The Substantial Requisite of Stabilizing Rights for Academic Works; Intellectual Property Law Reflections

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Abstract- *Intellectual Property (IP) rights are recognized as a regime which had been established by law to safeguard the creativity of mankind, in the atmosphere of fast moving global economy. In the present context, all most all the IP rights holders are not hesitated to stand over their rights, in a case of infringement or in a situation of imminent infringement. Academia is a very significant, respected group in an every society, who contribute to the enrichment of the knowledge and philosophy in their respective discipline. The problem of this study is focused on whether there is any level of different treatment available for the academia in enjoying copyrights, comparing to the other copyrights holders, since the most frequently their studies been funded by the state institutions. Objective of this study is to, clarify the legal possibilities, measures available for the academia in order to obtain equal enjoyment of their rights comparing to other copy right holder categories. The study is largely based on qualitative approach which analyzes the contemporary legislations and relevant documentary sources in the area. The study reveals that, some provisions of the prevailing legislation, Intellectual Property Act No. 36 of 2003 and the Articles of the Constitution of Democratic Socialist Republic of Sri Lanka have indicated some of the substantial and/or technical barriers in enjoying copy rights, since they are remunerated and facilitated by the state entities to explore new knowledge. Further, the study recommends and highlights the necessity of introducing and adopting European equitable judicial approaches coupled with international standards, to minimize the exiting debate on theoretical imbalance of enjoying copyrights, in order to celebrate the creativity and compassion of this special group of intellectuals.*

Keywords- Intellectual Property, Academic work, Copyrights

I. INTRODUCTION

Academics are not merely employees, but also members of a community of teachers and scholars. That community is constituted in part by its ethical commitment to the pursuit of truth, without regard to the implications of that pursuit for the commercial interests of its members' employer. To treat universities in the manner of regular employers, so as to support their ownership of employee inventions and copyright, would undermine principles of academic freedom, and the ethic which constitutes universities as such. (Pila. J, 2010)

Regime of Intellectual Property Law had developed in order to guarantee the protection of the creativity of mankind and to provide a platform to enjoy their rights, moral and economic rights, without being disturbed by any other party. Academic community holds a significant role in terms of generating new knowledge and enhancing the existing scope and the shape of the scientific, artistic and literal works. Therefore, the contribution mark by them to the development of the existing knowledge must be respected and rights over their creativity must be protected.

This study is focused on discussing the issue of, whether there is any level of different treatment available for the academia in enjoying copyrights, comparing to the other copyrights holders, since the most frequently their studies are been funded by the state institutions. Further, the objective of this study is to, clarify the legal possibilities, measures available for the academic in order to obtain equal enjoyment of IP rights comparing to other copy right holder categories, particularly in relation to copyrights. This study is mainly focused on qualitative approach which elaborates the

relevant Sri Lankan legal authorities, articles, books and other international legal instruments.

II. MINIMUM STANDARDS OF COPYRIGHTS – THE AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

In the intellectual property field there already existed a number of agreements for the international protection of intellectual property categories, such as the Paris Convention related to industrial property rights relating to patents and trademarks, while the Berne Convention concerns about copyrights. However, with more emphasis being placed on the trade-related aspects of intellectual property, it was seen as an urgent task to attain international agreement in the context of GATT, with as many nations as possible participating, concerning standards of protection of intellectual property associated with trade. The TRIPS Agreement covers the issues of protection of intellectual property in trade-related areas to a significant degree, and is seen as a comprehensive new framework prescribing standards of intellectual property protection. Further, the TRIPS Agreement has the added significance of being the first international agreement concerning all types of intellectual property with numerous substantive provisions. (Japan Patent Office Asia-Pacific Industrial Property Center,1998)

Article 1 of the Agreement permits that the members shall give effect to the provisions of this Agreement yet members may, but shall not be obliged to, implement in their law more extensive protection than is required by the agreement and the members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Similarly Article 7 of the TRIPS states that, the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Further, the copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such under the Article 9(2) of the Agreement. Article 10 of the agreement deals with the copyrights situation relating to computer programs and compilations of data while Article 11 states the position relating to rental rights of the copyrights holders.

The legal regime relating to minimum term of protection of copyrights can be found under Article 12 of the Agreement and it provides the protection of no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within50 years from the making of the work, 50 years from the end of the calendar year of making. Finally, it is the obligation in the part of the state to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the copyright holder under Article 13 of the agreement.

III. A COMPARATIVE ANALYSIS ON STATUTORY BASED APPROACH AND/OR STANDARDS IN THE DOMESTIC AND UNITED KINGDOM ON APPROACHES OF INTERPRETING COPYRIGHTS RELATING TO ACADEMIC WORKS

Sri Lanka, a dualistic country, has undertaken the obligations of the TRIPS Agreement by enacting an enabling statue, Intellectual Property Act, No 36 of 2003.

The preamble of the Act indicates that, this is an act to provide for the law relating to intellectual property and for an efficient procedure for the registration, control and administration thereof; to amend the Customs Ordinance (Chapter235) and the High Court of The Provinces (Special) Provisions Act, No.10 of 1996; and to provide for matters connected therewith or incidental thereto. In wider sense, it is observable that the domestic piece of legislation pronounces broader protection than the minimum level of protection guidelines of the TRIPS.

Section 6 of the statute identifies the items subjected to copyright protection in the categories of literal, scientific and artistic sphere. Derivative works had been identified by the Section 7, while Section 8 deals with the scope of works not

protected under this category. Moreover the chapter provides provisions relation to moral and economic rights of the copyright holders, act of fair use, rights of the copyright holders and copyright transactions etc.

Most importantly, Section 14 (4) stated that, in respect of a work created by an author employed by a physical person of legal entity in the course of his employment, the original owner of the economic rights shall, unless provided otherwise by way of a contract, be the employer It the work is created pursuant to a commission, the original owner of economic lights shall be unless otherwise provided in a contract, the person who commissioned the work. The economic and moral rights of the work too depend as per the aforesaid relationship of the employer and employee.

Under United Kingdom legislation, copyright in an original literary, musical or other work is owned by its author(s), and the right to patent an invention is reserved primarily to its inventor(s).(C.D.P.A. s. 11(1); P.A. ss. 7(1)) However, an exception exists for works and inventions made in the course of employment. In that case, the copyright or invention is generally owned by the employer, who also has the right to patent the invention.(C.D.P.A. s. 11(2); P.A. ss. 7(2)(b)) Whether an employer can claim ownership of the copyright subsisting in works created by its employees outside the course of employment is unclear. According to section 11(2), "[w]here a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary." On one reading, this section assumes (or is at least consistent with) freedom of contract regarding the ownership of copyright in employee works. On another reading, it recognizes only the right contractually to displace a statutory presumption of employer ownership. By contrast, legislation expressly prohibits the equivalent in respect of inventions, by prohibiting the contractual diminution of employee inventors' statutory rights.

It is widely assumed that the legislative scheme governing employer ownership of copyright and inventions applies indiscriminately, including in the context of academic employers. The result is that universities are assumed to own the copyright in the lectures, books, musical scores, research notes and other works created by academic employees in the course of their employment, along with any innovative methods or products which they devise. This assumption is reflected in the intellectual property policies of most United Kingdom universities, and in the tech transfer initiatives which those policies support.(Pila. J, 2010). Lord Evershed's suggestion that it is "just and commonsense" that academics own the copyright in their lectures, and by extension the copyright in their research, might explain why many universities shy away from claiming all academic copyright, and why some expressly undertake not to assert ownership of copyright in a range of academic works.(Stephenson Jordan (1952) 69 R.P.C. 10)

However, it is far from clear that such an argument justifies a claim to the copyright in academic works, whatever the formal legal position. One reason is the impact on universities of giving them economic rights in respect of those works. In times of financial pressure, a university's possession of such rights can be expected to distort its recruitment and other academic policies by orienting them towards those outcomes most likely to maximize economic returns. (Pila J, 2010) Further, legislation already permits certain uses of works for instructional, examination, study and research purposes,(C.D.P.A. ss. 29) and the common law likely gives universities a right to re-use their employees' teaching materials.(Stephenson Jordan (1952) 69 RPC 10) This means that universities ought not in any case to need copyright to fulfill their public benefit educational objectives. Finally, there is the impact of university ownership of copyright on academic authors themselves.

IV. SUI GENARIS NATURE OF UNDERSTANDING STABILIZING THE COPYRIGHTS OF ACADEMIC WORKS

Most of the jurisdictions have accepted the nature of copyrights of academic works must be understood per se. In the Australian case, UWA v. Gray [2009] stated, "to define the relationship of an academic staff member with a university simply in terms of a contract of employment" – as application of the employer ownership provisions of intellectual property legislation would seem to entail – "is to ignore a distinctive dimension of

that relationship," namely, the "apparent manifestations of the contested value of 'academic freedom'.

There are many policies that had framed and in operating in each higher education institution, including the persons (including students, academics or any other independent contractors) engaged in research. In such cases, membership alone is sufficient to trigger the university's claim to intellectual property ownership. Hence the grounds for review of university legislation are somewhat incomprehensible; they include compliance with primary legislations, reasonableness, and compatibility with the expected norms of equality.

Anheuser-Busch Inc v. Portugal (2007) case laid the foundation for a thought of understanding the sui genaris nature of the IP rights, particularly to copyrights, emphasizing the Human Rights Act's (1998) recognition of the right of persons to the peaceful enjoyment of their "possessions". Further the case highlighted the importance of expansively interpreting the aforesaid right in relation to intellectual property context.

V. RECOGNITION OF THE RIGHT OF PERSONS TO THE PEACEFUL ENJOYMENT OF THEIR "POSSESSIONS"

Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms stated that, the protection of property gives every person the right to peaceful enjoyment of their possessions.

The concept of property and possessions includes tangible things like land and money but also includes contractual rights; shares; leases; claims for compensation; intellectual property rights; statutory rights to benefits etc. This imposes an obligation on the state not to: interfere with peaceful enjoyment of property; deprive a person of their possessions; or subject a person's possession to control.

The right of persons to the peaceful enjoyment of their "possessions" has not been recognized in the legislations in the domestic context.

VI. CONCLUSION

Hence there are no any provision relating to protection of right to possession in the domestic context, it does open a flood gate to interpret the section 14(4) of the IP Act in literal sense. Moreover, the interpretation that can be provided for the nature and the function of the universities does not obviously carry the nature of commercial enterprises. Although, this is not merely a concern for the rights of individual academics, but also for the impact of institutional intellectual property claims on the nature and values of universities themselves.

Article 14 (1) of the Democratic Socialist Republic of Sri Lanka states on the freedom of speech, assembly, association, occupation, movement of every citizen in the country.

(a) the freedom of speech and expression including publication
(b) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise
In terms of the academics, they do bear the rights to select their occupation and to forward and share their academic thoughts with the society.

Similarly Article 15(5) demarcates the limitations to the aforesaid provision and it restricts the enjoying of fundamental rights of the citizens. There is a question how for the state looked into the operation of this article in terms of the protection of IP rights of the academics coupled with Section 14(4) of the IP Act, contrary denying the fact that the nature of the job role of the academics, to disseminate knowledge through lectures, speeches, publications and researches even though they are remunerated by the state authorities.

It is necessary to adopt equitable judicial approaches into the domestic context, coupled with international standards, to provide platform to the academics to enjoy their academic freedom in terms of copyrights enjoyment in order to minimize the exiting debate on theoretical imbalance of IP rights, in order to celebrate the creativity and compassion of this special group of intellectuals.

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