

Analysis of Copyright Act 2002 of Nepal

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Abstract: This article is analysis of Nepalese Copyright Act 2002 with different perspectives to TRIPS agreement and find out if the Act is harmonized with the agreement or not, also aims to find out different challenges in the enforcement of the Act. It tends to address the challenges of the protection of Copyright in the digital aspects which is one of the emerging issues in the modern world.

Keywords: Moral rights, Copyright Acts, Challenges, Computer programs

1. Introduction

When a person creates a literary, musical, scientific or artistic work, he or she is the owner of that work and is free to decide on its use. That person (called the “creator” or the “author” or “owner of rights”) can control the destiny of the work. Since, by law, the work is protected by copyright from the moment it comes into being, there is no formality to be complied with, such as registration or deposit, as a condition of that protection. Mere ideas in themselves are not protected, only the way in which they are expressed.¹ Copyright is the legal protection extended to the owner of the rights in an original work that he has created. It comprises two main sets of rights: the economic right and the moral rights.

Nepal Copyright Act, 2002 has enlisted following various areas which is copyrightable in Nepal:² which can further be elaborated as (a) Books, pamphlet, article, thesis, (b) Drama, dramatic-music, dumb show and a work prepared to perform in such manner, (c) Musical notation with or without words, (d) Audio visual works, (e) Architectural design, (f) Photography, painting, work of sculpture, work of woodcarving, lithography, and other work relating to architecture, (g) Photographic work, (h) Work of applied art, (i) Illustration, map, plan, three-dimensional work relating to geography, and scientific article and work (j) Computer program

1.1 Rights Conferred by Act

Copyright is not a single right but a bundle of rights which can be exploited independently.³ And the rights conferred by Copyright are as follows:

2. Statutory Rights

Copyright is purely a creation of the statue.⁴ The copyright in a work is a creation of statue. A person owns a copyright because the law recognizes the existence of such a right.⁵ The rights which an author of a work has

by virtue of creating the work are well defined by the Copyright Act, 2059 (2002) of Nepal. A copyright subsist in a work as per the Act a work may be defined as:⁶

- 1) Any writing, essay, story, poem, novel, epic or lyrical poem or any other book, pamphlet, descriptive working or any part thereof relating to poetry or prose and which has been written, printed, lithographed, typed or produced through some mechanical device or broadcasted, in whole or in parts, whether in their original or translated form.
- 2) Any drama or cinema or any dialogue, stenographic arrangement or manner of acting or any part thereof, or
- 3) Any drawing, map or photograph made, engraved or photographed or any other direct drawing or creative work, or any part thereof, or
- 4) Any musical notation or sound record or any part thereof,
- 5) Any other kind of creative work relating to literature, music or art or any part thereof.

3. Economic Rights

Economic Rights are the creators' rights which can be transferred through the written agreement to the business holders/users with clear provision regarding the royalty/remuneration to the creators. “Economic Rights” means the right conferred on the copyright owner pursuant to Section 7⁷ of the Copyright Act, 2059. The author may exploit the work himself or license others to exploit anyone or more of the rights for a consideration which may be in the form of royalty, a lump sum payment.⁸

The author of a work shall be the first owner of the economic right of that work⁹ and co-author in the case of a joint work.¹⁰ The author or the owner of copyright shall have the exclusive right to carry out the following acts in respect of the work¹¹:

- a) To reproduce the work,
- b) To translate the work,

¹ <http://www.wipo.int/about-ip/en/copyright.html> (visited at 03/10/2017)

² Copyright Act, 2002 (Section 2).

³ P. Narayanan, *Intellectual Property Law* 278 (Eastern Law House, Kolkatta, 3rd edn., 2006).

⁴ P. Narayanan, *Copyright & Industrial Designs* 89 (Eastern Law House, Delhi, 3rd edn., 2002).

⁵ B.L Wadehra, *Law Relating to Intellectual Property*, 325 (Universal Law Pub CO.LTD, Delhi, 5th edn., 2012).

⁶ Copyright Law Nepal available at www.helpline.law.com/article/nepal/82 accessed on 1st March 17.

⁷ Copyright Act, 2002 (Section 2(f)).

⁸ P. Narayanan, *Intellectual Property Law* 327, 90 (Eastern Law House, New Delhi, 3rd edn., 2008).

⁹ Copyright Act, 2002, Section 6 (1).

¹⁰ Ibid. Section 6 (2)(a)

¹¹ Ibid. Section 7, Economic Rights.

- c) To revise or amend the work,
- d) To make arrangement and other transformation in the work,
- e) To sell, distribute or rent the original and copy of the work for the general public,
- f) To transfer or rent the right of audiovisual work, work embodied in sound recording, computer program or musical work in graphic form conferred to that author or owner,
- g) To import copies of the work,
- h) To have public exhibition of the original or copy of the work,
- i) To perform the work in public,
- j) To broadcast the work,
- k) To communicate the work to the general public.

4. Moral Rights

The new Nepalese law embodies features reflecting the two great legal traditions in the field of copyright: the common law tradition and the civil law tradition. As long as it makes no distinction between copyright and related rights,¹² it is closer to common law. But when it comes to moral rights, it turns to the civil law tradition of continental Europe.¹³ It addresses moral rights from a dualist point-of-view, and hence considers them rights as distinct from, and independent of, economic rights. It can also be said that Nepalese act contains no express provision for the Moral rights as it does in most of the countries. protect an author's non-pecuniary or non-economic interests.¹⁴ In the legislative schemes of French and German law..., moral rights rank as a category at least the equal of economic rights.¹⁵ In the legislative schemes of French and German law..., moral rights rank as a category at least the equal of economic rights.¹⁶ reference to this right is just faintly implied with respect to sec 15 which deals with restriction on authorized publication.

The moral rights are:

- 1) The right to decide whether to publish or not to publish the work (*droit de divulgation*- the right of publication)
- 2) The right to claim authorship of a published or exhibited work (*droit a la paternite*- the right of paternity)
- 3) The right to prevent alteration and other actions that may damage the author's honour or reputation (*droit au respect de loeuvre*- the right of integrity)

¹² 4 The Act recognizes only three types of related rights: the rights of performers, phonogram producers, and broadcasting organisation

¹³ Stewart, Stephen, *International Copyright and Neighbouring Rights*, 79 (Butterworths, London, 2nd edn., 1989).

¹⁴ Bently & Sherman, *'Intellectual Property Law'* 233 (OPU, Oxford, 1st ed., 2001).

¹⁵ International Copyright by Stewar as cited in P. Narayanan (n11), 90

¹⁶ W.R. Cornish, *Case and Materials on Intellectual Property*, 386, (Sweet & Maxwell, London, 3rd edn., 1999).

Article 6 of the Berne Convention provides for recognition of so called "moral rights", the right of the author to claim authorship of his work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to the work, which would be prejudicial to his honour or reputation. Under these two new rights to the owner of copyright are available:

- Right to attribution of authorship
- Right of integrity

The author of a work shall have the following moral rights, irrespective of whether that author has the economic right to that work¹⁷:

- a) To get his/her name mentioned in copies of the work or in his/her work where it is used publicly,
- b) In cases where, instead of his/her real name, a pseudonym is mentioned in his work, then to get that pseudonym mentioned while using such a work publicly,
- c) To prevent such acts as undermining the reputation or goodwill earned by him/her, by mutilating his/her work or presenting it in a distorting manner,
- d) To make necessary amendment or revision in the work.

These rights shall not be transferable during the life of the author, however, that where the author has nominated any one whom such right is to be transferred after the death of the author; such right shall devolve on the person or organization so nominated, and on the nearest heir, failing such

5. Challenges Regarding Enforcement of Act

- Under the new law, copyright protection is available to authors whose works were first published in Nepal, and authors whose works were first published in another country and within the next 30 days published in Nepal, irrespective of the author's nationality, domicile or residence. This is set out in Article 13 (1: b), which deals with the scope of application. These provisions which limit protection to be granted to works of foreign authors are, however, likely to be amended very soon, for Nepal has made commitment to adopt the TRIPS Agreement by 2006.
- The Act protects the works of authors domiciled in Nepal. However, it does not deal with the works of co-authors where one of the authors is a foreign national. Protection is accorded to audiovisual works produced by a producer whose head office is located in Nepal, or who is domiciled in Nepal. Likewise, architectural designs of buildings constructed in Nepal, or any artistic works used in the building, or any other structure constructed in Nepal, are protected by the Act.
- As prescribed by the Berne Convention, the protection is automatic without requiring compliance with any formalities. However, authors wishing to register their works are provided with an option for registration under Article 5 (1). The registration may serve as a valuable

¹⁷ Ibid. Section 8(1), Moral Rights.

evidence for establishing ownership in case of dispute regarding the date of creation.

- Unprotected Works (Article 4) enumerates items that are excluded from protection. They include ideas, news, and methods of operation, concepts, principles, court decisions, and decisions of administrative agencies, folk songs, folk stories, proverbs and statistics of general information. Apart from these exceptions, copyright is available for any literary, scientific or artistic works of original and intellectual creation.
- Transfer Chapter 5, which concerns the transfer of copyright, is very brief. It contains only one article (Article 24). According to it the copyright owner can transfer or license his or her economic rights in whole or in part, with or without specifying any condition. The article, however, maintains that such transfer must be executed in a written contract, but it does not contain any provision specifying the modes of transfer.
- Terms of Protection As regards the duration of protection, the Nepalese law, like the laws of Germany and the Nordic countries, makes no distinction between moral and economic rights, and extends the same period of protection to both categories of rights. Protection is generally available for life plus a post mortem period of 50 years. However, this period of protection varies with the nature of the respective work as follows: (a) in the case of work of joint authorship, 50 years from the death of the last surviving author; (b) in the case of works prepared under the direction or control of a person or legal entity, 50 years from the date of the first publication or from the date of the first public dissemination, whichever comes first; (c) in the case of anonymous or pseudonymous works, 50 years from the date of the first publication or from the date of the first public dissemination, whichever comes first; (d) in the case of works of applied art and photographic works, 25 years from the date of their creation; and (e) in the case of a work published after the death of its author, 50 years from the date of its publication
- The pertinent issue of copyright violation is heard day by day.¹⁸ But the concerned authority and the court aren't serious about it. These issues have been published in daily newspaper as such Kantipur and Kathmandu post, National Daily of 8th September 1997.¹⁹ But legal action is rarely taken to avoid the situation. mostly the cases are unheard claiming not having jurisdiction and lack of evidences

¹⁸ Ibid.

¹⁹ According to these daily newspapers, 'Female bondage and liberalism' and 'Protozoa to Human beings written by UML MP Mod Nath Prashrit were found in the market for sale. Mr. Prashrit himself didn't know who published those books. He said "there is not adequate law to file suit against those who violate copyright Act" Both of those books were sold at forty rupees each. The bookseller informed Mr. Prashrit that his book "Female Bondage and Liberalism" written by him was published in 1986. The publisher was apprehended and Mr. Prashrit got 1, 500 rupees equivalent to the price of 5, 000 copies of the book as royalty.

A close and critical reading of the text reveals several instances of lapses and defects, which exist, to a great extent, simply because copyright has never been applied previously in Nepal. The new Act has become the first Nepalese law on copyright to see a trial before the court. With its increasing use and exposure to cases involving a variety of issues and circumstances, the law is gradually mature and has eventually become more refined and polished, more consistent and reliable. Until such usage of law, the *lexes cryptal* will remain largely incomplete, and defects and deficiencies will simply pass undetected till the need arises to respond to disputes or litigation, or that what is happening in 'the market place'.

The law, no matter how well drafted and conceived, is unlikely to sustain its credibility unless adequate mechanisms ensuring its proper enforcement are put in place. The success of this law will much depend on the ability of the judges to give rational and creative interpretation of its provisions, and its proper enforcement by the court and the administrative authorities. Regrettably, Nepalese judges and advocates do not possess adequate knowledge of intellectual property law, for they have never had occasion to confront issues involving intellectual property rights before. Given this situation, together with other problems such as lack of copyright awareness as well as difficult and unaffordable access to copyrighted works, it is apparent that Nepal has still a long way to go before it is able to develop and establish a sound copyright regime.

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