VOLUME 4 | ISSUE 2

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

AN ANALYSIS OF THE SCOPE OF THE TERM 'PUBLIC' UNDER INDIAN COPYRIGHT LAW

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1. Abstract:

An original piece of work is like a new life given by the creator; It is a part of him, a culmination of his thoughts, experiences, and originality. For such a massive investment, it is only fair that he gets complete rights over his work. The Indian Copyright regime provides adequate protection of such work, but certain elements are excluded. Conceptualise a situation wherein a short film is made, for a particular audience. As the director, the individual would love to share his work with the whole world, however there would be situations wherein the audience exploits the work; or it is used for unintended purposes. That defeats the purpose of copyright protection in a certain sense The issue at hand is to what extent does the owner have control over the transverse of his work, and how much protection can the law offer? This paper dissects this through five sections: First, an introduction to Indian copyright law and a presentation of the problem. Next, a public domain analysis through legal theories, followed by current legal provisions and their limitations. The fourth segment discusses relevant judicial precedents, and the paper concludes with the author's stance and proposed solutions.

Keywords: Indian Copyright Act, Public, Work, Author, Rights

2. Introduction:

The Indian Copyright Law provides substantive protection for literary, musical, dramatic, artistic, and cinematograph films and sound recordings from unauthorized use.[2]This is a bundle of rights given to the owner, including the right to reproduce, communicate, adapt and translate the work. Copyright can be claimed by either the owner, the person who inherited the rights from the creator, or an authorized representative of the creator. These rights not only acknowledge the

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[2]Copyright.gov.in, https://copyright.gov.in/documents/handbook.html (last visited 12th Oct. 2023)

creator's ownership, but also reward their creativity, originality, and innovation. Further, the Act also provides for an integrity right, allowing them to protect their honour and reputation and not have a piece of work falsely attributed to oneself.[3]

The term "public domain" does not have a standard definition, but it can be stated as those elements not protected by intellectual property law or whose protection has expired due to the lapse of protection time. Section 2(ff) of the Indian Copyright Act talks about "communication to the public". It covers instances wherein a piece of work or a performance is considered a public display of work. However, who constitutes the public, rather its purview is not expressly mentioned. Without a clear definition of public, it is difficult for performers and authors to know when their work is being performed or communicated to the public without their permission. This can lead to uncertainty about whether they have a valid claim for copyright infringement. Further, there is an increased risk of unauthorized use of copyrighted work, and it can make it easier for people to get away with such unwarranted use especially in new and emerging technologies. All of these factors can hurt the livelihoods of performers and authors, and they may lose out on income and royalties. Another concern is that the lack of a definition for the term "public" can make it difficult for courts to interpret and apply the law. This paper intends to analyse section 2(ff) of the Indian Copyright Act and the impacts that the vagueness of the term public will have on owners of artistic work and the legal system as a whole. Further, this paper will decipher the possibilities and viability of giving the term public a proper definition and boundary in the light of the contemporary Indian legal system.

Research Methodology

This writing analyses the ambit of the term public with reference to the Indian Copyright Act by doctrinally analysing the data available. The method of data collection utilised in this research is secondary in nature. This data is available in the form of articles, and other pieces of literature collected from indigenous sources.

The author conducts a textual analysis of legal provisions and articles concerning the Indian Copyright regime, owner's rights and the public. The existing data is analysed to understand various scholars' and the Court's interpretation of the public.

[3]European Commission, https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/copyright-protection-india-overview-and-recent-developments-2022-03-02_en (last visited on 10th Oct. 2023)

3. A Jurisprudential Analysis of the Public Domain

Natural Rights Theory:

The natural rights theory formulated by John Locke, fundamentally forms the basis for intellectual property rights and the public sphere. This theory states that an owner has a natural or intrinsic right over his work by virtue of the labour, innovation and creativity involved in creating that piece of work. The term "natural right" underlines a fundamental right that a person has in his possession. Now, in the intellectual property realm, a person acquires ownership over his work, which gives him the authority over the replication, release, translation, and adaptation of the work, as mentioned earlier. Since ownership is a bundle of rights in itself, it also gives the power to the author to choose his audience and to decide who has access to his work and who doesn't. In a practical context, the owner cannot have complete control over the public realm about his work. However, there should be a reasonable amount of authority to decide who views his work and who does not because that is also an element of his ownership right according to this theory.

Common Resource Theory:

The common resource theory is an economic theory with jurisprudential backing which highlights the importance of the public space. It considers three primal factors: first and foremost, the nature of the copyrighted work. Some works, such as news articles, are more likely to be considered "public" than others, such as novels. Second, how the copyrighted work is distributed. Works that are distributed online are more likely to be considered "public" than works that are distributed more traditionally, such as in print. Third, the purpose of using the copyrighted work, whether educational or non-commercial, is more likely to be considered fair use than commercial use.

Ethic and Reward Theory:

The public domain is often seen as a common shared resource that belongs to everyone. This view is based on the idea that authors are granted intellectual property rights in exchange for sharing their works with the public. Once the copyright term expires, the work enters the public realm, where it can be freely used and enjoyed by everyone. Another philosophical view of the public domain is that it is a space for creativity and innovation. When works are in the public arena, they can be freely used and adapted by others, leading to new and original works. This perception stems from the concept that creativity thrives on the free flow of ideas.

4. How do Works enter the Public Domain?

Let us take the example of the open-source software illustrated by operating systems like GNU and Linux, which go against the conventional view of intellectual property rights. These software systems are open to unrestricted use, modification, and user access to promote innovation. However, certain strings of responsibility are attached such as ascribing any modification made to the author. This is a classic example of the success of balancing intellectual property rights along with widespread access. There are specific ways, however, where works can enter the public naturally:

Expiration of the Copyright:

This is one of the most prominent ways a piece of work can enter the public domain. Copyright protection usually lasts for a specific period of time. This period varies from one jurisdiction to another and also depends on the nature of the work. In India, for literary, musical, artistic, and dramatic works, the time period is 60 years plus the author's lifetime. For cinematograph films, sound recordings, photographs, and posthumous and anonymous publications, protection subsists for a period of 60 years from the year of publication. Broadcast reproduction rights are valid for 25 years from the year of broadcast, and performers' rights last for 50 years from the year the performance was made.[4] Due to the expiration of copyright term in the United States, works published before 1926 are generally in the public landscape. One of the most well-known creations under this category is the famous Mona Lisa painting. This was a masterpiece created by Leonardo da Vinci in the 16th century. The painting's copyright had expired a long time back, which allows for its free use, modification, and replication without the permission of the owner, and legal implications.

Failure to Renew Copyright:

In certain circumstances, a piece of work that was protected by copyright can enter the public domain due to failure to renew the work. This process is usually done by paying the requisite fees.

Absence of Copyright Protection:

[4]Intellectual property.eu, https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/copyright-protection-india-overview-and-recent-developments-2022-03-02_en (last visited on 12th Nov. 2023)

Certain types of works do not qualify to be protected under copyright law. For instance, court judgements, government documents, and acts of the Parliament, are also considered to be a part of the public realm since their inception.

Creative Commons License (CC):

The Creative Commons License allows the public to use, modify, and share that particular creation in certain situations. This license will itemize when a piece of work is supposed to enter the public domain. It will specify the time period after which it can enter the public realm.

5. An Analysis of the Current Legal Framework

The current copyright regime does not provide for an express provision or explanation clause defining the term public. This lack of an express provision creates ambiguity concerning the body of the public forum. However, there are provisions in the Indian Copyright Act that indirectly deal with the scope of this word.

Section 2 (ff) states, communication to the public means 'making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available'.[5] It is clearly seen in this provision that the word public is used without expanding the definition of the same. This section talks about making any work or performance available to the public, but who constitutes the public is not discussed. The absence of a definition creates an ambiguity while providing for protection of a piece of work because there is clarity on when a work is being communicated to the public, but the audience is not defined. For example, if a work is created in India, and the owner's intent is to keep his creation within the territory of India, but it is circulated internationally, it will impact the owner's rights and intent.

An interesting provision in the Act is section 4; it talks about when a work is not deemed to be published or performed in public. It states that "Except in relation to infringement of copyright, a work shall not be deemed to be published or performed in public, if published, or performed in public, without the licence of the owner of the copyright".[6] This provision explicitly talks about when a work will not be considered to be displayed in the public landscape. However, it suffers

[5]Indian Copyright Act, 1957 § 2, No. 269 Acts of Parliament, 1957 (India)
[6]Indian Copyright Act, 1957 § 4, No. 269 Acts of Parliament, 1957 (India)

from a slight lacuna. Even if a piece of work is put forth in the public without a license, from a logical perspective, it is still displayed before a crowd, an audience, and a substantial number of people. The fact that the work in question is accessible to the public is enough to say that the work is communicated to the public. Despite this, the terms "publicly available content" and "public domain content" are often used interchangeably to describe any content to which the public has access.

Let us look at an interesting example highlighting the importance of performing or publishing a work in the public realm. Warner/Chappell, a famous American music company, had copyright over the world's most famous song, "Happy Birthday to You," for almost a century. A filmmaker, Jennifer Nelson, who was working on a movie about the song, claimed it belonged to the public and filed a case in 2013. Initially, Warner/Chappell were collecting royalties from people who sang the song and annually collected $2 million. Anyone who sang the song in a movie, TV show, radio show, or in public had to pay a fee. In 2015, the U.S. Federal Court held that the Warner Bros claim was invalid. The company had to pay a sum of $14 million in settlement, and in February 2016 the song was a part of the public domain and free to use.

Section 14 talks about the meaning of copyright; it is yet another provision under this Act, which reiterates this indeterminate issue. It talks about the categories of work which fall under the purview of copyright. This is an excerpt from the provision,

> 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:
>
> **(a)**
>
> (ii) to issue copies of the work to the public not being copies already in circulation;
>
> (iii) to perform the work in public or communicate it to the public;

Sub-clause (iii) is intertwined with section 2 (ff) of the Act. In essence, it summarises the latter provision; however, falls short of an explanation clause for the term public. Both of these provisions combined communicate the fact that the law lacks clarity on how wide this term can be expanded and how its horizon will change from a case-to-case basis. As reiterated earlier, what might be public in one context may not be the case in another scenario. A movie is more public than a magazine, but in case that movie is not released in theatres and instead is streamed

on OTT platforms, it does not indicate that the movie is not released in public. Going by the current copyright framework, OTT viewers would be considered as a public audience.

Section 52 deals with the exceptions to copyright infringement. Under that, sub- section (1) (iii) says that the reporting of current events and current affairs, including the reporting of a lecture delivered in public,[7]would not be considered as a copyright infringement. Now, the question that arises here is, if a speech is given before a small crowd of five people, will it constitute a public speech? It is evident from these provisions that there are multiple gaps in this legislation, which may lead to questions of law in the future.

The Problem of Orphan Works

Orphan works are an essential but often overlooked category of literary and artistic works. As the name suggests, orphan works are those whose author, origin, and age cannot be traced. There is a lot of ambiguity regarding these pieces of work because whether it is in the public domain or not is questionable, its protection is not defined, and due to the lack of identification of the author, it is subject to maximum exploitation. When known works themselves are subject to the problem of exploitation, orphan works are entirely out of the question.

There are a few problems embedded in the Indian Copyright Act with respect to orphan works. First, it needs a clear definition of what constitutes an orphan work. This means that it can be challenging to determine whether a particular work is an orphan work, making it difficult for users to obtain permission to use it. Second, the law requires a diligent search to locate the copyright owner before applying for a compulsory license to use orphan work. This process can be costly, time-consuming, and frequently fruitless, particularly for older or obscure works. The Act's ambiguous criteria for a thorough search make it difficult for users to know if their efforts have been adequate to earn them a compulsory license. The likelihood of copyright infringement lawsuits is increased in this risk. Further, the current regime provides copyright holders of orphan works with an insufficient compensation mechanism. In many cases, the pay offered pales in comparison to the actual value of the work. The issue of orphan works hampers cultural heritage digitization and preservation. Uncertainty over copyright makes it difficult for libraries, museums, and archives to make these works publicly available.

[7]Indian Copyright Act, 1957 § 52, No. 269 Acts of Parliament, 1957 (India)

6. A Critical Analysis of Judicial Precedents

There are certain landmark cases wherein the Supreme Court has interpreted the term public. In the case of Eastern Book Company v. D.B. Modak (1976), the Supreme Court held that the term "public" under the Copyright Act does not mean the whole world but only a section of the public. The Court further held that the sale of a book to a single person would not amount to publication, as it would not be accessible to a section of the public. In the case of Ladli Graphic Arts v. Roop Chand, the Delhi High Court held that the term "public" under the Copyright Act includes a group of persons, even if they are not strangers to each other. The Court further held that the sale of a book to a group of students would amount to publication, as it would be accessible to a group of persons.

In the case of Anand Prakash Jha v. State of Bihar, the Patna High Court held that the term "public" under the Copyright Act includes the general public, as well as a specific group of persons. The Court further held that the unauthorized performance of a play in front of a group of students would amount to publication, as it would be accessible to a section of the public. The internet was also held to come under the purview of "public" by the Delhi High Court in the case of Subhash Chandra v. Roopak Digital Solutions. The Court further held that the unauthorized uploading of a movie on the internet would amount to publication, as it would be accessible to a section of the public.

In Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd, The Court, while summarizing the points on "fair dealing" makes a very interesting observation, as provided below:

> "Public interest may in certain circumstances be so overwhelming that courts would not refrain from injuncting use of even 'leaked information' or even the right to use the 'very words' in which the aggrieved person has copyright, as, at times, the public interest may demand the use of the 'very words' to convey the message to the public at large. While the courts may desist from granting injunction based on the principle of freedom of expression, this would, not necessarily protect the infringer in an action instituted on behalf of the person in whom the copyright vests for damages and claim for an account of profits".[8]

[8]Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd, 2011 PTC (45) PTC 70 (Del.)

A prominent American case namedSony Corp of America V. Universal City Studios, Inc. fundamentally analysed the problem of copying different kinds of work. The Supreme Court stated that "copying a news broadcast may have a stronger claim to fair use than copying a motion picture".[9]The decision taken due to the informational work carries more educational values, such as spreading of ideas and creating new scientific inventions or educational works, and all of them will benefit the society or the public.

The author recognises that it might be difficult to define the term public with a hardcore meaning because it may vary from one case to another depending on the nature of the work, type, audience, and other circumstances. However, due to the fluid nature of law and its continuous evolution, initially giving a basic outline for the word's definition is viable. There are multiple legislations that have explanation clauses (for example, the Indian Penal Code,) and thus, this claim is not baseless. Further, defining the term public will have leaping benefits on owners, the legal system, in particular the judiciary, and the society. Thus, although there are identified difficulties in this process, they are weak compared to the central contention, thus strengthening the author's claim.

7. Control over the Public: A Dancer's Perspective:

People enjoy watching dance performances and come in huge numbers to witness the performers. In such a situation, it is implicit that people are recording the performance on their devices, and circulation of the same is undoubted. If it is a crowd known to the dancer, for example, a performance at a wedding, then the individual might be all right with it. However, if it is a massive audience, the performer might be uncomfortable with the same. Such scenarios, however, are beyond the scope of the law and human control, and naturally, the dancer has no control over the viewers of the performance.

There are many intricacies when it comes to the copyrightability of choreographic creations. For a dance move to be registered, it has to be original, creative, unique, and comprise a systematic format. Dance moves fall under the ambit of choreographic works defined under section 2(h) of the Indian Copyright Act as "dramatic works". This includes any expressive and creative form of art, excluding cinematograph films. The problem with the copyright of dance lies in the fixation

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

aspect. This is a problem due to the short-lived nature of the work. It is performed once or twice, for a few performance seasons, and probably never again. So, the public will only constitute the live audience present at the program. However, if it is recorded and circulated, whether the viewers of the video will also constitute the public is the issue at hand. Recording the video is sufficient to apply for copyright protection of the dance. Moreover, if the dance is reduced to notations or writing, it can be copyrighted but not trademarked.

The landmark case of Anupama Mohan v. State of Kerala indirectly emphasizes the necessity of defining the term "public". In this case, a writ petition was filed by the famous Kuchipudi artist, Anupama Mohan, against the state of Kerala for circulating copies of her dance performance and thereby reproducing digital copies of it. The petitioner claimed copyright over her work and said that none of the performers consented to marketing their performance for commercial gains. According to her, the performers hold exclusive rights as the first owners of the work they did.[10]The Court reasoned that a moral and economic right is granted to the owner of the work. The moral right is to be acknowledged as the owner of the work, and the economic right is to receive royalty or to sell their work. This economic right inherently includes the right to decide the audience or viewers of your work. The petitioner further contended that the work was circulated to the public without her permission. It is evident that Ms. Anupama Mohan did not want her work to reach the public domain beyond the viewers of the live performance. The High Court of Kerala decreed in favour of the petitioner.

Dancers' rights are an undermined aspect of the current copyright regime. They belong to the category of performers as mentioned under the Act and, as owners of their work, should be the judge and have a substantial amount of control over the spectators of their work.

8. An International Perspective

International copyright does not exist as a separate framework of law. The Berne Convention is a treaty which regulates the protection of artistic and literary works globally. Every country has its own copyright laws that regulate both internal and cross border copyright material. It allows content creators and owners to enjoy copyright protection not only domestically, but globally as

[10]Lawbeat.in, https://lawbeat.in/columns/dancers-dilemma-copyright-state-youth-festival, (last visited on 9th Nov. 2023)

well. Every member nation of the Berne Convention provides the citizens of other countries with the same minimum standard of protection as it does for its own citizens. For instance, if an article is photocopied in Australia, it is protected by Australian law, even if that article originates from a British author. On similar lines, if a German film is screened in a theatre in the US, then American copyright law will be applied with respect to the right to publicly perform a piece of work. In Berne member countries, when a piece of work takes a tangible form, copyright protection is automatically granted. This implies that copyright protection can be obtained without registering or making a deposit with a government copyright office. Nonetheless, copyright holders can voluntarily register their works through government registration systems, which entitles them to certain privileges, particularly in situations where there is infringement of work. Similarly, neither the Berne Convention nor the member countries mandate the use of the copyright symbol.

When an analysis of the term ‘public’ is done from an international standpoint, two keywords need to be taken into consideration, ‘public’ and ‘public interest’. The distinction between the two is that the former focuses on whether a piece of work is made available to an undefined audience; whereas the latter delves into the benefits related to certain use of work. The Berne Convention recognizes education, research, and criticism as possible justifications for restrictions, and implicitly defines the promotion of knowledge and cultural development as a "public interest.” This distinction emphasizes the dynamic nature of the 'public', which goes beyond mere access to encompass broader social goals in a particular context.

Geographical boundaries complexify the whole scenario. The copyright laws of a particular nation operate domestically, making the ‘public’ within each jurisdiction distinct. This leads to a major lack of clarity, because the public in one jurisdiction may not be considered as the public in another jurisdiction. In simple terms, if a particular creation is protected in one country, the same piece of work may be freely available for use in another country. The WIPO Copyright Treaty is a special agreement under the Berne Convention which covers the protection of works in the digital realm. Apart from the rights granted by the Berne Convention, this treaty provides for economic rights. It deals with two important subject matters to be protected by copyright namely: computer programs and compilations of data.

Moreover, cultural analyses sculpt the interpretation of the term ‘public.’ Concepts like "fair dealing" in common law systems and "fair use" in the United States emphasize the transformative nature of a use over mere public access. This indicates that public discourse and creative expression are valued, even when it entails minimal infringement on existing works. On the contrary, civil law countries place more emphasis on the precise exceptions elaborated in legislations and less emphasis on transformative uses. These differing approaches hint that the term ‘public’ is not constrained merely by geographic factors but has elements of cultural values as well.

Furthermore, advancement in technology challenge the understanding of the public realm. As mentioned earlier, the internet's limitless reach raises questions about whether online audiences constitute a single "public" or a fragmented one governed by multiple national laws. In addition, user-generated material blurs the distinction between producers and consumers of content. These changes call for new definitions of "public" that take into account how dynamic and participative internet environments are.

In a nutshell, it is difficult to assign a universal definition as to what constitutes the public under copyright law. This ambiguity cultivates discussion and adaption within legal systems. The definition of "public" continues to be reshaped due to cultural norms and technological advancements, which forces constant reassessments of how to strike a balance between creator rights and public access.

9. Other Challenges:

Copyright Confusion:

This is the biggest challenge surrounding the question of the public domain. Determining the status of a work, whether it is in the public domain or not, complexifies the entire process. Although certain works are not protected by copyright law, it does not imply their availability in the public sphere. This is especially relevant for works created during the 1800s, a time when copyright laws had not substantively evolved.

Digital Reproduction:

Digitalisation is happening rapidly in today’s day and age. This allows for extensive availability and duplication of work. While this might have a positive impact on certain levels due to ease of

access, it is also a disadvantage, in the sense that it gives rise to concerns regarding the quality, authenticity, and accuracy of the material.

Misuse and Appropriation:

People may capitalize and exploit individual creations for their personal benefits without giving due credit to the owner of the work. Many times, companies appropriate a famous piece of work for commercial purposes. This can spark ethical disputes, especially in the case of works which hold a considerable amount of cultural or historical importance.

International Disparities:

Public domain laws vary from one country to another, giving rise to challenges when it comes to cross-border use and distribution of public domain works. For instance, a piece of work protected by copyright law in one country may be in the public domain in another country. Confusion and legal complications may result from this, particularly in the digital age where work can be easily shared and accessed on a global platform. Artists, writers, and content creators must be aware of these international differences to avoid unintentional infringement of copyright laws.

10. Conclusion:

In Indian copyright law, the term public refers to a wide range of people, from members of a specific group to the broader public. Over time, this term's meaning has changed to reflect the shifting nature of technology and communication. For copyright law, the term public is becoming increasingly ambiguous. For example, it has resulted in a stronger focus on the idea of "fair dealing," which permits restricted use of copyrighted content without the owner's consent. This idea is essential to strike a balance between the public's desire to access and use creative works and the rights of copyright holders. Furthermore, the way that "public" is defined is changing and that will affect how copyright laws are enforced. Copyright holders may face challenges in identifying and prosecuting individuals who infringe their rights, particularly in the online environment. This necessitates a more sophisticated strategy for copyright enforcement, one that considers the intricacies of digital communication and the diversity of the public. Moving forward, all these key considerations need to be kept in mind to ensure a more suitable and dynamic copyright regime.