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"My Words, My Copyright": Justifiability of Performer Owning 'Speech' or 'Address'

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The Indian Copyright Act, 1957 provides for exclusive rights to the creator of an intellectual piece, defined as work under the Act, by granting certain rights for commercial exploitation of the same, for a limited period. The basic reading of jurisprudence of copyright gives us two primary findings (required for the present research), i.e., there is a difference between a work, and its author, and a performance, and its performer; and that the author may or may not be the owner of the work. This further enunciates that the rights vested in the work and the performance is different from each other.

This understanding finds an exception in terms of the provisions laid down under the *proviso* Clause (cc) of Section 17, which in effect talks about who shall be the first owner of a particular work. The preliminary understanding of the provisions suggests that in the case of the speech or addresses, the performer will also become the 'first owner' of the work itself and will enjoy the rights of Section 14 for literary work as well as the performance. There is no dispute that the author of the work will be the person who creates the work, but the ownership is deemed to be of the person delivering the speech or address, or of such other person who delivers it on behalf of someone else.

The present research aimsto understand the rationale behind the promulgation of such a provision through amendment, which was passed with an objective to meet international obligations, with a discussion on its relevance in present times, and tries to justify the existence of the situation, by specifically mentioning out the scenarios which can and cannot seek the protection of this provision.

Keywords: Authors, Performers, Oral works, Speech, Address, Expressed Words, Copyright, First owner, Berne Convention

The Indian Copyright Act of 1957 (hereinafter Act) has come in as a major incentive for the promotion of the intellectual, moral, and economic interest of the authors, as well as that of other interested individuals. This Act was passed as an '*independent and a self-contained law*'.[1] It does not only confer rights on the author of certain works but also provides provisions for the protection of derivative works and neighbouring rights to performers and broadcasters, by providing the negative right of stopping anyone else from exploiting the work without the permission of the author. Besides the rights of economic exploitation of the work,[2] the statute has also made provisions to protect the integrity and paternity of the author, and the work and such rights have been provided in the form of moral rights,[3] which exists even upon expiration of the term of protection under the statute.

Primary understanding of copyright suggests that the author of a work may or may not be the owner of the work, and there is a difference between a work, and its author, and a performance, and its performer.

'Author' has been defined in the Act as the author of work (for literary or dramatic work), composer (for musical work), artist (for artistic works), producer (for cinematograph film or sound recording) and the person who causes to create the computer-generated literary, dramatic, musical, or artistic work.[4] While the Act nowhere defines the term owner, as provided in Section 17, the Act vests first ownership with the 'author'. However, this understanding is limited and subjected to the proviso clauses present in the statutory provision itself, which elaborately provides for situations when an individual, other than the author is 'deemed' to be the first owner of the work. The basic rationale behind the proviso clauses is the situation of work created during the course of employment, depending upon whether it was a contract for/of service.[5] In the instance when the employment has terminated, the employer has an ownership right over the work which the author had done under the period of employment and not the work done subsequent to it.[6] Further, when a person does some work to discharge a certain obligation, and this interest is transferred for valuable consideration,

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the person to whom it was transferred would be the first owner of the copyright.[7] Furthermore, in cases of government work, until and unless there is a contract to the contrary, the government is construed to be the first owner of the work. All these instances find their protection in some or another proviso of the first ownership provision, where the author is different from the owner. One of these *provisos*, under Clause (cc), is the subject matter of present research, which in effect talks about who shall be the first owner of a speech or address delivered in public. The provision reads as:

> *"17. First owner of copyright –*
> *(...)*
> *(cc) in the case of any address or speech delivered in public, the person who has delivered such address or speech or if such person has delivered such address or speech on behalf of any other person, such other person shall be the first owner of the copyright therein notwithstanding that the person who delivers such address or speech, or, as the case may be, the person on whose behalf such address or speech is delivered, is employed by any other person who arranges such address or speech or on whose behalf or premises such address or speech is delivered. (...)"*

This creates a unique situation of creating an exception to the already explained exception. While the general rule vests ownership of the work with the author, an exception to the same is found in the instances when the said work is created during the course of employment, in which case the employer is deemed to be the owner. However, in the case of Section 17 (cc), 'notwithstanding' the employment consideration, the first ownership is deemed to be vested with the person who delivers the speech or on whose behalf the speech is delivered.

Illustration

Robin is an employee of XYZ & Co., who works under the supervision of his manager Rachel. In his own time, Robin is a hobbyist travel blogger wherein the following situations arise:

(a) Ownership over all the work created on the blog, it being done in personal time, is vested with Robin.
(b) Ownership over all the work created by Robin during the course of employment is vested with XYZ & Co.
(c) Ownership over a speech made by Robin in an event arranged by XYZ & Co., vests with Robin.
(d) Ownership over a speech made by Robin, on behalf of his supervisor Rachel, in an event arranged by XYZ & Co. vests with Rachel.

In other words, this means that the person who delivers the speech or addresses, or on whose behalf the speech or addresses is delivered, enjoys the bundle of rights provided under Section 14 of the Act. A better understanding of the issue could be arranged for through the reason behind its inclusion, or rather its acknowledgement under the copyright regime, and for that study of the historical development of subject matter is required.

Protecting Oral Works: Historical Development

While undertaking research over the historical development of a certain category of work under copyright, one must start with the international development of the same. When talking about copyright Berne Convention plays the role of a basic international instrument, which has guided the development of legislation in several jurisdictions.

Berne Convention

In the nineteenth century, while colonisation still existed in most of the world under the rule of Great Britain, the common law flourished as a part of domestic laws in different countries, of today's time. In such countries, which followed the principles of British law, fixation was considered to be a pre-requisite for granting protection.[8] This lead to a situation because of which no discussion on the issue of oral works took place during the 1886 conference.[9] However, soon after the production of the first text of the Convention, Association Littéraire Et Artistique Internationale (ALAI) Congress, which was established as an independent society in 1878 with an objective 'to study and discuss legal issues arising in connection with the protection of the interests of creative individuals',[10] in the year 1895 made recommendations for the protection of "oral productions", among other things, and called for its protection throughout the Union.[11]

Yet, as far as Berne Convention meetings were concerned, no action on the recommendations was taken into consideration and hence no inclusion of oral works was carried out in the Convention text for quite some years. It was argued that the text of the

then Article 4, was wide enough to include oral works within its ambit, however, the inconsistent practice among the member states made it difficult for that understanding to be accepted uniformly.[12]

Rome Revision

The matter was thereafter raised for the first time during Rome Revision,[13]wherein different proposals were made for replacement of 'whatever the mode or form of reproduction', *viz.*'whether this be written, graphic, plastic or oral'.[14] Other countries suggested inclusion of a separate list under the existing provision, for explicitly protecting oral works, while giving liberty to member states for making provision over situations which would not amount to infringement.[15] Upon witnessing the growing difference among member approaches of various member states, a sub-committee was constituted,[16] which brought in a negotiated view on the table wherein the 'lecture, addresses, sermons and other works of same nature' were included within the text of the Convention.[17]

Once a decision was made over general protection over oral works, then the debate started on granting individual member states the autonomy to limit the extent of such works, through their national legislation. It was only then that a new provision in form of Article 2bis was adopted in the text of the Convention, which granted countries freedom to make legislations thereby excluding total or partial protection to oral works and situations under which such works can be reproduced by the press.[18] However, till now the issue of fixation was not dealt with by the Convention, which was the primary reason for dispute between protection being accorded by different nations.

Stockholm-Paris Revisions

It was only during the Stockholm-Paris Revisions that the issue of fixation was resolved.[19] The delegation referred to Berlin Revision, which provided protection to 'choreographic work and entertainment in dumb shows', wherein the means of the provision 'fixed in writing or otherwise' was used,[20] with the primary intention behind the same being evidentiary in nature.[21]

It was the Indian delegation who proposed, during Stockholm Revision, for the addition of a new paragraph which Article 2, which would allow member states to make law over the requirement of fixation of different categories of work.[22] This was considered as the continuation of the debate going on for decades over fixation and suggested that many member states still weren't in favour of fixation as mandatory criteria for grant of protection of copyright.[23] Even though this proposition was opposed by a certain number of countries, yet the UK took it up vigorously and the same was adopted in the text during Paris Revision.[24]

Kamenstein, the US observer participating in the Main Committee of Stockholm Revision and was Registrar of Copyright at that time, commented that the need for retaining the idea of fixation is evidentiary, and it is difficult to prove the fact of the existence of an unfixed work.[25] Furthermore, in absence of scope of protection, due to unavailability of fixation, might lead to protection of mere ideas, happening of which will defeat the basic jurisprudence of the copyright laws. But the fact remained the same that fixation is the subject matter of national legislation, and the requirement of the same could be relaxed, or negated, via domestic legislation.

Once the matter of protection to oral works was settled, it stirred an academic debate over the usage of the phrase 'and other works of same nature', as to what kind of works would encompass the same. Some academicians have stated that the scope of the phrase is limited to some or the other form of 'formal considered delivery' being done before an audience.[26] Such an argument puts a 'formal' delivery on a higher pedestal than other forms of oral expression, without any proper justification.

A lecture being delivered in the class by a professor is a well-considered piece of delivery and is also formal in nature, but as per the requirement of the Convention, it may or may not be fixed. In such a situation it becomes unjustifiable to grant protection to unfixed lectures, while not granting the same to say a live commentary of a sporting event. This situation will pre-suppose involvement of higher intellect and creativity in a lecture as compared to a commentary, which is not something to be judged under the copyright laws, for granting protection.[27]

However, applying the rule of interpretation of *ejusdem generis*, it is clear that just like a lecture, address and sermons, all other kinds of work seeking protection as "work of the same nature" needs to be authored by a single person.[28] This would exclude oral expressions like during the interviews or conversations, as the issue of attribution of work will always exist.

Indian Adoption

The un-amended Indian Copyright Act 1957, never had a provision for the protection of oral works, even though India was a party to Berne Convention and oral works were adopted into the text of the Convention, granting liberties to countries for drafting laws whether to include or exclude protection to oral works, after Rome Revision in 1928 through the addition of Article 2bis.[29] The Indian delegation, however, made a recommendation for making the requirement of fixation a subject-matter of national legislation, as existing provision didn't suit the country's scenario,[22] after which Article 2(2) was adopted in the text of Convention, which granted liberty to countries to decide the issue of fixation requirement as well.[30]

A debate, however, continued over the scope of the phrase '*and other works of same nature'* used in Article 2 of the Berne Convention. The jurisprudence of copyright law granting protection to the expression of the idea and not to the quality thereof doesn't put any limitation on the scope of the phrase when being talked about oral works,[27] and thus it defeats any argument requiring 'oral works' to be a 'formal delivery'.[26] It can be better understood through the analogy that pre-supposition of involvement of higher intellect and creativity in the delivery of a lecture is not permitted under copyright jurisprudence while being compared to the content of a live commentary.

Even after settling the issues on international forum, it was only in the year 1983, that the Indian parliament brought in the amendment to the Copyright Act, 1957, with an intention to bring the domestic law in consonance with the international instruments which India was a signatory of.[31] While including the *proviso* (cc) to Section 17, the Amendment Act 1983 gave the rationale, '*To provide for copyright in lectures, addresses, etc. delivered in public and for the publication of the entries made in Copyright Register'*, for this specific amendment.[31]While the amendment ensured the fulfilment of international obligation by India, it also raised several questions, which are aimed to be answered in this research.

Speech and Address: Literacy or Dramatic?

A basic understanding of the legislative wordings used for defining different types of works suggests that the definition of works pertaining to musical, artistic and sound recording is exhaustive in nature,[32] but the definition of works pertaining to literary, dramatic, or cinematographic film is inclusive in nature.[33] In other words, it means that there is the scope of addition of different nature of works wherever the definition is inclusive only. In such a situation, it becomes necessary to look on to different types of work, which have been provided for in different legal instruments, of international or foreign in nature, to have an idea of what all could encompass as protectable work under the Act.

Moving ahead to the issue at hand, the subject matter for Section 17, *proviso* (cc) is 'address or speech delivered in public'. When we go through the interpretation provisions of the Act, we find mention of 'lecture' as an inclusive definition again, which includes address, speech, and sermon.[34] The only other mention of the term 'lecture', which would include the subject matter of Section 17 *proviso* (cc) as per the abovementioned definition, is found in the definition of term 'performer',[35] which suggests that it would include any person delivering a lecture.

By the virtue of its inherent nature, performances are based on three types of works: pre-existing work protectable under the Act, at the time of performance; a protectable work being created simultaneously at the time of performance; and performance of non-copyrightable subject matter.[36] An example of these situations could be considered below:

(i) There is a published dramatic work of a play, over which certain performers have made a performance.
(ii) There is a public performance by a pianist of an unpublished original literary work, in which situation the existence of work and performance will come into effect together, for the purpose of statutory force to protect them.
(iii) There is performance is either based on a work that is not protected, or is creating a work that is not copyrightable, thereby creating a situation where there exists a performance under the Act, but no work.

Restricting the scope of the subject matter, for the present research, it is logical to suggest that the performance in the purview of current importance will fall under the category of situations (a) or (b) of the above illustration. The discussion also suggests that while the subject matter of Section 17 *proviso* (cc) is in effect a performance, but it is unsure that the work which it may a performance of is protected under the Act under which category of works. However, the nature of the work suggests that the type of work under which this subject matter could probably be discussed

are limited to literary and dramatic works (considering musical and artistic work have exhaustive definition and does not include speech and address).

At first, the statutory provision of India will be examined and discussed to determine the position of speech and addresses among the different categories of work. Furthermore, by virtue of Article 13 of the Constitution of India, the pre-independence laws which were in conformity with the provisions of the constitution, were adopted in the legal system of the independent and newly formed state. This led to a situation where the colonial law of Copyright Act 1914 was made a valid law of India, with all the administrative and other necessary powers being vested with India and its appointed officials. Even though the old law was repealed by virtue of the enactment of the present legislation Copyright Act 1957, the new legislation has relied upon the old statute. Considering this discussion, after looking into the Indian provision, a quick glance will be given to provisions of the UK, with which India shares its legal history, and for the purpose of general understanding and debate, the provisions of the US will also be examined to get a holistic idea of the subject matter, while discussing the applicability in Indian copyright jurisprudence.

Literary Works

As stated before, the Act provides for an inclusive definition for literary work which states that it '*includes computer programmes, tables and compilations including computer databases*.[37] As the Act is silent about the types and nature of work that could form a part of Literary work, it is pertinent to look at how other jurisdictions have defined such works, and what types of work form part of the same. In the UK the literary work has been defined as any work, not being a musical or dramatic work, including a table or compilation or computer program. The provision also mandates such works to be written, spoken, or sung.[38]

At the same time, the United States, through its Copyright Act 1976 provides for the protection of literary works which are works, "*other than audio-visual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.*"[39]

What is seen from these definitions is that while Indian provision does not include speech and address by being an inclusive definition, the US and UK legislations are also silent on the same, through their provision which is exclusive in nature.

Dramatic Works

Like in the case of literary works, the definition of dramatic work under the Act is also inclusive. It states that it will include '*any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film'*.[40]

The UK legislation has the simplest version of the definition and states that 'dramatic works includes dance or mime'.[41] However, in the case of *Banner Universal Motion Pictures Ltd.* the matter was brought before the chancellor division, which held that in absence of any definition to what would entail as dramatic work, ordinary meaning should be accorded to it.[42] Therefore, the court relied on the decision passed in *Norowzian*v *Arks Ltd (No 2)* where it was held that dramatic works would be 'a work of action, with or without words or music, which is capable of being performed before an audience'.[43] However, this, in turn, suggests that the definition of dramatic work will depend upon the industry practice, leaving the discussion open-ended.

At the same time, the US legislation does not have any specific definition accorded for dramatic works.[39] The provision only talks about the rights that the owner of the dramatic work might have upon protection. However, in the judgement of *Teller* v*Dogge*, it was held that while certain acts could not be protected under the provision, such as magic tricks, they might be granted protection as dramatic work if the work provided specific details of the whole performance as well along with the surrounding environment.[44] In absence of any definition, this judgement has narrowed down the scope of protection, by limiting what could be construed as dramatic works.

The above discussion suggests no specific presence of speech and address, under any of these two works and therefore making an analogical suggestion necessitates examining the internationally available definition over the subject matter. In this regard, Berne Convention for Protection of Literary and Artistic Works comes to the aid. It states:

"Article 2. Protected Works

(1) *The expression "literary and artistic works" shall include every production in the*

> *literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; (...)"* (emphasis added)

Only one aspect in Indian provision suggests that a speech or address could be dramatic work, i.e., if it is a piece for recitation. Recitation has been defined by Oxford Dictionary as 'the action of repeating something aloud from memory'[45] and has been suggested to be related tothe work of poetry and pledges only. As far as other jurisdictions and international instruments are concerned, as discussed above, they also fail to make any suggestion regarding the inclusion of speech and address under dramatic work. Therefore, it is only logical to conclude that speech and address, as mentioned in Section 17 *proviso* (cc) is not 'work' under the category of dramatic works.

Even though the Indian statute is silent about which kind of a 'work' a speech or address could be, yet the international instruments and foreign legislations suggests speech or address to be part of literary work. While, Berne Convention mentions these works by name in its provision, the fixation requirement under the UK CDPA provision suggests that the literary work could also be '*spoken'*, which suggests the presence or acknowledgement of oral works.[41] A close study of the definition of all the types of work, suggests that oral works would by their nature will fall in the category of literary works (through non-inclusion of oral works in the category of artistic, dramatic, and musical works). Establishing this raises the question with respect to granting of protection to such 'works' and examining if they qualify the fixation requirement under the statute.

Oral Works: When can be Protected?

Fixation Requirement

In order to understand the copyright ability of a literary work, the criteria have been provided for in the Act which states that the work should be original in nature,[46] and another criterion is the publication, which includes communication to the public (which is an inherent ingredient of speech and address provision in question),[47] and fixation, which although has not been mentioned in the Act specifically but has been held by the judiciary to be an integral part of copyright protection.

When Berne Convention left the issue of fixation to be a subject matter of national legislation, some countries made it mandatory,[48] while Indian statutory provision remained silent on the requirement of fixation, which raised a debate if fixation is at all required as a criterion for protection in India or not. Peterson J, while deciding *University of London Press Ltd.* v *University Tutorial Press*[49] held that:

> *"In my view the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political, or electioneering literature and refers to written or printed matter."*

Indian courts have time and again relied upon this definition of literary work while deciding cases.[50] This argument is also advanced by the basic principles of copyright law that the copyrights exist in the expression of the idea and not the idea itself. Such expression of the ideas has been called to be the fixation of the work, in some tangible form, either by writing or recording or by any other means available.[27]

The rationale behind fixation is very simple. Copyright grants exclusive economic rights to the author for the enjoyment of their work and therefore there is a requirement of knowing the boundaries of the work, which is protected, to enjoy exclusivity and to avoid infringement.[51]

Speech and Address: Author, Speaker and Fixation

Speech and Address in itself could be of different types, i.e. where the work of which delivery is being done is self-authored by the speaker; or, it has been authored by someone else and only delivery is being done by the speaker; or, delivery is being done on behalf of other person, of a work written by such other person; or, delivery is being done on behalf of other person, of a work written by someone else; or, the delivery is an extempore speech and has not been fixed in any tangible form; or, the delivery is an extempore speech or address of the speaker and is being fixed on the authorisation of such speaker; or the delivery is an extempore speech or address, being fixed without authorisation of the speaker (Fig. 1).

While the above discussion on fixation requirement has obvious applicability, based on the preceding discussion, in all the instances where either the work is

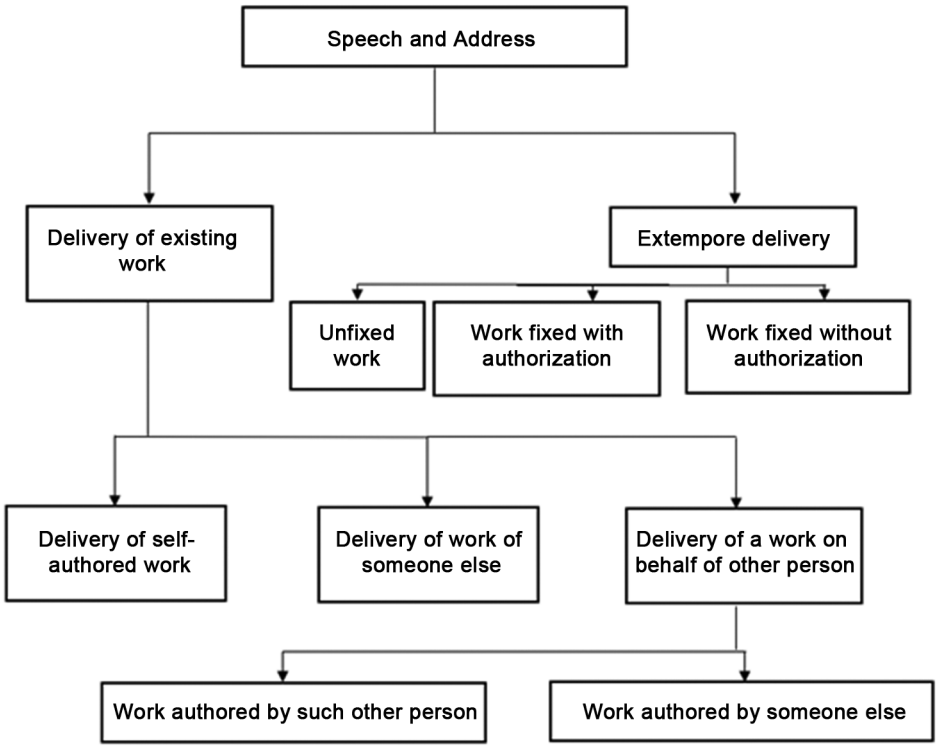

Fig. 1

pre-existing or is being fixed as simultaneously, however, a question may arise about fixation requirement for an extempore delivery, and one might argue that in absence of any explicit fixation requirement under statute, the extempore oral works will have protection, with or without fixation. However, it is important to understand that while a speech or address, upon delivery in public, is capable of being protected, being a subject matter within the domain of literary work, but it would require some record of the delivery for grant of protection.[27] The rationale behind the requirement of fixation is the same as discussed earlier, i.e. to ensure what is the 'work' which is being protected for which the holder will have exclusive economic rights.[52] While an extempore delivery could amount to publication of the work, through communication to the public, yet until fixated it will exist only in the transient form,[53] i.e. memory of the public, and therefore a permanent tangible fixation is called for. The requirement of fixation is furthered by the earlier discussed legislative intent to bring in this amendment. Parliament expressly stated that Amendment to Section 17 (cc) is brought in '*To provide for copyright in lectures, addresses, etc. delivered in public and for the publication of the entries made in Copyright Register'.* For an entry to be added to the Copyright Register, the proof of work is required to be submitted, which will warrant a tangible fixed record of the work, whether in writing, short-hand, sound recording or audio-visual recording.[54] Though an argument here can be raised that registration of Copyright is not mandatory for protection, however, this establishes the legislative intent on the requirement of fixation for grant of protection.

The general provision of Section 17 states that the author of the work shall be the owner of the copyright.[55] The issue is thus raised by such scenarios from Fig. 1 above, where ever the author of the pre-existing work and the person delivering the work is different; or when the delivery is being done on behalf of other person, and the author of the work being delivered is different from such other person; and, when the extempore delivery is being recorded without authorization, then only the proviso Clause (cc) of Section 17 gets attracted. It is in these instances when the first ownership right of such speech or address is vested with the speaker, rather than with the author.

Under the provisions of the Act, delivery of such speech or address in public will amount to performance being done by the speaker,[56] and she/he will be enjoying the rights adhered thereto.[57] It

becomes an issue of debate in such scenarios only as to why such performers are vested with the ownership rights in the work, which otherwise would be accorded to the authors.

Another understanding on the issue relates to publication, which provides that a speech or address unless delivered (communicated) to the public, will not be considered as publication and hence there will exist no copyright in it, which suggest that a private delivery will be devoid of any protection.[58] Having discussed the rationale behind the development of an international regime, which allowed protection of oral works, then the type of 'work' under whose domain it will fall, followed by discussion of copyrightability of oral works and conditions thereof, it is time to answer the final and the most important question of all, i.e. why this provision was incorporated, in the form it has been incorporated, as it grants the performer, the person delivering speech or address, right of an author, of work itself.

A Rational Justification

While the general justification, of the adoption of the provision pertaining to the protection of oral works, has been discussed in the second part of the paper, it is time to discuss the justifiability of the action of the Indian parliament in inserting the provision, in the form it has been inserted. As the copyright legislation and its jurisprudence are very new in India, compared to that of many other nations, the Indian judiciary often relies on foreign judgements when encountered with issues, not being answered by the statute.

Position of US

However, in the US the requirement of fixation is a primary condition for grant of copyright. Therefore, in the matter of *Rokeach* v *AVCO Embassy Pictures*,[59] where the plaintiff, a psychiatrist, had claimed an infringement of his work, which had contents spoken by different patients, due to its adoption in the motion picture, the court held that the plaintiff was not the author of the work he was seeking protection for, as he merely had written down the quotes which were spoken by someone else. In another matter of *Craft* v *Kobler*,[60] it was held that "where a speaker's words are transcribed by another, for the purposes of the 1976 Act the speaker is the author of those words".

Position of UK

In the matter of *Walter* v *Lane*,[61] which was filed under the provision of the Copyright Act 1842, where Lord Rosebery had delivered a lecture in the presence of certain reporters, which got published in Times newspaper verbatim. Later when Lord Rosebery published a compilation of his works, the Times sued him for infringement. The court held the matter in the favour of the newspaper saying that the speech was inevitably fixed by the reporter. It further held that, "the speaker, of course, has no copyright in the matter; copyright is the right to multiply copies of some original, and there is no original here in respect of which he could have held any copyright."[62]

When the matter went into appeal, the decision was overturned, however, the appellate court held that neither the reporter nor the speaker had a right in such a work, and therefore it effectively stated that in lectures, existed no copyright.[62] House of Lords agreed with the Court of Appeal for the part that they held that Lord Rosebery had no copyright in the speech. However, the House of Lords took into consideration the involvement of skill utilised by reporters for expressing the speech as an article and held that the copyright in such situation shall be vested with the person who fixes the speech or lecture first.[63]

In the UK, this judgment is still followed as a valid precedent, even after the adoption of new legislation of 1911.[64] In 1977, Whitford Committee on Copyright suggested that:

> "*Speeches and lectures delivered extempore do not acquire copyright unless and until fixed… We think it would be right to make it clear that, as and when [speeches and lectures are] fixed, albeit by someone else, a copyright in the material should be created which will vest in the speaker*."[65]

Thereafter, during the promulgation of new legislation in 1988, the parliament defined literary work as 'written, spoken or sung', and added a fixation criterion to it in the form of 'writing or otherwise'.[47]

Indian Position

Generally, the pre-independence courts relied heavily on findings of the British courts, over which the courts post-independence continued to rely upon. However, in 1924, when the matter of *Macmillan* v *K and J Cooper*[66] was listed before the Bombay High Court this practice found an exception, as the court choose to deviate from the findings of *Walter* v *Lane*.[61] The Privy Council held that:

> "*To secure copyright for this [compilation] it is necessary that the labour, skill and capital expended should be sufficient to impart to the [compilation] some quality or character which the raw material did not possess, differentiating the [compilation] from the raw materials.*"

This laid down a new doctrine of originality which required a 'minimal degree of creativity' for establishing originality of an expression, for the purposes of copyright. This understanding was reiterated by the Supreme Court of India in *Eastern Book Company* v *D.B. Modak*,[67] wherein it was held that originality need not be novel but distinguishing enough from the raw material over which it has been built upon.

Justification of the Provision

Among all the discussions done until now, what is understood that *proviso* (cc) of Section 17 gets attracted in the situation only when the author of the pre-existing work and the speaker are a different individual or when an extempore speech is fixed by someone without permission of the speaker.

Speech and address, which are extempore delivery, including delivery based on any such work which is not fixed till the time of delivery, if being communicated to the public at large, there lies a possibility of some or the other person from the audience who would be fixing the work either through writing or otherwise, including sound recording or audio-visual recording.

The judicial development had created a situation through earlier case laws, then such person who would be making such fixation of the expression would be deemed to be the author of the work. It was to tackle this situation specifically that the Parliament used the provision of the Berne Convention to bring in a modified version of protection of oral works, to suit its requirement.[68] This justification enhances the idea of fixation, which is required to be present for the purpose of grant of protection under the Act. A speech or address, only when fixed in a tangible form, regardless of the fact by whom or under what authority, will be treated as a work for the purpose of the protection.

It is collaborated by the discussion above, that oral works have not been provided for as work under the Act, but at the same time, they have been included as something a performer would do. Therefore, in every instance, as presented in Fig. 1 above, the speaker enjoys the right of the performer in the performance, and the author, either performer himself or any other person, would be enjoying the right of the author in such work. This is further strengthened from provision defining the term lecture which states it 'includes speech, address and sermons'.[34] While the provision of *proviso* (cc) of Section 17 specifically spells out only speech and addresses, however, the objects and reasons for the amendment clearly stated "*(...) copyright in lectures, addresses, etc. (...)"*, which extends the applicability of provision to all kinds of oral works, including lectures, speech, address, sermons etc. However, as the primary requirement is of delivery to the public, therefore, such works, which are delivered in front of a closed group of people (which would in effect mean no publication of work due to non-meeting of the criteria of communication to the public) are also not covered under the provision of *proviso* (cc) of Section 17.

Since oral works do not find any place in the list of works under the Act (unless fixated by someone else during or after delivery, when it falls in the ambit of literary works), it is only logical to deduce that there exist performers right in every oral work, but not the authors right.

A Modern-Day Mandate

The growth of technology from the industrial to the information age has changed the paradigm of understanding in which a speech or address can be delivered and has also changed the understanding of the term public. While the conventional understanding would require the physical presence of the speaker and public at the same place, along with the person who is fixating the work, the same has changed massively in the current times.

The same could be easily understood from the examples of live video streaming on a social media platform, where speech or address is being communicated to the public through viewership over the internet. The fixation requirement of such work depends upon the platform being used and varies from automatic upload to manual[69] and permanent (until deleted)[70] to upload for a specific period.[71]

However, another example from academia, where live online lectures based out of different platforms, like EdX or Unacademy, are quite common these days, where faculties conduct sessions in a virtual classroom with students as digital participants to the same.[72] While the practised mode of education was restricted to pre-recorded videos on the online platform, however,

with time and need the same has seen a shift.[73] Distance learning has been furthered by platforms specifically made for education activities, such as Blackboard Collaborate, Moodle, Zoom, Virtual Classroom, etc., on which the educators have relied upon for imparting knowledge to the designated students or interested participants. These platforms have seen a massive upsurge in usage after the global lockdown due to the presently prevalent pandemic, COVID–19,[74] and it is being speculated that this experience might change the manner of education in the coming days. While the pre-recorded sessions (which are not essentially live) are already fixated in a tangible medium, live sessions of such lectures are fixed only transiently on the server and thus requires attention.

In the above scenarios, there always exists a possibility of someone other than the performer recording the live sessions, through unauthorized, such as a third-party recording device or application, or by bypassing the security module of the platform and downloading the live lecture or session while it streams.

The unique difficulty that these scenarios offer, as against the discussions done in the rest of the part of this paper, mostly relates to the fact that performer and public need not be in the same jurisdiction and therefore may not be governed by the same laws. It, thus, becomes more important that the copyright arising out of all fixations of the work, whether done by the user on the platform or unauthorized fixation by any participant, should belong to the performer, who is the rightful author of the work contained therein, for all the economic and moral rights.

Conclusion

The primary understanding of the statutory provision under *proviso* (cc) of Section 17 creates an anomaly by letting performers of speech and address, delivered in public, to be owners of the copyright in such speech or address also. However, the finding of the discussions above suggests that this approach adopted by India is only applicable to the situations when a speech or address, not being fixed already in any tangible form, is being delivered in public, and whereas is being fixed at that time, or at any later point of time, then the copyright in such expression will be of the speaker or the person on whose behalf the work was delivered. This inevitably means, that besides having the rights of the performer, such speaker, or the person on whose behalf the work was delivered, will also enjoy the rights provided for in Section 14.

In all the other instances, the speaker of a speech or address will only enjoy the rights of a performer, as provided for in the Act. It is to be understood that for every other case, the work is already in existence that has an author. If such author were under the employment of "contract of service" with the speaker, then by virtue of Section 17 *proviso* (c) such speaker is already the first owner of the work. However, the act does not transfer the deemed ownership to anyone else than the author, in the situation when it is a 'contract for service' and the work is a literary work in nature. Therefore, if authors are not employees of the speaker, their work is being delivered in the public by the speaker, then the speaker will be required to take permission from such author before communicating the work to the public, which inevitably means that the first owner was the authors themselves, who have either granted a license to perform or have executed an assignment (transfer of ownership, and not 'first ownership'), and the act of speaker is limited to performance.

Also, in the cases when the work is being delivered to the public on behalf of other person, then by virtue of *proviso* (cc) of Section 17, copyright may subsist in such other person, but the performer's right will be of the person delivering the work, which is in consonance with the wordings of the definition clause for performers, as provided in the Act.

In the bigger picture, this whole understanding and adoption are justified as the Berne Convention gave the member states the liberty to make laws regarding the protection of oral works, under Article 2bis, and to lay down for how much and what type of protection is being granted to them. Indian adoption, based on the existing precedent of that time seems to suggest a very rational approach, which probably is the reason for the lack of litigation on the subject matter as well. The rationality of the provision so discussed may further be ascertained by the fact that it provides a legitimate solution for the modern-information-age problems as well.

Therefore, as far as the protected situation is concerned, it seems only logical and justified that the speaker (who is the performer of the speech or address) will have the right of authorship also over his work, regardless of the fact who has fixed the work, while being delivered.

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