

# CONFLICT BETWEEN COPYRIGHT LAW AND THE FREEDOM OF SPEECH AND EXPRESSION

Written by *Krithika Dineshan*

*3rd Year BBA LLB Student, Christ, Deemed to be University, Bangalore*

## INTRODUCTION

When a fundamental right is conferred by the Constitution, the object that is sought to be achieved from the right conferred is to be analysed. Jurisprudence deals with 'the law' by how they grow and effectuate in the society, what could be the foundations and the ends of law. Different Schools of Law (e.g. Natural Law School, Analytical School, Historical School, Pure Theory School, Sociological or the School of Realism) propound the initials of sustenance of law. Jurisprudential justification of these rights is also a *sine qua non* for its sustenance.

This paper focuses on freedom of expression conferred by Article 19 of the Indian Constitution and the conflict with intellectual property rights. Freedom of speech and expression is the mother of all liberties.<sup>1</sup> Wherefore, the social purpose of freedom of expression is fourfold; i) it helps an individual to attain self-fulfillment, ii) it assists in the discovery of truth, iii) it strengthens the capacity of individuals participating in decision making and iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.<sup>2</sup> All members of the society should be able to form their opinion and beliefs and be able to communicate them freely.<sup>3</sup>

Article 19 (1) (a) and Article 19 (2) of this constitution deal with the freedom of speech and expression and the restrictions laid on that freedom respectively.<sup>4</sup> It also becomes important to

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<sup>1</sup> M.P. Jain; Indian Constitutional Law 6th Edn. Vol. 1, 2010, LexisNexis, Butterworths Wadhwa, Nagpur P.1413

<sup>2</sup> The Law Lexicon, Vol 3 P.2796

<sup>3</sup> Indian Express Newspapers v Union of India, (1985) 1 SCC 641

<sup>4</sup> Article 19 (1) All citizens shall have the right (a) to freedom of speech and expression. Article 19 (2) Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

note that in the case of *In Re: Berubari Union*<sup>5</sup>, the Court held that Preamble to the Constitution is “a key to open the mind of the framers of the Constitution”. The freedom of thought and expression is given due importance in the Preamble as well, “to secure to all its citizens “liberty” of thought, expression, belief, faith and worship”.

The Supreme Court of India has attached importance to the freedom of speech and expression. In *Ajay Gautam v Union of India*<sup>6</sup>, a petition was filed for the prohibition on the film PK. The court held that the right to communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, drama, theatre, dance, music, film, through a newspaper, magazine or book is an essential component of freedom of speech and expression. And this right cannot be suppressed. Further, in *Shreya Singhal v Union of India*<sup>7</sup>, the Court observed that if Article 19(1) includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its impact cannot restrict the content of the right nor can it justify its denial. As mentioned above, the social purpose of Article 19 is to assure the maximum development of the human personality in the atmosphere of freedom of speech and expression. The Supreme Court on innumerable occasions has discussed the significance of this right. In *Sakal Papers v. Union of India*<sup>8</sup>, the Supreme Court has held that even indirect impediment to right of freedom of speech and expression is not permitted. Freedom of speech is considered as one of the most valuable rights guaranteed to a citizen by the constitution and the judiciary is the guardian of the Constitution.<sup>9</sup> In *Maneka Gandhi v. Union of India*<sup>10</sup>, *Bhagwati, J.*, has emphasized the significance of the freedom of speech and expression in these words; “Democracy is based essentially on free debate and open discussion, for that is the only Corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential”. *Patanjali Sastri*,

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<sup>5</sup> *In Re: Berubari Union* (1) (1960) 3 SCR 250

<sup>6</sup> *Ajay Gautam v Union of India* AIR 2005 Del. 92

<sup>7</sup> *Shreya Singhal v Union of India* (2015) 5 SCC 9

<sup>8</sup> *Sakal Papers v Union of India* AIR 1962 SC 305

<sup>9</sup> *Natural Resources Allocation Special Reference No. 1* (2012) 10 SCC 1

<sup>10</sup> *Maneka Gandhi v Union of India* AIR 1978 SC 597

C.J., delivering the majority judgment in the case of *Romesh Thappar v. The State of Madras*<sup>11</sup>, the court observed, “.there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Indeed, without circulation the publication would be of little value”. In *Vishram Singh Raghubanshi v. State of U.P.*,<sup>12</sup> the Supreme Court held that liberty of free expression is not to be confounded allegations against any institutions, much less the judiciary. In *Centre for Public Interest Litigation v. Union of India*<sup>13</sup> the Supreme Court held that telephone tapping unless it comes within the grounds of restrictions under Article 19(2) is violative of Article 19(1) (a) of Indian constitution.

Further, the First Amendment to the U.S. Constitution which guarantees freedom speech in the U.S.A. the U.S. Supreme Court has observed;<sup>14</sup> “It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a Private licensee” The United States Constitution states; the Congress shall have the power to promoted the progress of science and useful arts, by securing limited times to authors and inventors the exclusive right to their respective writings and discoveries.<sup>15</sup> In order to find what is right and what is not right, why and which idea is acceptable and how a policy should be framed ultimately what should be enacted as law, the exercise of the right to free speech and expression must be exercised. The very existence of the political parties, the parliamentary system of government would not be possible or without the right to freedom of expression and would become inefficient.

## **INTELLECTUAL PROPERTY RIGHTS AND FREEDOM OF SPEECH AND EXPRESSION**

Copyright is a fundamental right under Article 19(1) (a) of the Constitution of India. The law of copyright is the extension of right of freedom of speech and expression, which means that if an individual has freedom of speech and expression that person, will naturally get a right to

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<sup>11</sup> *Romesh Thappar v. The State of Madras* AIR 1950 SC 124

<sup>12</sup> *Vishram Singh Raghubanshi v. State of U.P* AIR 2011 SC 2275

<sup>13</sup> *Centre for Public Interest Litigation v. Union of India* SCC (2011) (1) 560: 2011(1)UJ211

<sup>14</sup> *Associated Press v. U.S.* 326 US 1.

<sup>15</sup> The Constitution of the United States of America; Article 1, Section 8.

protect that intellectual work as a property. Under Article 300-A of the Constitution of India, right to property is provided which says that, no person shall be deprived of his property save by authority of law. It ensures that a person cannot be deprived of his property without any law. Deprivation of property can only be done according to law. Intellectual property is also a property<sup>16</sup>, hence protected by Article 300-A of the Constitution of India.

Man, by nature is a social animal and has the urge to express his thoughts and views. However, without the grant of exclusive right, innovators would have too little incentive to invest in socially beneficial innovation. Technological revolutions, innovations developed through intellectual accomplishment demands protection of their product against misuse. Intellectual property is the tangible outcome with commercial value.<sup>17</sup> As per Hegel, property is “*the notional extension of one’s own individuality.*” Intellectual Property Rights are justifiable as the manifestation of one’s personality in one’s intellectual expression. After so many conventions, deliberations, the comity of nations has acknowledged and accepted that intellectual property is also tangible and could be made *corpus* of proprietary right for the original creator. There are certain basic concepts common to all intellectual property. E.g. Patent law is all about concept of novelty, the Design law on originality of design, the Trade mark on the concept of distinctiveness and the copyright on the concept of originality.<sup>18</sup>

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<sup>16</sup> Intellectual property is the outcome of intellectual labour and hence, it becomes important to note the Labour Theory propounded by John Locke, where, instead of nature, life and property is secured. As ideas are common in nature they cannot be protected as was observed by Courts on the basis of the idea and expression dichotomy. Hence, only once man adds his creativity, innovation and expression, protection under the law is given. The root idea of Lockean theory is that people are entitled to hold as property, whatever, they produce by their own initiative, intelligence and industry. This is essentially known as Locke’s Labour to Property equation. Further, the utilitarian theory propounded by Bentham and J.S Mill which is also known as the Economic Incentive theory gives us the idea that Intellectual Property Rights is bestowed on the creators of intellectual property as a reward for their efforts and that there exists a social quid pro quo between the innovator and the sovereign. The protection is the reward by the sovereign and the socially valuable good is the consideration for the creator.

<sup>17</sup> The economic jurisprudence behind the commercial value of Intellectual Property can be found in the Article Tragedy of Commons written by Garrett Hardins. The public goods will be underproduced and undersupplied in the absence of the protection by the Government. This is because the potential producers will not be able to realise a profit sufficient to justify the cost of expression and production. In this way the provision of non-excludable goods is a classic example of positive externality which leads to inefficiency.

<sup>18</sup> Narayanan P.; Intellectual Property Law 3rd Edn. Eastern Law House, Kolkata, 2007, p.2

## **COPYRIGHT AND FREEDOM OF SPEECH AND EXPRESSION**

Copyright is one of the most important aspects of the intellectual property. Copyright means an intangible incorporeal right, granted to the author of literary, artistic, dramatic, musical production. Copyright gives rise to a form of property that can be dealt with just as with any other property and which can be assigned, mortgaged and licensed. In *Entertainment Network v Super Cassette Industries*<sup>19</sup>, the Supreme Court observed that an owner of copyright employs to exploit the copyright through the vehicle of voluntary licenses in terms of Section 30 of the Copyright Act. Copy right is exclusive right of the author to derive economic benefits from his writing, performance or creative work. The copyright law provides an incentive to the creator to create a socially and commercially viable commodity and that creative output, after lapse of period that becomes the property of the public The laws of copyright enhance the value of such speech and expression, because it gives an effective protection to the creative speeches and expressions like poetry, criticism etc, from being reproduced without a license, Copyright Law cannot be viewed as an obstruction or restriction on the freedom and expression, because the freedom is available to express his own views and views of others also, but not to express views of other as his own. The most important feature of copyright is the proprietor or owner may use his property as he wishes. Copyright law is concerned with rights; the copyright is a right to do certain things such as making copies of a work of art and correlative duty is duty owned by all others not to infringe it.<sup>20</sup> Copyright does not extend to ideas or schemes, or systems or methods, it confined to their expression or methods. Copyright is confined to the expression of ideas and does not extend to the ideas themselves.<sup>21</sup>Being a type of ‘property’ copyright has all the characteristic features of property. Copyright implies the existence of ‘bundle of rights’ such as right to own, sue, transfer, exploit, copy, translate or adopt the copy righted work. The copyright law in each country was developed according to the needs of that country. If ideas are restricted, the society cannot advance. The Economic Incentive theory enables the State to strike a compromise that, the proprietorship given to the author was restricted to a period.

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<sup>19</sup> *Entertainment Network v Super Cassette Industries* 2008 (9) SCALE 69

<sup>20</sup> The moral basis of protection of copyright afforded against plagiarism can be stated in the words of Eight Commandment of Mosaic Law “Though shall not steal”. It is the basis of copyright law, which means that no man shall steal what belongs to others.

<sup>21</sup> *Thomas Walker v Time life Film Inc.* 615 F. Supp. 430 (S.D.N.Y. 1985)



## **COPYRIGHT: BUNDLE OF RIGHTS**

The underlying principle of copyright protection is that specific creative expressions are protected but not the ideas behind them. Copyright comes into existence as soon as a work is created. The law does not permit one to appropriate to him what has been produced by the labour, skill and capital of another and hence, copyrights conferred under Section 14 of the Copyright Act, 1957 consist of a bundle of rights. The bundle of rights varies in complexity depending upon the nature of the work-literary, dramatic, musical recording or cinematograph films.<sup>22</sup>This is very foundation of the copyright law. Copyright in a work means the exclusive right to make certain uses of the work and varies from work to work is as below;<sup>23</sup>

- a) Literature; it is a form of expression through literature
- b) Drama; the expression through the performance
- c) Musical Work; the expression by way of communication to public by loudspeaker
- d) Artistic work; expression through reproduce in any material form
- e) Cinematograph film; communicate by broadcast
- f) Record; communicate the recording by broadcast

## **NEWS MEDIA'S FREEDOM OF EXPRESSION AND COPYRIGHT**

Copyright, being a bundle of rights can be bestowed with varying complexity. Everything that is an outcome of originality and creativity have copyrights attached to it. Copyright is not a cost to the economy, but is a significant asset to the country's economy.<sup>24</sup>Nothing can be more properly described as a man's property than the products of his mind, and over the years a system of law has been established to protect the ideas, patents for inventions, copyright for literature and art, and so on. The intellectual property system has served us well by encouraging creativity and innovation and the spread of ideas. Without copyright law, the publishing and record industries would scarcely operate. With its enormous writing and printing activity, the media may confront several copyright issues. Whether it is a letter to the editor or a contribution from a free-lance journalist, or a commissioned interview or a photograph purchased or a story sought for magazine section or an investigative report sent by staff correspondent, the publisher

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<sup>22</sup> Sholay Media and Entertainment Pvt. Limited v Parag Sanghavi, 2015 (64) PTC 546(del), p.556

<sup>23</sup> Section 2 (a) of the Copyright Act, 1957

<sup>24</sup> Lydia Pallas Loren; The purpose of copyright, Open Spaces Quarterly, February 7, quoted in Dr. Madhabushi Sridhar; The Law of Expression Asia Law House, Hyderabad 2007, p.791

is concerned with the ownership and other related rights regarding that creative writing. A film script, but not the actual film or its sound track, will normally count as a dramatic work, dramatic work includes a work of dance Feature films, newsreels, home and music videos, television programmes and filmed advertisements are also part of these dramatic works.<sup>25</sup>Broadcast also can be copyrighted. It is defined as a transmission by wireless telegraphy of visual images; sounds or other information which is capable of being lawfully received by members of the public or it's transmitted for presentation to members of the public.<sup>26</sup> What is important is that this very freedom of speech and expression.

## **PRIVACY OF INDIVIDUAL AND NEWS REPORTING**

The man must have his own way of living. Privacy is man's copyright in his own self, where the publication of the most worrying factor than imitation. It is not possible to have satisfactory definition for the 'privacy'. Black explained it as the right of an individual to withhold himself and his property from public scrutiny and unwarranted publicity.<sup>27</sup>It is further explained by the Apex Court in *R.R.Gopal case*<sup>28</sup>, "a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst others. No one can publish anything concerning the above matters without his consent – whether truthful or otherwise, and whether laudatory or critical. This kind of publication not protected under Article 19 (1) (a) of the constitution." If he does so, he would be violating the fundamental right to privacy<sup>29</sup> of the person concerned and would be liable in action for damages.

## **CONCLUSION**

The misconception is that proprietorship of copyright and right to freedom of speech and expression cannot go together. Right to freedom of speech and expression is a very broad right, a varied right, whereas a copyright is an exclusive right of the creator. But it is made very clear

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<sup>25</sup> <http://manupatra.com/roundup/370/Articles/Freedom%20of%20Speech.pdf> (last visited 03.03.2019 18:30hrs)

<sup>26</sup> Journal of Intellectual Property Rights Jan.2011 pp.53-54 (www.indianexpress.com) last visited 03.03.2019

<sup>27</sup> Black's Law Dictionary

<sup>28</sup> R. Rajagopal v. State of Tamil Nadu: AIR 1995 SC 264

<sup>29</sup> Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors.: WRIT PETITION (CIVIL) NO 494 OF 2012

a copy right is given to originator for its explicit form. For example: a play, a music composition, but not for the ‘idea’ of the play or the composition. This is due to the presence of the doctrine of idea expression dichotomy. This does not mean that ideas are less valuable; it is indeed, the opposite that ideas are too valuable to be copyrighted. This was well observed in the case of *R.G Anand v Deluxe Films*<sup>30</sup>. The idea of ‘romance’ is the most universal content of literary works all over the world. When the idea of romance takes shape, a form it can become a novel, a short story, a play, even a painting, sculpture and no one can claim copyright for the idea of romance. A copy right is extension of freedom of expression at the same time, copyright is the fruit for original thoughts and their expression, if it does not exist, as explained above, the incentive to produce socially valuable goods will be lost. Recognition to the author and the expression of his original ideas makes all the difference and hence, copyright is a tool for the States to bestow the fundamental right of freedom of speech and expression upon creators of original ideas.

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<sup>30</sup> R.G Anand v Deluxe Films AIR 1978 SC 1613