Copyright Issues in E-Publishing

T C James

Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Udyog Bhavan
New Delhi 110011

(Received 2 May 2003)

Copyright law emerged and developed as a response to technological challenges to publisher’s control over his publications. The advent of e-publishing made possible by digital technologies is no exception. An examination of various sections of the Indian Copyright Act makes it clear that e-publishing gets protected under the Act. There, however, are a number of new issues between the author and the publisher and between the publisher and the end user. There have been efforts by the international community to address these issues and these efforts have lead to the finalization of the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Phonograms and Performances Treaty in 1996. These treaties obligate national governments to provide legal protection for the technological measures of protection used by copyright owners on their digitized works and also the rights management information put on them. These provisions are required to be acted upon by the government in the interest of e-publishing. Further, the industry and the government should come together to find solutions to the various unresolved copyright issues involved in e-publishing in the interest of the development of the book publishing industry in India.
The technological development that has caused the greatest challenge to publishing industry since the invention of the printing press by Gutenberg is the emergence of the digital technologies in the second half of last century. Apart from the possibilities that this new technology has opened up for individuals in copying and manipulation of works, it has spawned a new kind of publishing, that is, e-publishing and a new kind of work, that is, multi-media-work. Both these have raised a multitude of challenges to the copyright regimes in India and in other countries.

Issues

The first issue is whether electronic publishing qualifies as publishing. As per the Indian Copyright Act, “‘publication’ means making a work available to the public by issue of copies or by communicating the work to the public” (Sec.3). There are two ways of publishing as per this definition. The first one is that of issuing copies, and the second one is that of communication to the public other than by issuing copies. E-publishing is making available to the public ‘copies of work’ through a network of computers or the Internet. Here, the time-honoured concept of ‘copy of a work’ comes under challenge. Ordinarily, ‘copy’ refers to a tangible material copy. In the case of a literary work in book form this is usually a copy on paper, which is bound. When the statement, “a publisher has published 1000 copies of a book” is made, it means that he has brought out 1000 material copies that people can touch, count, stack, or destroy. In the case of e-publishing, we
do not see the 1000 copies stocked in one place. We cannot touch or count them. Even their dispatch is quite different from the usual distribution through transportation. In e-publishing, copies are distributed through signals of the binary digits zero and one. Any number of copies can be distributed to any number of computers simultaneously and instantly. The issue is whether this amounts to issuing copies? To arrive at an answer one first has to find out what is a 'copy.' The Copyright Act does not define 'copy.' Dictionary meaning of 'copy' is a thing made to be similar or identical to another (The New Oxford Dictionary of English, 1998). Therefore, a copy of a literary work is an identical reproduction of an original literary work. In fact, the etymological meaning of ‘copia’, the Latin root word, is ‘transcribed.’ One has to make a conjoint reading of Section 3 and Section 14(a)(i) of the Copyright Act to get the real purport of ‘copy’ in the context of copy. Section 14(a) defines ‘copyright’ in the case of a literary work as the exclusive right, inter alia, “to reproduce the work in any material form.” The sub-section further clarifies that ‘reproduction’ includes “storing” of a work in any medium by electronic means.” Since e-publishing is issuing of copies of a work using electronic means and it involves storing of the work in a digital format, it is covered by the definition of ‘publishing’ in Section 3 of the Copyright Act. Therefore, e-publishing gets protected under Copyright Act.

Section 3 of the Copyright Act further provides that communicating a work to the public is also ‘publishing.’

‘Communication’ to the public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display diffusion other than by issuing copies of such work regardless of whether any member of public actually sees, hears or otherwise enjoys the work so made available [Sec 2(ff)]

The language of this definition is such that keeping any work in a digital format in a computer that is part of a network becomes ‘publication’. Thus storing of works in web sites is ‘publication’ as per the Copyright Act and, therefore, e-publishing comes under the purview of the Act.

Internationally the major issue that e-publishers were facing was that of coverage of e-publication by the definitions of rights of reproduction and distribution. Strange as it may seem, in India the Copyright Act covers e-publication because electronic reproduction and distribution are within the scope of those rights in the Indian Copyright Act.

With regard to the right of distribution there is, however, the issue of ‘first sale exhaustion’. Section 14(a)(ii) of the Act while reserving with the copyright owner, the right to issue copies of the work to the public, excludes ‘copies already in circulation’ from the purview of that right. So far as ‘physical’ copies of a work are concerned, this does not cause a problem and is a perfectly understandable exception. However, how this exception clause works in the case of a digital copy is a moot point. If a person having purchased a work in digital format makes another copy for personal use and then sells the
copy to another, will he not be infringing on the right of the owner? More importantly, how does a publisher or copyright owner monitor movement of a second-hand copy in the e-world?

The criterion of ‘originality’, the basic concept of copyright, raises certain questions in e-publishing. This has many connotations. For example, if a publisher converts a work in the public domain to a digital format from the print format, how his investment and effort are protected? Since the work is outside copyright regime, any person can freely reproduce or distribute that work. Therefore, if a person gets access to the digital version and makes a number of copies of the same then will he be infringing any right under the Indian Act? If the digital copy is considered not as a ‘new’ work entitled for copyright protection, then, the original digital publisher is at a great disadvantage as his investment goes down the drain, since in the absence of protection any and all can copy his work. How to protect his initiative and investment is a point to be probed.

A major issue in e-publishing is that of multi-media products. Because of its versatility, e-publication does not limit itself to mere re-production in digital format of a literary work. They tend to become multi-media works. This raises some difficult questions for publishers, especially,

(a) What is the ‘work’ to be protected?
(b) Who is the author of such a ‘work’ and the owner of the rights?

Is the multi-media product a literary work or a cinematographic work or a sound recording? Under which ‘class’ would it go if it were a sum of many components, which form separate ‘classes’ of works under the Act? This also poses further problems. Protection of a multimedia product as the sum of its many component parts only makes the management of rights in the multi-media product a highly complex issue because of variegated nature of rights in different works. The application and enforcement procedures of rights such as communication to the public and rental rights differ from one class of work to another. Therefore, there may be a need to introduce a separate class in the classification of copyrighted works as ‘multi-media works’ whose rights may differ from those of the other classes.

E-publishing by its very nature spans across countries and continents. This raises a number of questions with regard to the laws applicable and territorial licences. If a book written by an Indian author, published by a British firm, issued through a Website located in Hong Kong and made available on the Internet to a person in the USA, which country’s law would be applicable? Can owners issue territorial licences in such publications? If so, how those territorial licences can be respected and enforced. These are issues, which do not elicit ready answers.

While e-publishing generates immense possibilities, it also creates gigantic problems from the copyright angle. These can be broadly classified into two categories:

(a) Coverage of digital works under copyright laws
(b) Enforcement of the copyrights

So far as the first category is concerned, the Indian copyright law makes it abundantly clear that e-work/publica-
tions are covered by the copyright law. The law has met with the technological challenges to that extent. The grey areas are those of enforcement of the rights in the cyber space. In this area the issues are primarily of two categories, so far as e-publishing is concerned:

(a) Contractual issues relating to assignment or licensing

(b) Technological and management issues

The first category can be divided into the following two groups:

(a) Issues between author/owner of rights and publisher

(b) Issues between publisher and user

The basic issue that will arise between the author and the publisher is about the scope of the licence agreement or assignment already given for publishing the book in the paper medium. This is especially so in the case of assignments and licences when e-publishing was not conceived as a possibility. Where the medium is not indicated it will be a matter of dispute as to whether e-publishing is covered under the agreement or licence. If the entire rights are assigned to the publisher then again the question may arise as to whether the right of reproduction in e-format is a new right or a new use not covered by the right at the time of assignment. It will also raise a very fundamental question as to whether a new right will go back to the original author/owner or to the owner of the other copyrights at the time of emergence of the new right as a consequence of a use not conceived or anticipated at the time of the transfer of the rights. Even assuming that original contract covers e-publishing by interpretation, it may still lead to a number of problems between the author and the publisher such as, whether the existing licence or assignment permits alterations and changes necessary for a digital transmission. The territoriality of the e-publication may cause a serious problem. Most publishing contracts are for specific countries or geographical regions. How can this clause be effectively enforced in the borderless cyber world? Another set of problems that may arise relate to the moral rights of the author. Since the problems of manipulation were not serious in the context of paper medium, the pre-existing contracts are more likely to be silent on measures for protecting the moral rights. How the liability of the publisher will be decided in this case? Will it be his responsibility to make the text unalterable? There are also still unanswered questions such as, how the resale rights will be regulated, and if the licence is time-bound, what safeguards can be offered against reproduction and distribution of a legally obtained copy in a computer, after expiry of the period, and so on.

There are a whole host of issues between the publisher and the user that the author also has to take note of at the time of assignment or licensing. These primarily relate to access and fair use rights. For example, in a bookstall one can browse through the pages to decide whether to buy the book or not. This is a consumer right. How this preview right can be ensured in the cyber world? Similarly, can one person lend the soft copy to a friend, through e-mail, for non-commercial personal use? Copyright law allows fair use
of copyrighted works in classrooms. Can a teacher teaching through the distance education mode send copy of the complete text of a book that he is teaching, but which is within the copyright regime, to each of his students for carrying out an assignment on review of the text? Also can the owner impose printing regulations for taking a hard copy on a person who has paid for the digital copy? Can the font size and style be altered to suit the user’s convenience? Can one side printing be taken to facilitate recording of notes on the other side? Or can double column printing with one column for notes alone be allowed?

The law may have to make detailed provisions to cover such issues. Perhaps, instead of depending solely on the copyright law authors and publishers may turn more and more to contract law and there may be more and more written and detailed contracts and licences to avoid litigation later on the grey areas. May be ultimately “the answer to the machine is the machine,” as Charles Clark once said.

E-Publishing and Internet Treaties

In e-publication, the two most important aspects so far as enforcement issues are concerned are that of protection of technological measures that the author or publisher may use in the work against unauthorized uses and protection against alterations of the copyright management information. The international copyright community after many years of discussions came out with the following formulations as these two aspects in the Internet treaties, viz., the World Intellectual Property Organizations (WIPO) Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), of 1996.

Article 11 of WCT reads:

Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their right in respect of their works, which are not authorized by the authors concerned or permitted by law.

On protection of rights management information, the WCT, Article 12 makes the following obligation on contracting parties:

Provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distributions, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

Two more aspects of this issue are relevant. The first one is the definition of ‘rights management information’. It means

Information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the
work and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

The second aspect is that countries are not to rely on the article 12 to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention, prohibiting the free movement of goods or impeding the enjoyment of rights.

Conclusion

While the international copyright community has arrived at these formulations to safeguard the interests of copyright owners in e-publications, national governments have to place in position appropriate legislation. That will be the legal response to the technological challenges to copyright posed by e-publication. While enacting such legislations, national governments should take adequate care to protect the interests of the public. Otherwise, the rights may remain protected, but may not be contributing to further creative efforts either in the literary and artistic fields or in the technological field. A recession in creative world is neither in the interest of publishers nor of the community. With India having one of the largest publishing industries in the world, appropriate responses to the above mentioned and other related problems in e-publishing need to come from both the industry and the government early to prevent avoidable litigation and spilling of bad blood between the authors and publishers.

References

2. Mathews Brenden, The evolution of copyright, Political Science, 5(4), December 1890