



Copyright law and taxation – An interplay

ITRAF Workshop
Bengaluru, 24th January, 2018

Ganesh Rajgopalan

Background

- Importance of copyright
 - Computer and entertainment software
 - Explosion of Internet use
- Direct tax
 - Rulings on films, software, database, live events, broadcasting, news
 - Situs
- Indirect tax
 - Rulings on films, software
 - Chargeability and Exemptions

Copyright – relevance for tax

- Economic rationale
 - Not monopolistic
- From where does value arise
 - Intrinsic value of the work vs its protection
- Is copyright law relevant for taxation?
 - No copyright other than under the Act [s. 16, CA 1957]
 - Copyright and non-infringing uses –Meaning under CA 1957
 - two sides of the same coin

Nature of copyright

- Property
 - Characteristics of property
 - Can be owned and transferred, residual interest
 - right *in rem*
 - Statutory right
- Territoriality
 - Section 1 of CA 1957
 - Extends no farther than the nation's borders [Quality King Distributors (1998) 523 US 135]
 - Extends to whole of the United Kingdom [UK CDPA, 1988]
 - No such thing as a global copyright - Copinger

Copyright

- Indian work
 - Protection under CA 1957; extends to whole of India
- Protection to foreign work
 - protection under own law
 - TRIPS Article 3 - National treatment obligation–
 - Sec 40, CA 1957; International Copyright Order 1999;

The *situs* issue

- Where relevant
 - Property or asset in India, transfer of capital asset situate in India [sec. 9, ITA]
- Situated in every territory it is protected
 - Foster's Australia (AAR)]
- Global copyright; assignment of only Australian rights would be a partial assignment
 - ATO TR 2008/7EC
- Mobilia sequuntur personam
 - Cub Pty (Delhi HC)

The *situs* issue

- Choses in action situate where they are recoverable or enforced -Dicey & Morris
- Under Conflict of laws rules
 - Applicable law – *lex loci protectionis*
- IP situated where it is exercisable
 - Sec. 275 UK TCGA; CBDT Circular No. 3(WT) of 1957
- US Source of income rules
 - Place of use/where protection for use
- 1923 League of Nations Report
 - Place where rights to wealth can be enforced (Doctrine of economic allegiance)
- Valuation?
- Migration?

Place of protection

- An act if infringes copyright, it implies protection
- Internet streaming, where user is
 - Copying
 - a copy in computer RAM “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” [MAI Systems 991 F.2d.511 (9th Cir 1993)]
 - Communicating to the public where public is “targeted”
- Broadcasting
 - Emission theory – where the broadcast originates

Broadcasting example

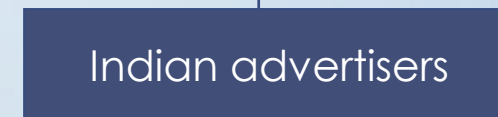
Singapore



India



- No copyright in live events
 - Broadcast rights vs broadcast reproduction rights
- Rights of broadcasting organisations – whether copyright -
 - CA 1957 or the Singapore law



Booking of advts./
air time on behalf of
Set Singapore

Place of protection

- Copyright laws of countries- Mosaic of similarities and differences
 - As to subject-matter of protection
 - As to term of protection
 - As to who is the first owner
- Can foreign law be applied?
 - “*transfer of all or any rights in respect of **copyright...***”
 - Sec.9 Expln 2 clause (v)
 - “*consideration for the use of or right to use **copyright....***”
 - Article 3(2) of OECD/UN Model

Computer software

- Copyright vs copyrighted article debate
 - Whether use of software use of copyright in it?
 - Fair use provisions
 - Lawful possessor gets absolute right
 - *[Reliance Industries Ltd. & Ors (2016) 47 CCH 94 (Mum Trib)]*
 - Economic impact on the copyright owner –negligible

Computer software

- Dealing with copyrighted article whether a copyright?
 - First sale doctrine and the principle of exhaustion
 - Issue of copies to public not being copies already in circulation [Sec. 14(1)(a)(ii) of CA, 1957]
 - Exhaustion national– *Penguin Books (1984)* DLT 316; *John Wiley (2010)* [CS (OS) No. 1960/2008]
 - To sell or give on commercial rental or offer for sale or for commercial rental any copy of computer programme [sec. 14(b)(ii) of CA 1957]
 - A TRIPS Plus Provision
- ‘Licensed, not sold’ defense
 - Whether sale/transfer of ownership
 - ‘Transfer of right to use’ a deemed sale [Article 366(29A) of Constitution]
 - Rental meaning
 - A copy made available on terms that it would /might be returned [UK CDPA]
 - Making available for use, for a limited period of time [EU Rental Directive]
- 2012 amendment futile?
 - ...transfer of rights for use or right to use computer software

Thank you