



THE IP PRESS LAW REVIEW

Volume 1 Issue 1 April 2022

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Published by
The IP Press
2021 - 2022

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EDITORIAL NOTE

Intellectual Property is the key driver to propel the economic growth of a nation. Hence, understanding IP gains utmost significance not only from a business point of view but also from a socio-economic perspective. We as nationals of any country should be vigilant in protecting and defending our IP rights. However, there are multiple issues and challenges that need discussions, and reforms. The IP Press Law Review (IPPLR) is an initiative of The IP Press to extend our objectives of spreading awareness on the issues concerning intellectual property rights and related laws. It aims to promote study and research in the field of intellectual property laws in the form of academic literature. This issue reflects some of the key concerns of the Intellectual property regime both under national and international parlance. It is envisioned to embody some of the most brainstorming insights that help readers to grasp the discourse around contemporary developments in the field of Intellectual Property Law. Throughout the year, the editorial board has reviewed the papers with multiple rounds of editing to ensure quality and standard.

This issue presents intriguing issues and challenges pertaining to intellectual property law in the national as well as the international regime. The first paper encapsulates the protection of personality rights under Intellectual property laws and briefly presents the status of multiple jurisdictions. The second paper discusses a pertinent issue of protection of fictional characters that have been a cause of concern in many disputes. The author discusses the theoretical framework and analyses various tests laid down by the judiciary.

The third paper explores religion as a subject and object of the trademark. The author determines the legality of the trademark of religious symbols for private companies and religious organisations. The fourth paper presents a policy discussion on the overlap between trademark and functionality doctrine. The fifth submission deals with the congruence of intellectual property assets in combination and corporate restructuring wherein the author states that IP has immense power to help businesses to grow and hence its valuation becomes an important aspect of commercialization of IP. The sixth paper demonstrates how open-ended section 57 of the Copyright Act, 1957 is which leads to ambiguity. The author asserts reforms in the current provision of moral rights. The seventh paper discusses the recent dissolution of the intellectual property appellate board in the backdrop of the Tribunal Reform Bill, 2021. The eighth paper discusses the relevance of IP Due diligence and suggests quarterly checks and steps carry out the due diligence process to combat the closing down of businesses and lifelong losses. The ninth paper presents analyses of the patent denials in the biotechnology sector and their impact on the industry. The tenth paper presents an interesting analysis of trademarkability of non-conventional trademarks due to hindrances of graphical representation and discusses multiple judgements of the European courts. The last two items present an analysis of two landmark cases, one Monsanto case and two, Phonpe v. Bharatpe trademark tussle.

Happy reading!

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MORAL RIGHTS AND ITS SHORTCOMINGS IN INDIA

Vrishti Shami*

ABSTRACT

This paper focuses on moral rights in India and the drawbacks of the provisions. This paper was motivated by the Charging Bull- Fearless Girl controversy that occurred in the USA. In an attempt to understand whether such cases are possible in India or not, this paper has looked at a similar instance where the 'Kala Ghoda' statue in Mumbai was removed and a similar statue was reinstated there. Other examples such as that of the Manu statue in front of the Rajasthan High Court have also been briefly mentioned. The purpose of using these examples is to demonstrate how the open ended wording of Section 57 allows for a wide range of cases to be registered currently. The juxtaposition of the same with the laws in the USA is then used as a means to emphasize the benefits of a well defined law. The aim of this paper is to thus assert that while there is a need for the promotion of artistic expression, to grant rights for the same with such a free hand can prove deleterious in the longer run. Hence, there is a need for reforming the current provision.

Keywords: Moral rights, copyrights, USA, charging bull, artistic expression.

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1. INTRODUCTION

Moral rights are the rights bestowed upon an artist that allow them to practice ownership over their work even after it has been sold to someone else.¹ This allows them to control how their work is treated post the sale.² The purpose of providing such rights is to encourage artistic forms of expression to flourish. Moral rights have thus also been read into The Copyright Act, 1957. However, the scope of moral rights under the Act is too broad. This may prove detrimental, especially in instances where Cultural Revolution has led to alteration of the meaning associated with statues. Thus, this paper uses such instances to elucidate the shortcomings of the definition of moral rights within the Copyright Act. Furthermore, it will rely on the ‘Charging Bull- Fearless Girl Controversy’ to illustrate the need for more comprehensive laws for moral rights. Using these instances, it will highlight the changes that are needed in the current Indian provision.

This paper has primarily relied on the case of *Amarnath Sehgal v Union of India*³ to understand the Indian interpretation of moral rights. However to understand the definition and scope of moral rights internationally, Andy M Adler’s paper titled ‘Against Moral Rights’ has been relied upon.⁴ This paper aims to argue that moral rights have endangered artistic expression under the guise of protecting them.⁵ This paper has played a crucial role in outlining the intention behind the creation of moral rights. Furthermore, this paper has been relied upon to explain moral rights as they exist under the American statute; Visual Artists Rights Act of 1990 (VARA). Additionally, Adler’s critique of fossilising artwork has been imperative for enhancing the argument on the need for more exhaustive laws in India.

Bhushan Tilak Kaul’s paper ‘Copyright Protection: Some Hassles and Hurdles’⁶ has also been heavily cited. Kaul’s paper highlights the shortcomings within the Copyright Act.⁷ This paper has been used since it has deeply analysed the problems with the Indian interpretation of moral rights. Kaul’s analysis of India’s failure to reproduce the European outlook on moral rights has been

¹Amy M Adler, ‘Against Moral Rights’ (2009) 97(1) California Law Review <<https://www.jstor.org/stable/20441070>> accessed 11th December 2020.

² *ibid.*

³*Amar Nath Sehgal v Union of India and Anr* 2005 (30) PTC 253 (Del).

⁴Adler (n 1).

⁵ *ibid.*

⁶ Bhushan Tilak Kaul, ‘Copyright Protection: Some Hassles and Hurdles’ (2004) 46(2) Journal of Indian Law Institute <<https://www.jstor.org/stable/43951906>> accessed 11th December 2020.

⁷ *ibid.*

paramount in illustrating the drawbacks in the Indian statute. These two articles have therefore played a crucial role in this paper since the former has assisted in juxtaposing Indian law with the American law while the latter paper has proved crucial in shedding light on the shortcomings of the Copyright Act in understanding moral rights.

2. MORAL RIGHTS IN THE INDIAN CONTEXT

Moral rights in India are encapsulated under Section 57 of The Copyright Act, 1957. This provision is a realization of Article 6bis of the Berne Convention. The latter provision states, “the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of the said work.”⁸ The same has been reiterated in the former provision where Section 57(1) (a) allows the author to claim authorship over their work⁹ and Section 57(1)(b) mandates that the author may claim any damages for distortion of their work.¹⁰ These provisions were heavily relied upon in the case of Amarnath Sehgal; this case played a pivotal role in clarifying the Indian court’s stance on the matter. In this case the plaintiff, who was a renowned artist, was commissioned to create a mural for the lobby in Vigyan Bhawan, Delhi.¹¹ However, in 1979 the Mural was removed from the lobby and kept in the store room without informing the plaintiff.¹² The plaintiff then filed a suit under Section 57 claiming damages and an apology from the Indian authorities. Here the court held that, “Moral rights also promote the development of a social attitude of respect toward individual creativity. While authors must accept the responsibilities which accompany the privileges of creative work, is incumbent upon both the public and the state to acknowledge the value of artists' contributions to cultural heritage.”¹³ The court thus held that relying on Article 6bis of the Berne Convention and Section 57 of the Copyright Act, the plaintiff must be paid damages. Additionally, the court also mandated that the state government should issue an apology to the plaintiff.¹⁴ While this case played a crucial role in establishing the role of moral rights in India, there are still some drawbacks within the provision which have not been addressed. Firstly, Section 57(1) (b) merely states that an author may claim damages over the distortion of their work. However, the definition of ‘distortion’ has not been

⁸Berne Convention for the Protection of Literary and Artistic Works 1971, Art 6bis.

⁹Copyright Act 1957, s. 57(1) (a).

¹⁰Copyright Act 1957, s. 57(1) (b).

¹¹Amar Nath Sehgal (n 3).

¹² *ibid.*

¹³Amar Nath Sehgal (n 3).

¹⁴ *ibid.*

stated anywhere in the Act. Similarly, while the court in the Amarnath Sehgal case stated that “physical destruction or loss of intellectual property has far reaching social consequence¹⁵”, there was no mention of practice of one’s moral rights being limited to only physical destruction of their work. Further, the judge held that the words ‘any other modification’ should be read *ejusdem generis* with the words ‘distortion’ and ‘mutilation’. This judgement has therefore been described as one which elevates the cultural, over the merely proprietorial and industrial, aspects of copyright.¹⁶

3. MORAL RIGHTS AND STATUES IN INDIA

The aforementioned case law and provision state the open ended nature of moral rights in Indian law. Bhushan Tilak Kaul has highlighted the same by underlining that while Section 57 has attempted to embody the provisions of the Berne Convention, it has overlooked the history and cultural importance associated with the law. As a result, the Indian law is only a poor emulation of the intended law. Hence, Section 57 extends the frontiers of droit moral far beyond the European jurisdictions which gave birth to them.¹⁷

Firstly, since Section 57(1) (b) allows assertion of moral rights in instances of any modification, cases where the artwork appears to be disrupted due to the contextual change in their interpretation may also be accepted by the courts. While such a case may later on be rejected, there is no legal scholarship preventing the admission of such a case in court since it will *prima facie* appear to be a valid law suit. The same may be understood using the example of statues in India as well. For instance, recently a new ‘Kala Ghoda’ statue was erected in Mumbai. The original statue, sculpted by Joseph Boehm, was erected in Mumbai in 1900. This statue portrayed King George riding a Black horse. However, this statue was removed in 1965 and transferred to the Byculla Zoo since it was believed that the statue commemorated colonisation.¹⁸ Nonetheless, in 2017, a statue of a lone black horse was inaugurated in the same spot where the original statue stood. The new statue symbolises a piece de resistance, it is also seen as a celebration of Mumbai’s cultural history while

¹⁵Amar Nath Sehgal (n 3).

¹⁶Kaul (n 6).

¹⁷ *ibid.*

¹⁸Anshika Jain ‘The Tale of Kala Ghoda’ (*Live History India* November 12 2018) <<https://www.livehistoryindia.com/snapshort-histories/2018/11/12/the-tale-of-the-kala-ghoda>> accessed 11th December 2020.

ignoring the negative aspects of colonisation.¹⁹The Kala Ghoda statue is not the only instance of the removal of reminders of the British Raj in India. Several other statues such as Lord Cornwallis' statue in Mumbai and King George's statue which previously stood in front of the India gate in New Delhi have also been removed over the years.²⁰Similarly, there has also been a recent call for removing Manu's statue from the High Court in Rajasthan. It is claimed that this statue is not just a religious symbol, but also a symbol of discrimination, oppression and subjugation.²¹These instances highlight the social changes that take place over time, thus altering the meaning of any art form. Hence while the statues may have been celebration of an individual at the time that they were sculpted, fluctuating social circumstances may make the art form a reminder of oppression. In such situations, where the meaning associated with an art form is not guaranteed, the demand for the removal of a statue that subsequently becomes oppressive may invite suits where the creators assert their moral rights.

The second issue that must be discussed is that of the time period associated with moral rights. Article 7(1) of the Berne Convention mandates that, "The term of protection granted by this Convention shall be the life of the author and fifty years after his death."²² Thereby ensuring that the author' is granted moral rights for fifty years after their death.²³ Similarly, Section 22 of the Copyright Act allows legal representatives of an author to assert moral rights on their behalf for sixty years after the death of the author.²⁴However, Section 24 claims, "In the case of a literary, dramatic or musical work or an engraving, in which copyright subsists at the date of the death of the author copyright shall subsist until [sixty years] from the beginning of the calendar year next following the year in which the work is first published."²⁵ The latter provision will be applicable in the present instance since although Joseph Boehm passed away December 1890, his sculpture

¹⁹ Mustansir Dalvi 'The new horse statue in Kala Ghoda embodies Mumbai's efforts to create a false memory' (*Scroll.in* January 28 2017) <<https://scroll.in/article/827837/the-new-horse-statue-in-kala-ghoda-embodies-mumbais-efforts-to-create-a-false-memory>> accessed 11th December 2020.

²⁰ Vaishnavi Chandrashekhar, 'How Colonial Statues vanished from India's cities' (*Times of India* July 15 2017) <<https://timesofindia.indiatimes.com/india/how-colonial-statues-vanished-from-indias-cities/articleshow/76703063.cms>> accessed 12th December 2020.

²¹ Dhruv Jadhav and Aditya Wakhlu, 'A Symbol of Injustice' (*The Indian Express* July 31 2020) <<https://indianexpress.com/article/opinion/a-symbol-of-injustice-manu-statue-rajasthan-high-court-6533021/>> accessed 12th December 2020.

²² Berne Convention for the Protection of Literary and Artistic Works 1971, Art 7(1).

²³ *ibid.*

²⁴ Copyright Act 1957, s 22.

²⁵ Copyright Act 1957, s. 24.

was erected in 1900. Thus, the time period of moral rights would extend to 1960. It is pertinent to note here that Boehm's legal representatives may then not be able to contest the removal of the Kala Ghoda statue in 1965, and the installation of the new statue in 2017. However, they could still claim that due to the attainment of independence in 1947, the sculpture has been distorted. It no longer signified the glory of the British Rule, but was rather indicative of its oppressive nature. As has been mentioned above, such a law suit may eventually be rejected. However, its admissibility could not be questioned since there is no provision qualifying the definition of 'distortion' under the 1957 Act. Nonetheless, this could prove detrimental for the Courts that are already overburdened with cases.

4. 'CHARGING BULL- FEARLESS GIRL CONTROVERSY' AND THE VARA

To better understand the need for more effective moral rights, we must look at the 'Charging Bull- Fearless Girl' controversy that recently occurred in the USA. The controversy began when the Sculptor of the Charging Bull; Arturo Di Modica claimed that the installation of the Fearless Girl statue opposite to his artwork altered the meaning of his work and was thus an insult to his creation.²⁶Di Modica's creation was installed on the Wall Street in 1989 post the Wall Street Crash to encourage people to keep persevering. The Fearless Girl on the other hand, was created by Kristen Visbal and was erected on Wall Street in 2017 to symbolise female empowerment and gender equality in the work place.²⁷However, Di Modica, creator of the Charging Bull, has claimed that the installation of Kristen Visbal's work distorts the meaning of his work to a symbol of male chauvinism rather one of courage and persistence. Further, he has claimed that such a distortion is an infringement of his authorship rights granted to him under his moral rights.²⁸To better understand this, we must look at the Act that grants moral rights to artists in the USA; the Visual Artists Right Act (VARA). VARA was introduced in 1990 in the USA to grant rights to visual artists. This was considered a crucial law since it granted artists moral rights.²⁹However, unlike the Indian law, VARA grants rights of authorship only over forms of physical distortion of the

²⁶ James Barron 'Wounded by 'Fearless Girl' creator of 'Charging Bull' wants her to move' (*The New York Times* 2017)<<https://www.nytimes.com/2017/04/12/nyregion/charging-bull-sculpture-wall-street-fearless-girl.html>> accessed 13th December 2020.

²⁷Renae Merle "'Fearless Girl' sets off a storm of debate' (*The Chicago Tribune* 2017) <<https://www.chicagotribune.com/business/ct-fearless-girl-statue-debate-20170421-story.html>> accessed 10th December 2020.

²⁸Barron (n 24).

²⁹The Visual Artists Rights Act 1990, 5 17 U.S.C. § 106A (a)(3)(B) (2017).

author's work. The same has been enshrined in Exception 1 of Section 106A as well; "The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).³⁰" Hence, although Arturo Di Modica may be deeply upset about the positioning of the Fearless Girl opposite his Charging Bull, he cannot contest the same since the positioning of the new statue does not in any way physically alter his work.

A. Why is VARA important?

VARA is a crucial law since it consists of comprehensive provisions on moral rights. The specification of the right to integrity being limited only to physical distortions is perhaps one of the most salient features of the Act. Andy M Andler explains the same, "We may be truer to the spirit of contemporary art if we start from the premise that it exists to be violated, reworked, and even destroyed rather than to be embalmed and preserved just as the artist intended."³¹ Such a law leaves room for multiple interpretations of the artwork and creates avenues for it to evolve over the years rather than become a redundant creation. Subsequently, VARA also prevents arbitrary law suits such as the 'Charging Bull- Fearless Girl' from reaching the courts.

B. Reforms needed in India

While some people may argue that the wide nature of India's stance on moral rights is beneficial for promoting artistic forms of expression, it is evident from the 'Charging Bull- Fearless Girl' controversy that too broad a law may aid in curbing artistic expression as well. This would be possible since a wide interpretation of the law would allow the original creator to curb any other artistic expression, which they believe threatens their work, which was also Arturo Di Modica's intention. To prevent such situations from arising India must introduce significant amendments into Section 57. The Copyright Act must include the definition of the term 'distortion'. It is imperative that a view similar to the one taken by the law makers in VARA is adopted since this would allow the creators to practice right to paternity while being forbidden from limiting another creator's right to integrity.

³⁰The Visual Artists Rights Act 1990, 5 17 U.S.C. § 106A(c)(3)(2017).

³¹Adler(n 1).

5. CONCLUSION

This paper has aimed to highlight the shortcomings of Moral rights as stated in Section 57 of the Indian Copyright Act. In order to do so we first analysed the law and its origins; this consisted of looking at the *Amarnath Sehgal v Union of India* case as well as select provisions of the Berne convention. This was then followed by developing a contemporary understanding of moral rights by using the removal and contestation of various statues across India. The discussion on statues was used to highlight the problems in both Section 57(1)(b) as well as Section 57(2). To further examine the problems associated with moral rights that do not define ‘distortion of artwork’ we looked at the recent ‘Charging Bull- Fearless Girl’ controversy in the USA. To examine the same, we also looked at VARA and the article by And M Adler. The article was used to highlight the need to let art evolve with the changing times, which was then used to demonstrate the need for more comprehensive laws on Moral rights in India. The same has been justified on grounds that while laws that are too stringent may curb artistic expression, laws as vaguely worded as those in Section 57 may disallow second generation creators to come up by granting previous authors absolute authority in the matter. It is thus my opinion that there is a need for the inclusion of a time period and definition of ‘distortion’ in the Act in order to promote better and more inclusive forms of artistic expression.