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Analysing the constitutionally of the expanded scope of section 31D of the Indian copyright act

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Abstract
In Simple parlance, copyright or author's right denotes the rights which authors or creators have over their literary and artistic works. In the Indian context, the copyright discourse is regulated and governed by The Copyright Act, 1957 ("CA"). Amongst many other provisions of the CA which have been subject to numerous constitutional challenges in various courts of the land, one such provision is section 31D ("31D") of the CA which was introduced by section 18 of The Copyright (Amendment) Act, 2012. In a nutshell, 31D stipulates that any broadcasting organisation desirous of broadcasting or communicating to the public at large any literary or music work or sound recording can do so, subject to certain conditions which have been prescribed under 31D itself. 31D has been subjected to various constitutional challenges in the Supreme Court and various High Courts on grounds of its conflict with Articles 14, 19(1) (g), 21 and 300A alleging that the provision 31D hinders or restricts reciprocal understanding between the licensees and the owner of the copyright rights and that 31D supports broadcasters in publishing the content and works of copyright owners without allowing the latter any say in the matter and thereby denying them their intellect reward or the fruits of their labours. However, one important, relevant and yet unexplored area is the constitutionality of the DIPP issued office memorandum, dated 5th September, 2016, issued under 31D. The office memorandum disproportionately widens the scope of 31D by holding that in addition to radio and television broadcasters, as the language of 31D applies to and suggests, even internet broadcasters and internet broadcasting falls within the scope of section 31D. The scheme of the paper is to subject this very clarification via the office memorandum to the scrutiny of the articles 14 and 19(1) (g) of the constitution.

Keywords: Copy right, author, 31D, constitutionality

Introduction

Research Report

The paper has primarily relied on parliamentary committee reports and recommendations, journal articles, online articles and blog posts by Intellectual Property law experts and scholars to analyse and explore an aspect that has seldom been commented upon which is the constitutionality of the DIPP office memorandum or 'OM' that has expanded the scope of section 31D. Explanations of section 31D and the expansion by the OM have been gathered from the named resources and have been incorporated in the paper. In order to assail the constitutionality of the OM, the author, from cases and journal articles has outlined various constitutional principles and secondly, in order to serve the purpose of the paper, the OM which has had the effect of expanding section 31D, has been tested on the bedrock of the constitutional principles to conclude if the OM passes the constitutional muster or not.

Section 31D

The aspiration of the law on copyrights is to secure the expression of an idea [1] and concomitantly, serving and protecting public interest and the dissemination of works [2]. From the focal point of the author or owner of the copyright, a widely accepted form of non-voluntary licensing is statutory licensing [3]. Statutory licensing is legitimised by section 31D or '31D' which was introduced by the Copyright (Amendment) Act, 2012 [4]. The impetus behind the change was the loss-making radio and television broadcasters and the requirement to comply with India's international obligations under pertinent treaties and instruments [5].

In a nutshell, the gist of 31D is that broadcasting organisations desirous of communicating to the public by way of broadcast or performance of a literary or musical work and sound recording already published may do so subject to certain conditions provided in the section itself [6]. To further understand the import of the section, terms such as 'broadcasting organisations', 'broadcast', 'communication to the public', literary work, musical work and sound recording warrant elaboration.

The domain of broadcasting organisations or 'BO' is strictly regulated [7], and any such organisation requires licences to be obtained under the Indian Telegraph Act [8] and the Indian Wireless Telegraphy Act [9]. BO enjoy rights and prerogatives under section 37 of the Copyright Act, 1957 or 'CA'. As per the CA, the definition of broadcast has been provided for in section 2 (DD). Scholars often emphasise on the need to read the definition of 'communication to the public' under section 2 (FF) of the CA harmoniously with section 2 (DD) [10]. The harmonious construction alludes us to the finding that the latter is much restricted in its scope and is one among the various ways of 'communication to public' and therefore broadcast is only a mere subset of the communication to public [11]. 'Communication to the public' is a very broad term and has been provided for in section 2 (FF) of the act. It takes into its fold every mode of communication of any category of copyrights to the public by any means but not by way of issuance of copies [12]. Additionally, the definitions of literary works, musical work and sound recording have been provided in sections 2 (o), 2 (p) and 2 (xx) respectively of the CA. It is important however, that the difference between a musical work and sound recording is to be appreciated.

Musical work and sound recordings are varying or differently copyrightable and the copyrights in both these instances provide different and distinct sets of rights and protections. The same can be explained with the aid of an example which is, if a songwriter composes the lyrics and melodies or notes or tunes, the expression of the idea qualifies as a musical work [14]. However, if the lyrics coupled with notes and tunes is sung or played and is consequently recorded, the same is protectable as a sound recording [15].

31D and its repugnancy to the constitution

31D attracts a wide host of issues. To begin with, a constitutionally suspect application of 31D is that it accords special or preferential treatment to BO in the sense that it actually does away with hearing the concerns of the copyright owner which they may have with respect to the non-voluntary, statutory licensing in favour of the BO [16]. The legislature has aimed 31D to be a balancing weight between the interests of the author in protecting and preserving their work and the interests of the public at large [17]. Behind the enactment of 31D, policy considerations for advancing public interest have been major propelling factors and have attracted numerous scathing criticisms from copyright owners as it also denies to them the chance to negotiate the rates of royalty with BO which is claimed as an unreasonable restriction [18] on their Article 19(1) (g), the right and liberty to carry on trade and business [19].

The constitutionality of 31D has also been challenged on grounds of Articles 14, 19(1) (g), 21 and 300A [20]. The common line of challenges had been that 31D significantly impairs common mutual commercial understanding between the parties and vitiates the freedom to contract of the parties [21]. Additionally, specifically with respect to Article 300A, it has been argued that depriving authors or copyright holders of their works or property, does not in any manner satisfy or fulfil the criterion of public purpose contained therein [22]. Moreover, BO, broadcasting the works of authors unilaterally without effectively permitting or granting them any say in the entire discourse of licensing and the meaningful negotiation of royalty rates, also takes away from them any incentive to create their own works and bear and enjoy the fruits of their intellect [23].

The DIPP Circular and its unconstitutionality

In multiple cases, publications and blog posts what has been addressed is the unconstitutionality of 31D. However, the aim and objective of this paper is to focus on the constitutionality of the DIPP [24]. Office Memorandums or 'OM' themselves which enlarge or expand the ambit of 31D [25]. This area has been seldom addressed so far but is sought to be addressed in this piece as the source [26] is as important and relevant as the stream [27]. The introduction of the OM was warranted because of the uncertainty and debate on whether 'online streaming platforms and broadcasting organisations' were covered by 31D as well or was it just the, as conventionally understood, television and radio mediums [28]. To resolve the uncertainty, the DIPP, in consultation with other ministries and departments, issued the OM of 5th September, 2016 which brought online broadcasting squarely in the category and ambit of section 31D [29]. The reason behind the same advanced by the DIPP circular was that the very phrases and terms, 'any broadcasting organisation desirous of communicating to public' may not be read restrictively to only cover the conventional radio and television broadcasting but may be construed to cover internet broadcasting as well [30].

However, in addition to the stream itself which is 31D, even with respect to the source, the DIPP OM, it can be argued that it is squarely wrought with unconstitutionality due to the reasons that follow.

An action Ultra Vires the Executive's competence

In the Indian context, a strict and rigid doctrine of separation of powers is not followed [31]. However, the same has been held to be a part of the basic structure of the constitution [32]. The prerogative of interpreting provisions and sections of law predominantly lies with the judicial and quasi-judicial bodies. Under articles 73 and 162 of the constitution [33], the position of law, which has also been advanced by Shamnad Basheer is that the 'executive can only interpret provisions and sections of a statute if and only if, the same is legitimised or backed by a statute [34].' In the current fact scenario, the DIPP had no business or no legitimate sanction for doing in what it did which was interpreting the language of 31D, expanding its scope and consequently bringing online broadcasters within the fold or definition of BO in 31D.

However, this elongation or widening of the scope of 31D by the DIPP may not have been ultra vires or unconstitutional, if the same had been issued by the Copyright Board itself which has been held and affirmed to be a quasi- judicial body in the case of Shamnad Basheer v. Union of India [35]. Additionally, it is also pertinent to note that the Copyright Board has been merged with the appellate board which also happens to be a quasi-judicial body and could very well legitimately do what the DIPP was not empowered or had the sanction to do [36].

Article 14 and Arbitrariness

The arbitrariness principle is a well acknowledged principle of delineating the extent of Article 14 and offers a safeguard against arbitrary State intervention and action whether taken or exercised in the course of executive power without legislative sanction or with the authority of law [37]. In Om Kumar and Ors. v. Union of India, [38] the Supreme Court outlined the procedures to be followed in order to challenge an administrative or executive decision as being arbitrary. First, the administrator's order must be evaluated to see if it is 'rational' or 'reasonable'. The basis of this enquiry would be

whether the administrative or executive, appropriately and satisfactorily performed their primary duty or if they committed an illegal act or largely overlooked and did not account for important factors or overestimated the importance of insignificant factors or held an opinion that no rational, reasonable and prudent man could have held.

It is pertinent to note that 31D opens with the words any 'broadcasting organisation desirous of communicating to the public. The definition of 'communication to the public' in Section 2 (FF) of the CA is relied upon by the OM to insert 'internet broadcasting' into 31D [39]. Any work or performance made available to the public by any means of 'display or diffusion' is covered by Section 2(FF), which even clarifies that communication via satellite, cable, or any other simultaneous communication mode to more than one household, are covered by this definition. The DIPP interprets this language to suggest that such communication should encompass online broadcasting in addition to television and radio transmission [40]. This interpretation however is manifestly arbitrary as it completely goes against the legislative intent behind the enactment of 31D.

In order to decipher the precise legislative intention, it is to be noted that the language of 31D (3) and Rules 29(3), 29(4) (b), 29(4) (g), 29(4) (h), 30, 31(1), 31(5), and 31(6) of the Copyright Rules, 1957, 'radio and television broadcasting are the only modes specifically mentioned, and no indications have been provided whatsoever that the language may be broadened to include internet broadcasting or any other form.' The legislature has specifically restricted the scope of 31D to radio and television broadcasting only [41]. This makes it abundantly clear that the legislature only seems to have accepted that radio and television transmission modes only would be eligible for statutory licencing in India. The Memorandum has the effect of expanding the application of 31D to include 'online broadcasting', despite the fact that neither the wording of 31D nor any precedential legal rulings nor the legislative intent support or justify this expansive interpretation.

Due to the aforesaid reasons, it becomes clear that the Memorandum breaches Article 14 as it is arbitrary and does not stay within the intended bounds of the legislation established by the legislature.

The Conflict with Article 19(1) (g).

With respect to the rights of copyright holders under Article 19(1) (g), an associated or necessarily conjunct right is also the freedom to enter into contracts while carrying on their business or trade [42]. However, under Article 19(6), this freedom may be restricted in the public good and interests with appropriate and reasonable justifications. With respect to the restrictions, the Supreme Court in the cases of Modern Dental College and Research Centre and Ors. V. State of Madhya Pradesh [43] and Binoy Viswam v. Union of India [44], has categorically ruled that such restrictions must reasonable and proportionate to the goal that is to be achieved.

In assailing the reasonableness of the restrictions, the test employed is a conjunctive four-part examination that starts firstly with a consideration of the goal for which the restriction has come into being. Secondly, it must be shown that the actions taken or the restrictions placed bear a logical nexus with the achievement of the goal. Thirdly, the importance or need of accomplishing the aim or goal sought by the measure should be analysed or weighed in relation to the societal wellbeing and welfare which can be achieved by preventing limits on Article 19(1) (g) and lastly, no alternative measures must have been available that achieve the same purpose or goal with a lesser degree of limitation on 19(1) (g).

On the very specifics of the judicial interpretation of underlying purpose of 31D and its expansion, the Madras High Court [45] addressing and defending or upholding 31D as a reasonable restriction on Article 19(1) (g) opines that, Balancing public interest in relation to the private interest of copyright holders is essentially what 31D deals with. It was implemented as a matter of public policy and was designed to aid in the expansion and development of commercial radio. Additionally, injuring the monopoly which happens to be at the detriment of the wider population is another goal.

On the very specifics of sole legislative intent, [46] 31D was passed in public interest to aid in the expansion of commercial radio and television transmission. Radio broadcasting was gradually going out of business because copyright holders had no reason to licence their works at low prices and also because radio stations lacked the audience which was necessary to generate significant amounts of income through advertising that could be paid to copyright owners [47]. Therefore, 31D was to allow radio broadcasters access to a system where they could pay fair and reasonable royalties established by the IPAB, and not copyright holders for the use of the latter's content [48].

A question that begs consideration is, does the inclusion of internet broadcasting in 31D warrant a justification the said mode is to be given statutory recognition and protection in public interest, will the mode of internet broadcasting perish like radio broadcasts as elaborated above, if not given statutory recognition under 31D and would the same be detrimental to public interest at large?

It is pertinent to note that internet broadcasting is a growing industry. In such a short time, the internet has touched more than 500 million of India's 1.32 billion residents [49]. Internet consumers are increasingly abandoning television in favour of digital streaming services owing to the accessibility and variety of material they may access whenever they want online. Therefore, a larger audience will not only result in increased royalties but also wider recognition of the work of copyright owners, something that radio and limited television broadcasting simply cannot achieve, copyright owners will continue to be motivated to licence their work at fairer (or even lower) royalty rates to be put up on internet broadcasting platforms [50].

Therefore, there is absolutely no element of public interest involved in protecting or statutorily recognising the internet broadcasting industry, which is a form of broadcasting that is currently thriving and is likely to continue doing so given its inherent advantages of ease of access, low cost, and the ability to have a choice-based audience. The OM expanding 31D should not pass the first proportionality test, as not being in public interest, it unreasonably restricts the rights guaranteed by Article 19(1) (g).

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