on the effects of the first sale doctrine on the right of distribution of the copyright owner and its impact on the new owner. Secondly, the first sale doctrine and the problem of gray market goods & the parallel imports and its effect on the parties involved i.e., copyright owner, distributor, and consumer have been elaborated. Further, this problem has been discussed in the light of Indian approach towards parallel imports and the legal framework for safeguarding the rights of the copyright holder, licensee and the distributor. Thirdly, the effect of the First sale doctrine on digital technology has been discussed, and a comparative analysis has been done

between the impact of the First Sale Doctrine before and after the occurrence of digital networks on affordability and availability of the copyrighted products.

In the concluding part, the paper considers the approach of Indian judiciary towards the First sale doctrine. It also deals with the first sale doctrine on price discrimination/price differentiation faced by the consumers due to parallel imports and digital era. The necessity of the doctrine is traced under its objective to achieve further progress in the society and public utility of the present resources.

1.1 Copyright Law –A Glimpse

The underlining principle behind the law of copyright is that ‘creation’ is worthwhile and the creator ought to be provided with proper dues, thereby stimulating cultural activity and the production and distribution of new works onto public, a result which cannot be but public good. The system of copyright tries to balance and accord exploitative right to those engaged in literary and artistic production and seeks the public interest in general in the widest possible availability of copyright material. The enactment of copyright laws by over 150 countries and the vast participation in the conventions at international level like Berne Convention for protecting the works of literary and artistic confirms the universal concurrence about the public interest present in copyright. The philosophy which underlines the copyright law system may be found in *Goldstein v. California*,¹ wherein the

Court observed that the scheme of encouraging the masses to involve themselves in artistic and intellectual work may involve the grant of copyright to preclude others from harvesting on the creation of the author for commercial purposes.

1.1.1 Originality

A work must meet several threshold requirements to succeed for protecting the copyright. First, the work must be an 'original' one² of the author, rather than being copied from some other work, and exhibits some degree of creativity. Second, the work must be 'fixed' or embodied in some material object, such as ink on paper (books), paint on canvas (paintings), grooves stamped into vinyl (record albums), dye coloring celluloid (motion picture film), alignments of dipoles on magnetic media like audio tapes, flash memory, videotapes, floppies, or pits and lands on optical media (CD-ROMs, DVDs, B-DVDs).

1.1.2 Exclusive Rights

The creation of work by its original author with the protection of copyright gives rise to a set of rights to control uses of that work. These are referred to as "exclusive rights," of the copyright owner and consist the right of making copies of copyrighted work, to create a work based on the copyrighted work, to circulate copies of the work publicly, to perform the work publicly, and to display the work in the public. The "exclusive" nature of these rights means that the exercise of any one of them, without the consent and knowledge of the copyright owner, is a violation of the copyright owner's rights, and would be considered as "infringement" of copyright. The need to balance the 'right' in the copyright with the opportunity for the masses to actually use and benefit from the copyrighted material was felt from the inception of the copyright itself. Accordingly, means to balance these rights were sought to be made through judicial interventions and such exclusive rights of the copyright owner were limited in various ways.

The most important of these limitations are:

- (1) Exclusion of the right to control "fair use" of the work, which allows anyone of usage of the work, without authorization from the copyright owner, in ways that promote the purposes of copyright law and do not impinge unduly on the owner's economic interests in the work;³

- (2) The "idea-expression dichotomy," which grants the owner exclusive rights with respect to the work's expression, but denies any protection to the ideas underlying the work;⁴
- (3) The expiration of the copyright after a term of years; and
- (4) The first-sale doctrine, which with certain exceptions limits the copyright owner's distribution right so that it is applicable only to the first sale of a particular copy, and allows the owner of a copy to sell or otherwise discard of that copy without the authorization of the copyright owner.

2. Limitations to the Exclusive Right of the Copyright Owner

2.1 Fair Use

One of the primary exceptions to the copyright monopoly is the *Doctrine of Fair Use*. The essence of fair use doctrine may be aptly found in *Stewart v. Abend*,⁵ where the Court observed that "the fair use doctrine permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Hence, a harmonious construction is required in matters where there exists a fear that either, the right of an author or the public interest at large is besieged.

In order to ascertain whether a use would come within the protective umbrella of *fair use* or not, the courts are generally guided by four factors. The first aspect in a reasonable use enquiry is "purpose and character of use"; whether such use is of commercial nature or is for non-profit educational purposes. The second aspect is the "nature of copyrighted work", greater the creativity involved in the work, lesser will be the protection afforded to it by fair use doctrine. The third aspect is the "amount and substantiality of the portion used in relation to the copyrighted work as whole"; and the fourth aspect is "the effect of the use upon the potential market for or value of the copyrighted work".⁶

2.2 Idea-expression Dichotomy

Idea-expression dichotomy is the next most important exclusion to the monopoly of copyright. In the simplest terms the *dichotomy* essentially provides that an idea is beyond the protection of copyright and only an expression of such an idea can be granted protection under the law of copyright. It provides that

¹ 412 US 546, 37 (1973), see also *Film Fox Corp v. Dayal*, 286 US 123 [1932]

² For detailed discussion on originality in copyright law see, *University of London Press Ltd. v. University Tutorial Press Ltd.*, (1916) 2 Ch. 601, see also, *R.G. Anand v. M/s Delux Films & Ors.*, AIR 1978 SC 1613

³ Fair used remained exclusively judge- made doctrine until the passage of § 107, Copyright Act 1976, also see, *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 [1994]

⁴ *Baker v. Seldon*, 101 US 99 (1879)

the copyright law is concerned with, and is usually designed to protect the fixed expression or manifestation of an idea rather than the essential idea itself. To give an illustration, an author of an adventure novel will be clothed with the copyright in his work as a whole, in the specific story or characters involved, or in any artwork confined in the book; but normally not in the idea or genre of the story. Copyright therefore may not exist in the idea of a man venturing out on a quest, but may exist in a particular story which follows that pattern.

2.3 Public Domain

Public Domain is a concept in the copyright law whereby the protection attributed to a work in form of copyright is removed and the said work is made available to the masses without any recourse or restriction. A work is known to be in public domain when the copyright protection bestowed upon the work is undone either upon the expiry of the term of copyright or by an express act of relinquishment of copyright by the rightful owner of copyright.

2.4 First Sale Doctrine

The first sale doctrine provides limited privileges for buyers to distribute a copy without infringing the copyright. In general, it delivers that as soon as the owner of the copyright transfers the ownership of a copy or phone record, the receiver or the new owner without the permission of the original owner can redistribute the copy by resale, lease, or loan, and this should be done without invading the copyright owner's exclusive right of distribution. A detailed discussion on the meaning and the concept of first sale doctrine has been made in the following section.

3. First Sale Doctrine - The Concept

Since 1790, owners of the copyright have the special right to "vend" their copies. Copyright law has explicitly documented by court verdict and by statutory provision since 1908, stating that the right to control the sale of a copy by the owner of the copyright ends after the owner's first transfer of copy. This contribution in copyright law shows the alienation on the part of personal property of the owner. The control of the copyright owner was constrained over the distribution. Thus, giving the power to the person having the copyrighted work to resell the copy to the public. Under this first sale doctrine, several used bookstores and CD stores are growing. The present copyright law

gives the owners right to distribute their copies through sale or by any other method like rent, lease, lend which involves transfer of ownership.

The European equivalent of Doctrine of first sale is the principle of "*exhaustion of rights*". The exhaustion principle holds that the right holder to a work can no longer control the distribution of a copy of the work after the first sale of the copy. In other words, the buyer of a book may do with it whatsoever he pleases; he may sell it, move it from home to office and back, use it in any way he likes it. Although the online delivery of copies of such varied digital works as MP3 files, software, and movies is closely modelled on offline transactions such as selling and broadcasting, the status of such copies is still not settled appropriately. The application of the so-called exhaustion principle to digital works remains controversial. Further, most commercial software today is distributed under a licence; there is no transfer of ownership. The user has a licence to operate the software under certain conditions, but no legal ownership interest. For a copy to be lawfully made, the user must have first obtained the permission from the holder of copyright or under the protection of a statutory license or exemption. The first sale doctrine will rarely apply because it is virtually impossible to have a digital distribution, as opposed to reproduction. Broadly the First Sale Doctrine or Exhaustion principle can be divided into three types; namely:

3.1 National Exhaustion

Under national exhaustion, IP rights are exhausted on the first sale within a particular country. They are not, however, exhausted on the first sale outside the particular nation. Thus, if, hypothetically, Canada employs national exhaustion, when a company sells a pair of jeans in Canada, it no longer can control the further distribution of that pair of jeans, its rights have been exhausted.

3.2 Regional Exhaustion

A second type of exhaustion is a regional or community based exhaustion. Under community exhaustion, IP rights are exhausted upon the first sale within a particular geographic area. For example, if the European Union employs a system of community exhaustion, then any sale within the Union would exhaust the IP rights. However, a sale outside the Union would not. So, if the jeans were manufactured in France and the IP rights were held by a French company, a sale in England would exhaust the IP rights, but a sale in Egypt would not.

3.3 International Exhaustion

⁵ 495 US 207 (1990)

⁶ For detailed discussion on the 'four factor' see, *Leslie A. Kelly v. Arriba Soft Corp.*, 336d 811 (9C 2003), *Basic Books, Inc. & Ors. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (1991), *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1994)

The third and final major view of exhaustion of rights is a universal, or international based exhaustion. Under international exhaustion, the IP rights are exhausted upon the first sale anywhere in the world. This is the most lenient view of the exhaustion principle and encourages the production of gray market goods.

4. Jurisprudential Analysis of the First Sale Doctrine

The main objective of the copyright law is to promote progress while protecting the interests of the authors, creators, or copyright owners. It should make sure that new works should be produced while guaranteeing protection to the creators or authors of the already prevailing works. The progress is encouraged by the copyright in two ways: Firstly, it pursues to boost the creative work by both quantitatively and qualitatively. Second, it pursues to widen public access to creative works. The two “progress” goals happen in considerable tension with one another. The inducements that copyright law applies to authors operate by limiting public access to and use of creative works. On the other hand, the extensive public availability of creative works stimulates shared aspects of the general welfare. According to first sale doctrine, owner after selling the first copy cannot control the resale of the work. We cannot overlook the social organizations permitted by copyright law that traditionally have provided lower-income consumers with alternative means of access to works that they cannot afford to purchase outright. As mentioned above, the copyright law’s first aspect is to increase both the quality and the quantity of the creative output. This argument may be furthered by quoting John Locke’s, “Labour theory of value” which finally denote to the theory of property. It is mentioned that Locke presents his famous explanation for private ownership of goods and land on the basis of the energy or labour which human beings expend to produce goods or to cause the land to produce goods of value to beings.

5. Literature Review

The systematic beginning of the First Sale doctrine can be traced back in 1908, wherein it was for the first time recognised by the U.S. Supreme Court, and later codified under the U.S. Copyright Act of 1976. Although, in India the doctrine does not find any mention in either the in law books, commentaries or any judgment of the court till early 2009. Such a phenomenon has arisen

only because of the fact the legislators had carefully hidden the doctrine within the act itself and the same could not be identified quite easily as in comparison with other countries such as United States, United Kingdom where a lot of commendable work has been done by the researchers. In the subsequent section, a review of some prominent writings on the subject is undertaken to underscore the contents and the focus of researches on First Sale Doctrine.

Calaba (2002)⁷ explored in his work the first sale doctrine as it relates to the work which is digital and suggests application of first sale doctrine in digital work. He also described the application of first sale doctrine in non-digital work. He further discusses modern technology’s influence on the distribution and use of copyrighted material and proposes digital methods to protect copyright owner’s interests if a digital first sale doctrine were enacted.

Reese (2003)⁸ deliberates the long-term effect of technological change on the First sale doctrine. Her Article emphasise on the affordability and accessibility effects of the doctrine, studying the traditional causes and benefits of these effects, as well as the ways in which electronic commerce has weakened and could continue to weaken them.

Papadopoulos (2003)⁹ presents a systematic approach to understand intellectual property rights, followed by a study on the development of international IP law. This places the groundwork for the analysis of the first-sale doctrine in international law and the controversy regarding the exhaustion of copyright. His investigation allows to determine the legal obligation, with respect to copyright exhaustion, executed by membership of various international copyright resolutions, including TRIPS.

The impact of the first sale doctrine on parallel imports was examined by Oswald (2007)¹⁰ her work begins with defining gray market goods and parallel trade and its impact on the economic condition of the market. She also attempts to identify a course for addressing gray market goods in the future and what are the effects of first sale doctrine on parallel imports.

6. Methodology

To achieve the objectives, the methodology used in this exercise was explorative and analytical in nature. The present study was primarily based on doctrinal study relying on the library and other e-resources.

⁷ Victor F. Calaba, *Quibbles ‘n Bits: Making a Digital First Sale Doctrine Feasible*, available at, www.buscalegis.ufsc.br/revistas/files/journals/2/.../4076-4070-1-PB.pdf.

⁸ Anthony R. Reese, *The First Sale Doctrine in the Era of Digital Networks*, papers.ssrn.com/sol3/papers.cfm?abstract_id=46362

⁹ Papadopoulos Theo, *The First-Sale Doctrine in International Intellectual Property Law: Trade in Copyright Related Entertainment Products*, available at, www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/.../papadopoulos.pdf

7. First Sale Doctrine: History and Growth

As a first step in the analysis of the first sale doctrine, one should understand how the doctrine came to be and how it evolved over the years. The first sale doctrine's origin is jumbled at greatest. In some studies, the first sale doctrine has been related to the Sherman Antitrust Act. Others contend it originates from the English Common law rules critical of limitations on the alienation of property as this was regarded as essential to ownership. In 1907, the Sixth Circuit, remarking on restrictions upon sales and resale's, stated:

*"A prime objection to the enforceability of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best sub served by great freedom of traffic in such things as pass from hand to hand."*¹¹

Two interrelated socioeconomic influences have also been put forth. First is that the first sale doctrine authorise access to works where the copyright owner might then suppress the information. The second is the doctrine "creates secondary markets, which lead to more affordable used versions of copyrighted works and helps to serve members of the public who lack the means or opportunity to buy the items new."

Some commentators identify the Supreme Court's 1908 year decision in *Bobbs-Merrill Co. v. Straus*,¹² as the emergence of the first sale doctrine under U.S. copyright law.¹³ However, the modern first sale doctrine hints its theoretical beginnings as far back as the year 1854. The case was *Stevens v. Royal Gladding*,¹⁴ in which the U.S. Supreme Court explained the theoretical severability of the copyright from real property rights in the material object of embodiment. Plaintiff James Stevens owned the copyright in a map of Rhode Island. Pursuant to a civil judgment against him, the copperplate engraving used to print the map was sold to one Issac Cady, who consequently used the plate to print the map without Steven's authorization. Defendant Royal Gladding, who had contracted with Cady to sell his maps, contended that the rights to publish and sell copies made from the plate were necessary incidents or accessories of owning the same. In other words, Cady asserted, as the lawful owner of the copyright by virtue of

acquiring title to the copperplate he was well within his rights to hire Gladding to sell the maps. The Court differed, holding that that the rights to publish and sell the map did not pass with the sale of the copperplate, that the copyright and plate were "distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other."

In *Bobbs-Merrill's* case, the copyright owner of the novel "The Castaway" was the plaintiff. In the starting of the book, one of the page contained a notice: "The price of this book at retail is one dollar. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright." The defendant knowing the notice purchased copies of the novel from wholesalers and sold copies at less than one dollar per copy without the permission from the copyrighter. The plaintiff sued the defendant arguing that his right to 'vend' has been infringed. The Court rejected this argument and held:

"To add to the right of exclusive sale the authority to control all future retail sales...would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment."

Interestingly, the Court in *Bobbs-Merrill* appeared to base its decision merely on the statutory language of the Copyright Act and did not articulate a policy basis for this reading. However, the noble intentions of the court in limiting the monopolistic right of the copyright owner in favor of the larger public interest however led to an anomalous situation. It was soon realized that the application of the first sale doctrine in the strictest sense would in effect partially deprive the copyright owner from a very fundamental right within the 'copyright bundle'. This right was the right of distribution.

The classical case to represent this anomaly is *Quality King Distributors, Inc. v. Lanza Research International, Inc.*,¹⁵ L'Anza's most of the cosmetics products, were sold at a higher in US markets than in other markets. The products were distributed through networked channels zonally. Some products were also imported to Malta where three shipments found their way back to the US, and were sold through networks which were not authorized. L'Anza sued for violation of copyright in the labels and markings. The court of first instance and appeal courts held in its favour.

The US Supreme Court however articulate that the prohibition under Section 602 had to be read as subject to Section 109, which had a superseding process over the copyright owner's

¹⁰ Linda J. Oswald, *A Primer on Gray Goods and Parallel Imports for the Twenty-first Century: How Gray Market Goods Could Be the Difference between Success and Failure for Santa*, available at, <https://lawlib.wlu.edu/works/466-1.pdf>

¹¹ *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907)

¹² 210 U.S. 339 (1908).

¹³ Glen O. Robinson, *Personal Property Servitudes*, 71 U. Chi. L. Rev. 1449, 1470 (2004)

¹⁴ 58 U.S. 447 (1854).

rights under Section 106 (3). The following passage shows the important part of the discussion by the court :

“It is significant that this provision does not categorically prohibit the unauthorized importation of copyrighted materials. Instead, it provides that such importation is an infringement of the exclusive right to distribute copies “under section 106.” Like the exclusive right to “vend” that was construed in *Bobbs-Merrill*, the exclusive right to distribute is a limited right. The introductory language in Section 106¹⁶ explicitly states that all of the exclusive rights granted by that section-including, of course, the distribution right granted by subsection (3) are limited by the provisions of Section 107 through 120. One of those limitations, as we have seen, is delivered by the terms of Section 109(a)¹⁷, which expressly permit the owner of a lawfully made copy to sell that copy, notwithstanding the provisions of section 106(3).

After the first sale of a copyrighted item “lawfully made under this title,” any successive purchaser, whether from a domestic or from a foreign reseller, is clearly an “owner” of that item. Read literally, Section 109(a) unambiguously mentions that such an owner “is entitled, without the authority of the copyright owner, to sell” that item. Furthermore, since Section 602(a)¹⁸ simply provides that unauthorized importation is an infringement of an exclusive right “under section 106,” and since that limited right does not encompass resales by lawful owners, the literal text of Section 602(a) is simply not applicable to both domestic and foreign owners of Lanza’s products who decide to import it and resell it in the United States.”

The case of *Omega SA., v. Costco Wholesale Corporation*,¹⁹ is yet another significant US case in context of first sale doctrine. In this case, Omega manufactured watches in Switzerland and sold them throughout the world including United States. Each watch had on the back an “Omega Globe Design” which got copyrighted in US. Costco a discount store procured watches on the “gray market” from ENE Limited, a New York company, which purchased the watches from authorized Omega watch dealers overseas. Although Omega authorized the initial foreign sale of the watches, it did not authorize the importation of the watches into the United States or the sales made by Costco, and filed a copyright infringement in the Central District of California. The aggrieved parties filed cross motions for summary judg-

ment, with Costco arguing that the “first sale doctrine” under Sec 109(a) US Copyright Act, 1976 to provide a defence to any copyright infringement.

The court discussed the first sale doctrine enshrined in Sec 109(a) of the US Copyright Act which delivers: “*Notwithstanding the provisions of section 106 (3), the owner of a particular copy... lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy...*”

The court further discussed Section 602(a) of the Copyright Act which prevents importation of copies of copyrighted works into the United States, without the authority of the owner of copyright. Section 602 provides “*Importation into the United States, without the authority of the owner of copyright under this title, of copies...of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies...under section 106, actionable under section 501.*”

Moreover, Section 106 (3) of the Copyright Act gives a copyright owner control of distribution of its copyrighted works. Sec 106 (3) states “*Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights...to distribute copies...of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.*” The court highlighted the interplay between the aforementioned three sections, the first sale doctrine, the exclusive right to distribute, into the United States without the consent of the copyright owner. In this case, the Omega watches were actually manufactured and acquired abroad from an authorized foreign distributor, then brought in through importation into the U.S. by ESS, and then sold there by Costco.

The Court noticed that before *Quality King* was decided by the Apex Supreme Court, Ninth Circuit example was strong that the first sale provision Sec 109(a) provided no defence against a claim of infringement for importation of goods which had been made outside the United States, unless the goods had already been first sold in the United States with the permission of the copyright owner. The defendant, Costco had argued, and the District court had held, that prior Ninth Circuit decisions had been implicitly overruled by the *Quality King* decision of the Supreme Court. For example, the Ninth Circuit had earlier held in *BMG*

¹⁵ 523 U.S. 135 (1998)

¹⁶ Section 106, US Copyright Act states: Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and “(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”

Music v. Perez, that the first sale doctrine provided no defence against a claim of unlawful importation under 602(a) against foreign manufactured imported goods. As the court there said, the words “lawfully made under this title” in Sec 109(a) “grants first sale protection only to copies legally made and sold in the United States,” and the copies at issue there were made and first sold abroad. The Ninth Circuit in *Omega* noted that the rationale for this interpretation was twofold: First, “a contrary interpretation would impermissibly extend the Copyright Act extraterritorially, secondly, the application of Sec 109(a) after foreign sales would render Sec 602 virtually meaningless” ... because importation is mostly preceded by at least one lawful foreign sale that will have exhausted the distribution right on which Sec 602 is based on.

8. International Intellectual Property Rights Law and First Sale Doctrine

Intellectual property rights law grants originators many exclusive rights. Such rights amount to economic rights that allow the profitable exploitation of copyright product and are intended to promote and incentivize creative work. This boosts the development in technology enabling the owners to derive the monetary gains from the work.

The IPR protection can make significant impact to multidimensional aspect of copyright law and the challenges faced by policy makers in endeavoring to set the optimal level and nature of protection in case of conflicting interests of different nations. The distributional magnitudes of diverse levels of copyright protection for producers and consumers residing in different countries can raise many issues which can be very difficult to resolve. Critical to this fortitude is the level of concentration of ownership within various markets and the prevailing degree of competition. Too-much protection and the resultant market power can end in anti-competitive conduct that distorts economic efficiency of the copyrighted product but might benefit certain consumer of certain countries. In the realm of international trade, including of a distribution right, in which the inventor of a copyright product can control its distribution beyond the point of first sale, may introduce certain level of protection for the copyright owner's interests.

In the present chapter we will look into the development of international IP law, as a screening in considering the first sale doctrine and also the specific provisions dealing with the doctrine present in Trade Related aspects of Intellectual Property Rights (TRIPS), WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).

8.1 Overview of International IPR Conventions

Intellectual property is significant in creating for entities and nation. At international level this has led to rigorous efforts in developing a legal framework and an institution to nurture the protection and recognition of the intellectual property.

With respect to intellectual property rights, there are fundamentally two sets of international law, those succeeded by the World Intellectual Property Association (WIPO) and other, incorporated in the TRIPS Agreement of the WTO. Conventions such as Berne convention, Geneva convention and Rome convention, incorporate the exclusive right of IPR owner to make the product available for sale, which is discussed below:

The Berne Convention for the Protection of Literary and Artistic Works (1886) later revised as Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971 (as amended on 28 September 1979):

The main aim of the convention was to deliver protection to the foreigners which are enjoyed by the local people in the member countries. The three basic standards of the convention are:

- *National Treatment*: equal protection must be given to the member countries that are granted to their residents.
- *Automatic Protection*: no condition on the formality should be imposed on protection example: there is registration in case of trademark.
- *Independence of Protection*: there should be independence of protection which is granted against the protection in their own country.

Minimum standards for protection regarding “economic rights” of creator were set by the Berne Convention. The general principle related to the protection's minimum duration is the expiry after the 50 years of the creator's death.

In addition to the efforts made at international level by Berne convention at shielding music copyright, the similar efforts have

¹⁷ Section 109(a), US Copyright Act states: *Section 109(a) “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord...”*

¹⁸ Section 602, US Copyright Act states: *“Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. . . .”*

¹⁹ F. 3d (9th Cir. September 3, 2008)

been made by the International Federation of the Phonographic Industry (IFPI) in 1933 by focusing on the efforts to enforce intellectual property rights for the music industry and in preventing the music piracy. The purpose of the IFPI is to establish a legislation to protect IPR and to ensure that there is satisfactory enforcement of it. Organizations like IFPI were created to protect audio copyright where it does not exist and a legislation to ensure that pirated imports be regarded as not legal.

To protect the interests of the performers, IFPI negotiated the formation of the International Convention. Unlike the Berne convention, Rome Convention (1961) was exclusive to copyright in music works and worked for the improvement of protection for the artists and others related to the music work.

In the light of this failure and the necessity for continuous upgradation and improvement in international protection, Geneva Convention (1971) was formed for safeguarding and protecting the producers of phonograms. The main object of the convention was to check the growth of piracy, most important was to combat with the international piracy as many pirated sound recordings were being distributed all over the world. Piracy has increased due to technological developments at the international level. To report this, the Geneva Convention explicitly forbids:

- (a) Duplication of work without the permission of the producer.
- (b) Importing of duplicates.
- (c) distributing duplicates to the public.

The World Intellectual Property Organization (WIPO), an United Nations agency have applied all the above three agreements i.e. Berne, Geneva and Rome. Many developing countries have still not signed to these agreements despite of their extensive impact and some of them did, failed to efficiently enforce domestic IPR laws. Any dispute between the convention member countries is solved by the International Court of Justice.

9. Indian Perspective

The association between the Indian law of copyright and the first sale doctrine is a strange one. This is primarily so because, though the doctrine as such has been present in the Copyright Act, 1957 since its inception, the doctrine itself does not find mention anywhere either in law books, commentaries or any judgment of the court till early 2009. Such a phenomenon has arisen only because of the fact the legislators had carefully hidden the doctrine within

the Act itself and the same could not be identified quite easily as in comparison with other countries such as US. This chapter gives an account of the approach of the judiciary regarding first sale doctrine and also talks about the relevant provisions in the Copyright Act, 1956 wherein first sale doctrine can be implicitly found.

One of the first cases in India which explicitly deals with the first sale doctrine is the celebrated case of *Warner Bros. Entertainment Inc. v. Santosh VG*.²⁰ In this case, the plaintiffs sued the defendant for infringing the copyrights and for the damage incurred in respect of the hiring films. Plaintiffs and the companies associated with the film business are the owners and have the licence of rights and titles of the copyrights.

The Plaintiffs submitted before the court that the business of film production was a composite, time taking and expensive process, requiring a well-defined distribution policy for its commercial accomplishment. According to them such distribution strategy generally is in various phases, upon completion of a film, the first phase is releasing of the films in cinema halls or theatres. When the film is released in the halls, second phase of distribution strategy is achieved when it is shown through other media channels like cable, home videos, CDs, DVDs and satellite T.V.²¹ Accordingly, the Plaintiffs further submitted that it was usual to release their films first in the theatres of US and once the film is released in the theatres in the other countries then it should have already been released in US in home video format. Consequently, when the film is released in the theatres of India, then it is probable that the film must have been out through media like home video in US by the plaintiffs.

The Defendant, allege the Plaintiffs, is engaged in the business of renting/ lending of video films in DVD format. The DVDs which were rented before from the plaintiff are collected by the customers from various shops. Many DVD's thus rented have the warning written on them, not allowing other than plaintiff to sell or rent outside the Canada and US. The plaintiffs argued that the defendant has done an act of infringement by offering DVD on hire without having the licence of the copyright owner. Defendant having no rental licence was alleged by the plaintiff and this led to an act of infringement of copyright under the provisions of Section 14 (d) (ii)²² read with Section 51 of The Copyright Act, 1957.

The Defendant while raising various defences and objections against the maintainability of the suit filed by the plaintiff raised a specific defence under the doctrine of first sale.

The Defendant contended that importing the copies of CDs and DVDs rented from outside India and are not available in

²⁰ CS(OS) 1682 of 2008, decided on 13th April 2009 (Del HC)

²¹ It is noteworthy that the time difference between the release in theatres and cinema halls and release on other formats may sometimes be separated by a few months and at times by a couple of years depending upon the consumer demand

India does not account to the act of infringement. The Defendant also resisted since they only rented out original CD/VCD/DVD's which had been first sold in US, the said CD/VCD/DVD cinematograph film could never be termed as an infringing copy.

The defendant further contended that once a copy of original work is in distribution, the owner cannot exercise any right. For if a sale is made, it is apparent that no control can be exercised by the owner. It was held that in USA, if a rented copy is sold by the owner to a rental library then the owner is not eligible to choose the price at which the library can rent that DVD. Any conflicting explanation would mean that owners have a "long hand control" on the DVD sold by them. Section 14(d) (i) refers the exclusive copyrights of the owner and explains that once the owner had made and sold a copy of work, then his right has been exercised as the work is put into the market. So once sold, owner cannot further exercise any right and impose condition on the utilization. It was again reiterated that if an authentic work is put in the market for viewing at home the owner cannot decide the home at which it would be viewed. Likewise, once a copy bought from the copyright owner is circulated in the market, the owner will have no right to restrict any organization on renting or selling further.

The Defendant argues if the rental DVD is sold, the owner has exercised the right of hire and right of sale. This shows that the rights of the owner are exhausted with respect to the CD. Owners are vested with the right of sale and hire; but if the copy of DVD or CD is being sold by the owner, then he cannot exercise his right to hire. At the same time the owner can exercise his right of hire for his other copy of work.

Defendant argues that under Section 14 (d)(i), if the owner has exercised his rights then there can be no violation of rights if the same work is sold again. Section 14(d) read with Section 2 (m) explains the International exhaustion principle. Section 51(a) states the infringement by violating the exclusive rights of the owner, but in this case defendant argued that he has not violated the rights as the said rights were exercised by the owner. The section is concerned about infringement of copies and in this case the defendant has not made or rented the copies. However, the court negated the argument of the Defendants that it was protected by the doctrine of first sale and that held that the Plaintiffs' indeed had a right to claim protection under the copyright law. The court observed as under:

"Section 14(1)(d) refers that the owner of the copyright of cinematographic films has the exclusive right to sale or hire the copy of film even if the copy has already been sold or hired before. Thus, the copyright owner enjoys the right in a specific film copy although

the copy has been sold before and it also expresses contrary nature towards literary work which are already in circulation. The copyright owner thus continues to be entitled to exercise rights in a specific copy of the film regardless of whether it has been sold previously- in express contrast to literary works, which are "already in circulation". Section 51(b)(i), protects this by expressing that there will be infringement of the copyright if a person does which the exclusive right says by the act., conferred upon the owner of the copyright; it is also emphasized by Section 51(b) (i) which makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, any infringing copies of the work. The provision, critically, not allows from the definition the importation of an infringing copy for "the private and domestic use of the importer". Any copy if imported into India in contravention of the act like the permission of the copyright owner or without having the licence will be regarded as infringement under Section 2(m).

In India, there is another reason for which the defendant cannot apply the exhaustion principle. Owner of the copyright has the authority and right to transfer his right this can happen by distributing the copies through licensees. The term and the number of licensees depend on the various factors like copies entitled to be hired or sold and on the performance of the licensee. It can be restricted by geography too (Section 19).if this is seen from defendant's point of view, copyright owner's rights would be exhausted immediately after the copies have been given to the licensee can distribute copies in any territory he want to without the consent of the owner. Thus, if a distributor is given a copy to display a film in territory X, or hire them in that territory; he could, by extension of the defendants' viewpoint, travel beyond that territory, or use a rental copy to exhibit the film, in another territory, where it has not been released, or even rent it in such territory, and so on. According to defendant, if the rental copy is meant to be sold in southern part of India, then it can be distributed in the other regions too whether the film is released in those regions or not. Such renting out may have catastrophic commercial consequences: one of the hirers might well be a cinema theatre, which may exhibit it, in public. This would entirely defeat the copyrights owner's right to commercially exploit its rights, and for that purpose, partition the market at its convenience. The safeguard provided by Section 51 (b) (iv) proviso, in case of importation of one infringing copy, sufficiently testifies that if importation is for private use of the importer, which explicitly refers to the non-commercial use by such a person, it is not deemed an infringement....

²² Sec 14 (d) (ii) states: For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely: In the case of cinematograph film... to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions.

.... Section 14(a)(ii) indicates once the copies are in circulation, the copyright owner cannot exercise domain over the literary work, demonstrate that exhaustion of rights, if one may term it, this is applicable only to the class of copyrights in Section 14(a) and to the extent specified in clause (ii). Thus, the copyright owner of a literary work, cannot dictate how and under what conditions a copy can be re-sold, once it is "circulated". This limited "exhaustion" refutes the applicability of the principle in regard to other classes of copyrights. Thus, Parliament having intervened in one category of copyrights to grant a restricted kind of "exhaustion" and deliberately chosen not to extend it to others, sleight of judicial reasoning cannot extend its application. This, Section 14(a) (ii) to the extent it exempts the copyright owner's right in respect of copies in circulation, is by way of a proviso or exemption; there is a long line of decisions, that such provisos or exemptions, hold only the field covered by the main provision, and carving out an exemption, or exception (to such main provision) and to no other."

From the above it is clearly discernable that the Indian judiciary hitherto is of the view that the doctrine of first sale is per se not appropriate to cinematograph films and may only be a defense in infringements relating to either literary works. However, it is noteworthy that in the case, the real question or issue before the court was whether first sale doctrine can be raised as a defense in relation to infringement of cinematographic work. Hence, it may be argued that only the court's observation regarding the inapplicability of first sale doctrine qua works under Sec 14 (d) Copyright Act, 1957 is binding; whereas the views expressed by the court that first sale doctrine in India can at best be raised in infringement relating to literary works is merely a non binding dicta.

One more Indian case which deals with the doctrine of first sale is *John Wiley & Sons. v. Prabhat Chander Jain & Ors.*²³ This case deals with a peculiar copyright infringement issue which is referred to as *leakage*²⁴ by the international publishing industry. The Plaintiffs in this case are world renowned publishers of scientific and technical text books for college and university level students. The Plaintiff publishes and sells in Asia-Pacific and South-Asian Pacific regions text books which are Low Price Editions (LPEs) of their international counterparts.

Though content wise the two editions are similar, yet the LPEs are generally printed on lower quality paper, have lesser illustrations, pictures, photograph and are often without any additional supplements such as internet access materials or CD/DVD materials. However, the most significant difference between an LPE and its international editions is that the LPEs are almost 60%

- 85% cheaper. International publishers such as the Plaintiffs often publish and sell such LPEs to Asia-Pacific and South-Asian Pacific regions as a good will gesture so that the students of these regions are not deprived of quality educational material due to price variance. Additionally the LPEs also contain a special notice on their copyright page such as:

"This special low price editions Indian reprint is for sale in India, Bangladesh, Nepal, and Pakistan only. Sale outside these areas is prohibited"

However, the Defendants used to procure many such LPEs published and printed by the Plaintiff and used to export and sell them in beyond the 'authorized areas' for profit. The Plaintiffs accordingly claimed copyright infringement and sued the Defendants on the premise that the Defendant had infringed its copyright under Sec 14 r/w Sec 51 of Copyright Act, 1957.

The Defendants however contested the infringement suit and claimed protection under the first sale doctrine. The Defendants argued that since they had not illegally reproduced the LPEs but had in fact lawfully purchased the same from the Plaintiffs authorized sellers, the Plaintiffs could not stop them from now disposing it off any manner even if it be through sale outside the specified areas on the copyright notice. The Defendant also raised a contention that a plain reading of Sec 14 (a) (ii) r/w Explanation to Sec 14 Copyright Act, 1957 clearly shows that the first sale doctrine is valid to literarily works and the Plaintiff is precluded from claiming any infringement of its copyright and also from preventing the Defendants from exporting the LPEs from India.

The Plaintiff on the other hand contended that the Defendants' act of exporting the LPEs beyond the authorized areas as set forth in the copyright notice is a clear violation of its copyright. It further submitted that the first sale doctrine was inapplicable in the present case as the Defendant was interfering with its right of distribution by exporting the LPEs beyond the 'authorized areas'. According to the Plaintiff, the Plaintiff has only exhausted its copyrights qua the LPEs in areas which are mentioned in the copyright notice; and any sale by the Defendants beyond those areas would constitute an infringement of its copyright as it has not yet exhausted its copyright elsewhere. To buttress this argument, the Plaintiff has also contended that its stand is conformity with the principle of granting simultaneous licenses to different parties under the copyright law by relying on the decision of *Penguin Books Ltd. v. India Books Distributors*,²⁵

"If this view is not taken, not only will the procedure of granting exclusive licenses for particular areas of copyright be seriously

²³ CS (OS) 1960 of 2008 (Del HC). This case is presently sub judice.

²⁴ Presently two more cases are also pending before the Hon'ble Delhi High Court pertaining to leakage & first sale doctrine. These include *John Wiley & Sons & Ors v. International Book Store & Ors.*, CS (OS) 2488 of 2008 and *Elsevier Inc. & Ors. v. Aggarwal Overseas & Ors.* CS(OS) 2558 of 2008

undermined, but the national division of copyright set up under the system of International Copyright Convention in so far as it provides for partial assignments and exclusive licenses, both vertical and horizontal, would to a significant degree be subverted. (Time-Life International v. Interstate Parcel Express Co. (1978) FSR 251(4) per Bowen CJ)."

It is clearly discernable that the judgment in this case which subjudice is presently before the Hon'ble Delhi High Court will go a long way in shaping the first sale doctrine in the Indian copyright law.

10. Acknowledgement

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11. Conclusion

Intellectual property may be referred as the manifestation of a concept or idea because of an individual's efforts. Copyright law typically confers a bundle of rights on creators, comprising the right to make prints available to the general public. This sums to a right of *first sale* or distribution. Nevertheless, according to copyright law a distribution right is exhausted when the owner of the copyright has sold the copy. The principle of exhaustion means that the purchaser of the copyright product can consequently resale the product without the approval of the copyright owner. That's why, it is referred to as the *first-sale doctrine*.

However, the journey of the First Sale Doctrine has not been easy after the Bobbs Merrill's case; the status of the doctrine became murkier and confusing due to its presumed effects on alienability and competition. It was often argued that the first sale doctrine should be abolished altogether. As the copyright law is focused on rewarding the creators and authors and helping them to derive the revenues without fearing that such revenues be taken by other. On the other hand, its object is to ensure public utility of the intellectual product, i.e., the users should be able to appropriate as large share as possible of the benefits that flow from the use of such creations and also efficient use of the scarce resources, which might lead to further development in the field of copyright and encouragement for the new creations and thoughts of the future authors and creators.

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Annexure-I

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