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# **ARBITRABILITY OF COPYRIGHT DISPUTES: BALANCING RIGHT IN REM AND RIGHT IN PERSONAM**

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## **Abstract**

The Copyright Act, 1957 is a special legislation enacted with the object of protecting original literary, dramatic, musical and artistic works, cinematograph films and sound recordings from unauthorized use. It recognises the right of copyright owner to alienate, transfer, assign or licence the subject matter of copyright to third parties. Copyright, being a form of intellectual property comprises of right in rem and right in personam. In the first part, this paper analyses the jurisprudence of copyright law. Generally, a special statute ousts the jurisdiction of general Courts. The Copyright Board and the High Courts are granted jurisdiction to adjudicate disputes under the Copyright Act. However, in case of copyright disputes, party autonomy is given importance and disputes between parties where copyright is the subject matter of the dispute, may be referred to arbitration, with certain exceptions. The second part of the paper dwells with the jurisprudence of arbitrability and nature of disputes that can be arbitrated. This paper has explored the applicability of arbitration to copyright disputes in various international countries. It further explores the interpretation adopted by Indian courts in permitting parties to arbitrate copyright disputes.

**Keywords:** *copyright, arbitrability, right in rem, right in personam, public policy.*

## Introduction

Copyright is one of the intellectual property rights recognised and protected both under the international conventions and national laws.<sup>1</sup> Copyright has seen change in the level of importance and recognition given to an author and protection of rights over the years. Copyright is an affirmative and positive right granted to the owner of the copyrighted work. It is a statutory right and its existence is limited to the parameters and protection granted under the statute.<sup>2</sup>

Copyright law is enacted to provide safeguards to the rights of owners of copyright and to reward their creativity by granting them exclusive rights. It is aimed at motivating and creating a conducive atmosphere to create new art for the economic and social development of society.

Copyright serves as a vital safeguard to authors/ owners, ensuring protection and recognition of their creative works. It nurtures and rewards creativity, which is a cornerstone of progress and plays a pivotal role in society's economic and social development. Copyright protection is extended to writers, artists, designers, dramatists, musicians, architects, as well as producers of sound recordings, cinematograph films, and computer software. It cultivates an environment that nurtures creativity, which in turn, not only motivates these creators to produce more but also inspires others to embark on creative endeavours.

The Copyright Act, 1957 aims to bestow certain rights on the creators of copyrightable work, such as a literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. The Act confers a bundle of rights including, right to reproduce, communicate to the public, adapt and translate the work.<sup>3</sup> It confers legal right to the owner of the work to protect the work for a certain period of time. Copyright comprises of property right in rem and right in personam.<sup>4</sup> The duality of the rights under copyright poses a difficult in determining arbitrability of the disputes.

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<sup>1</sup> Paris Convention for the Protection of Industrial Property, 1884 (signed 20 March 1883 and came into effect 7 July 1884) Art. 1 (2); Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (concluded 15 April 1994, came into effect 1 January 1995) Art. 1 (2) and Convention Establishing the World Intellectual Property Organization, 1967 (signed 14 July 1967, came into effect 16 April 1970) Art. 2 (viii).

<sup>2</sup> Upendra Baxi, 'Copyright Law and Justice in India' (1986) 28 (4) JILI, 497, 505.

<sup>3</sup> The Copyright Act, 1957, s. 2 (p).

<sup>4</sup> Supra note 2.

## History of copyright

Property inevitability was recognised as physical and tangible property for a long period of time. The term 'property' is derived from the Latin word 'proprius', which refers to "one's own". The owner of the property is granted exclusive rights to deal with the property and to exclude others. The development of science and evolution of technology created need to recognise intellectual and intangible property. A wide interpretation was given to 'property' to include corporeal or incorporeal, real or personal, tangible or intangible property which is capable of ownership. The law has recognised intellectual property as a form of property as it is derived from the labour of a person's intellect. Therefore, the rights granted to a tangible property is extended to intellectual property.

Copyright is rooted in property paradigm and rights that are granted to property is extended to copyrighted works, with certain variations.<sup>5</sup> It is a branch of private law, which protects original expression of work. It strikes a balance between the interest of private author/owner of the copyright and the public at large. The owner of copyright has the right to possess and alienate, transfer, assign the work as per his choice. Copyright empowers the owner to prevent third parties from infringing his right and it is a negative right as opposed to positive right to deal with the property granted to the owner.

## International Conventions

The Berne Convention for Protection of Literary and Artistic Works, 1886 ('*Berne Convention*') sets down basic principles for protection of original work and the rights of the owner of such works.<sup>6</sup> The Berne Convention provides minimum standards of protection that are required to be granted by the member countries. It also enumerates the exclusive rights of the owner that must be recognised and protected by national laws, such as right to made reproductions, right to made adaptations, right to translate, right to broadcast, right to communicate to public etc. It also recognises moral rights of the authors. It also stipulates that protection must be granted for a minimum period of 50 years after the death of the author.

The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 ("*TRIPS Agreement*") which is annexed to the Marrakesh Agreement is binding on all the members of

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<sup>5</sup> Jatindra Kumar Das, *Law of Copyright* (2 PHI Learning Private Limited, Delhi, 2015) 1-15.

<sup>6</sup> Berne Convention for the Protection of Literary and Artistic Works, 1971 (came into effect on 9 September 1886).

World Trade Organisation. The TRIPS Agreement provides the minimum standard of protection for intellectual property, including copyrights. It mandates national treatment, automatic protection and independence of protection. It also provides limitation on protection in order to balance the interest of the general public and economy.<sup>7</sup>

## Right in rem v. Right in personam

Right to a property refers to right to use the property. The subject matter of a right of a property can be either material or immaterial thing. Immaterial properties that are created by virtue of human skill and labour is recognised as intellectual properties. The law recognises the product produced by a human intellect and grants exclusive right to use product and benefit from it. It also confers proprietary right and unauthorised use of the product is violation of proprietary right of the owner.<sup>8</sup>

The terms 'in rem' and 'in personam' are derived from the Roman terms 'actio in rem' and 'actio in personam'. *Actio in rem* refers to an action for recovery of control or ownership of property, whereas *actio in personam* refers to action taken for enforcement of an obligation. The right protected under *actio in rem* is known as *jus in rem* and the right protected under *actio in personam* is known as *jus in personam*.<sup>9</sup> Rights in rem are negative and rights in personam are positive. The distinction between the two rights (i.e. *right in rem* and *right in personam*) is important to determine arbitrability.

Salmond states that the distinction between *right in rem* and *right in personam* is based on the correlative duty. *Right in rem* imposes duty on all persons in general, whereas, *right in personam* imposes duty on specific individuals.<sup>10</sup> Owner of a property has the right to peaceful possession and occupation in his property against the world at large. Further, in case of renting of the property on lease, the owner will have right on the lessee to collect rent periodically. In the similar way, owner of a copyright has right to exclude the general public against infringement of the work. The assignor of the copyright has the right to receive royalty from the assignee.

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<sup>7</sup> Agreement on Trade Related Aspects of Intellectual Property Rights, 1995 (concluded 15 April 1994, came into effect 1 January 1995).

<sup>8</sup> P J Fitzgerald, *Salmond on Jurisprudence*, (12 Sweet & Maxwell, South Asian, 2021) 421-424.

<sup>9</sup> Id at 235-238.

<sup>10</sup> Id.

## Arbitrability of disputes

Arbitration is one of the forms of alternative dispute resolution, where parties mutually agree to waive their right to approach the Court and resolve their disputes by authorising an independent and neutral third party to adjudicate. Arbitrability refers to whether subject matter of dispute can be adjudicated by an arbitral tribunal.

The test of arbitrability can be based on three factors, namely, (i) existence of an arbitration agreement, (ii) the dispute is within the purview of the arbitration agreement and (iii) subject matter of the dispute is not barred by law from arbitration. The Courts should also determine whether the dispute can be adjudicated in a private forum and whether the arbitrator will have the authority to grant the relief claimed. Therefore, it is important to consider the above factors to determine whether the dispute can be arbitrated. Various nations have different criteria to decide whether the dispute can be subjected to arbitration or not.

### International perspective

The United States of America enacted Federal Arbitration Act, 1947 to enforce arbitration agreements and recognise the validity of arbitral awards.<sup>11</sup> Although Arbitration Act was in force, copyright disputes were confined to Federal Court as it fell within the ambit of public policy. In *Kamakazi Music Corporation v. Robbins Music Corporation*, the Court permitted arbitration of copyright infringement, when the dispute did not pertain to copyright validity.<sup>12</sup> The Congress made procedural changes to the framework and introduced Copyright Arbitration Royalty Panel.<sup>13</sup> Although, the courts have permitted arbitration of copyright disputes, a copyright infringement claim requires to be registered in the U.S. Copyright Office.<sup>14</sup>

The Supreme Court of Canada in *Desputeaux v. Éditions Chouette (1987) Inc.*<sup>15</sup> has held that a dispute arising from a copyright contract maybe referred to arbitration. It further held that copyright disputes are arbitrable as long as the relief sought is not intended to bind third parties.

In Italy, all contractual disputes, excluding the ones related to non-disposable rights can be

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<sup>11</sup> Title 9, U.S.C., 1947, 392, 61 Stat. 669.

<sup>12</sup> 684 F.2d 228 1982 U.S. App.

<sup>13</sup>The Copyright Royalty and Distribution Reform Act, 2004, 17 U.S.C ss. 801-803.

<sup>14</sup> *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881.

<sup>15</sup> (2003) 1 SCR 178.

arbitrated.<sup>16</sup> The law does not expressly bar arbitration of intellectual property rights. However, copyrights are partially regarded to fall under non-disposable rights. Arbitration of disputes arising from infringement leading to economic loss is permitted.<sup>17</sup>

In France, earlier, Courts had exclusive jurisdiction over copyright disputes. Further, all intellectual property suits were required to be approved by the public prosecutor prior to institution of the suit. In 1972, the French Civil Code was amended and permitted the use of arbitration for intellectual property disputes, except matters of public policy.<sup>18</sup>

Article 2059 of French Civil Code provides a general rule for submission of disputes related to rights which are in a person's full disposition to arbitration and Article 2060 enumerates exceptions to the same. It excludes disputes related to civil status of a person, divorce, public entities and public policy. Therefore, disputes arising from a contract pertaining to copyright, such as licensing, assignment etc., where claim is for damages or breach of terms and conditions can be arbitrated, while criminal infringement and validity of copyright cannot be arbitrated.<sup>19</sup>

In Egypt, a consolidated law for protection of intellectual property rights was enacted in 2002 in line with international conventions.<sup>20</sup> The Act directs the aggrieved party to approach Courts for adjudication of all disputes relating to copyright.<sup>21</sup> Arbitration law in Egypt was a combination of Sharia and European law and it was uncodified. Promulgating the Law Concerning Arbitration in Civil and Commercial Matters enacted in 1994 is based on UNCITRAL Model Law.<sup>22</sup> Article 2 of the Law permits arbitration of commercial transactions where the dispute pertains to legal relationship of an economic nature arising out of a contract or not. Although the arbitration law permits settlement of contractual disputes having financial dimension, the Courts are vested with sole rights to adjudicate under the intellectual property law.<sup>23</sup>

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<sup>16</sup> Italian Code of Civil Procedure, 1940, Art. 806.

<sup>17</sup> Laura Coriddi, Arbitrating Intellectual Property Disputes (in Italy), available at: <https://portolano.it/en/newsletter/litigation-arbitration/arbitrating-intellectual-property-disputes-in-italy> (accessed 15 October 2023).

<sup>18</sup> French Code of Civil Procedure, 1804, Art 2060.

<sup>19</sup> DELOS, Guide to arbitration places, available at: <https://delosdr.org/wp-content/uploads/2018/06/Delos-GAP-2nd-edn-France.pdf> (accessed 18 on October 2023).

<sup>20</sup> Pertaining to the Protection of Intellectual Property Rights, 2002.

<sup>21</sup> Id. Arts. 144, 151, 179 & 181.

<sup>22</sup> Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Law No. 27/1994.

<sup>23</sup> Islam Mohamed, Arbitrating Copyright Disputes in Egypt, available at: [www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1105&context=etd](http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1105&context=etd) (accessed 20 October 2023).

A member of the World Trade Organisation can approach the WTO dispute settlement system for redressal of the dispute or to determine whether the measure taken by one of the member nations is against the principles of WTO. Arbitration is one of the methods of dispute settlement mechanism recognised by the WTO.<sup>24</sup> The Director General of WTO has the authority to appoint arbitrator and the arbitrators have the power to determine the mandate.<sup>25</sup>

The World Intellectual Property Organisation (“WIPO”) provides procedure for arbitration of disputes under WIPO Arbitration Rules, 2021. Arbitrations that are conducted under the WIPO are consensual, confidential, neutral and award is final and enforceable. In case an agreement containing arbitration clause is referred to WIPO for dispute resolution, the rules shall govern the arbitration procedure. Disputes related to digital environment such as breach of license agreements can be arbitrated under WIPO.

### Indian scenario

The Arbitration and Conciliation Act, 1996 (“Act”) provides that certain disputes for which special law and enforcement mechanisms are provided may not be submitted to arbitration.<sup>26</sup> However, the Act does not enumerate the category of disputes that are non-arbitrable. The issue of arbitrability is required to be decided by the Courts.<sup>27</sup> The Courts are empowered to set aside an arbitral award if it is pertaining to a non-arbitrable dispute.<sup>28</sup>

The issue of arbitrability was dealt in detail in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*<sup>29</sup> The learned Judge enumerated three facets of non-arbitrability and provided examples of non-arbitrable disputes. It is stated that disputes relating to rights in personam can be referred to arbitration, whereas disputes relating to right in rem are required to be adjudicated in Courts. However, disputes arising from right in personam derived from right in rem can be arbitrated. Criminal offences, matrimonial disputes, guardianship, insolvency and winding up matters, testamentary matters, eviction or tenancy matters governed by special statutes where the

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<sup>24</sup> Francois Dessementet, “Dispute Resolution Proceedings in World Trade Organisation and International Commercial Arbitration: A Comparison” (2017) IJAL 174, 187.

<sup>25</sup> United States — s. 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, §§ 2.1 - 2.7 (9-11-2001).

<sup>26</sup> The Arbitration and Conciliation Act, 1996, s. 2(3).

<sup>27</sup> Ajar Rab, ‘Defining the Contours of the public policy exception – a new test for arbitrability in India’, (2019) IJAL 161, 162.

<sup>28</sup> Kushagra Sharma, Shivangi Sinha, et.al, ‘Arbitrability of Intellectual Property Disputes in Indian Context’, (2023) (8) IJERT 12, 14.

<sup>29</sup> (2011) 5 SCC 532.

tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the dispute are some of the disputes that are non-arbitrable. Further, the learned Judge opined that the standard of test of arbitrability must be based on the nature of reliefs sought rather than mechanically testing the subject matter of the dispute as a whole.

The Supreme Court in *Vidya Drolia and Others v. Durga Trading Corporation*, has laid down four-fold test to determine arbitrability of disputes. Disputes that relate to actions in rem and affect third party rights are not arbitrable. It has held that arbitrability is a matter of national policy and a statute may expressly or impliedly prohibit arbitration of certain disputes. However, Justice N V Ramana has pointed out that under Section 34, arbitrability and public policy are two separate grounds for an arbitral award to be challenged.<sup>30</sup>

The Bombay High Court in *Eros International Media Limited v. Telemex Links India (P) Ltd.*<sup>31</sup> has dealt with the issue of arbitrability of copyright disputes. In this case, the Plaintiff had exclusive rights in respect of certain feature films. The Defendant entered into a 'Long Form Agreement' with the Plaintiff for marketing and distribution rights. Subsequently, the Plaintiff filed a suit under Section 62 of the Copyright Act alleging exploitation of copyright by the defendant. The Plaintiff also challenged the arbitrability of such a claim. The Court dealt with the question of whether Copyright Act will oust jurisdiction of arbitral tribunal. The Court held that although Copyright Act is a special act, it does not prevent the parties from submitting their dispute to an arbitral tribunal. It further held that the dispute was based on the contract between the parties and the remedy sought in the suit was 'in personam' and hence arbitrable. The Hon'ble High Court of Bombay has heavily relied on the nature of remedy sought, which is not a rigid rule.<sup>32</sup>

The Court has clarified in *Onyx Musicabsolute.com Pvt. Ltd. & Others v/s Yash Raj Films Pvt. Ltd. & Others*<sup>33</sup> that the parties cannot initiate both litigation and arbitration in respect of the same dispute as it may result in conflicting decisions. It has also clarified that arbitration claim cannot be maintained against parties who are not party to the copyright agreement containing

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<sup>30</sup> (2021) 2 SCC 1.

<sup>31</sup> 2016 SCC Online Bom 2179.

<sup>32</sup> Vidhi K Tiwari and Suman Shetty, *Eros International Media Limited v. Telemex Links India Private Limited – A step ahead*, (2016) RSRR 65.

<sup>33</sup> 2008(6) Bom CR 418.

arbitration clause.

The Courts were examining arbitrability of disputes under Section 8 and 11 prior to 2015 amendment. The 2015 amendment was enacted with the intention to curtail judicial interference. Hence, the courts are permitted to only prima facie opine on the existence of valid arbitration agreement and not deal with the arbitrability of disputes.<sup>34</sup> It can be observed that there is an increase in the trend of referring suits to arbitration on filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996 on the ground that Section 8 is preemptory in nature and the Courts are mandated to refer the dispute to arbitration.<sup>35</sup>

## Conclusion

Copyright law has expanded with expansion and development of information and technology. The advent of artificial intelligence has also posed threat to copyright infringement on the internet. Due to greater penetration of internet, there is greater potential for infringement causing economic losses to the owner of the work and possibility of distortion of moral rights is higher.

Arbitration is chosen as a preferred mode of dispute settlement as copyright disputes as the unique challenges that are present in such disputes can be effectively redressed. A neutral person having technical expertise in music or art or cinematography can be appointed as an arbitrator, who will have the technical knowledge to appreciate and distinguish the nuances in the work. Arbitration will ensure confidentiality of scripts, lyrics etc. as the Court proceedings are public and confidentiality cannot be maintained. Arbitration is flexible mechanism as the rules of procedure can be altered as per the needs of the case unlike traditional courts. It also permits the parties to decide the venue and place of arbitration to avoid conflict of laws. It provides timely resolution of disputes, which is final and binding on parties.

It is observed that although the legal technicalities of arbitration may differ from country to country, the general principles governing the arbitration, whether international or national, are consistent. The countries make a distinction between public law and private law and have permitted arbitration of disputes within the purview of private law and restricted arbitration of

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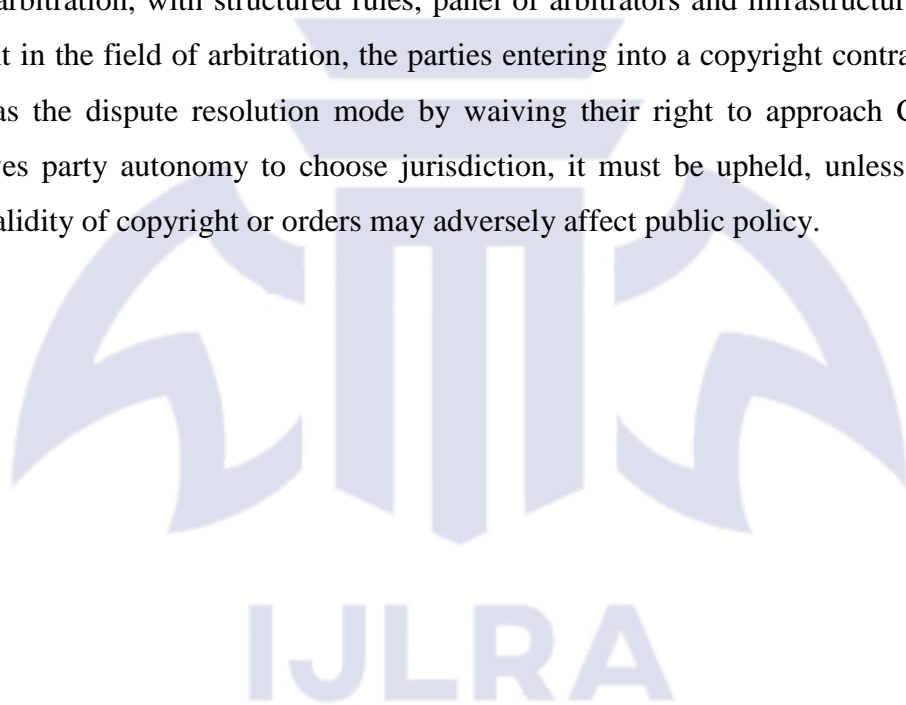
<sup>34</sup> *Vidya Drolia and Others v. Durga Trading Corporation*, (2021) 2 SCC 1.

<sup>35</sup> *Tandav Films Entertainment Private Limited v. Four Frame Pictures and another*, 2009 SCC OnLine Del 3930; *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503; *Rashtriya Ispat Nigam Limited v. Verma Transport Company*, (2006) 7 SCC 275.

disputes within the purview of public law. It is prudent to permit arbitration when adjudication of the disputes does not affect third party rights or impose liability on third parties.

The copyright disputes can also be arbitrated by online mode. Remote hearings will reduce cost of travel, venue, environmental impact, arguments will be shorter and effective. However, it would involve issues of risk of witness misconduct, credibility of witness, difficulty in effective cross examination, increase in cost to adopt technology, audio and visual clarity, network connectivity etc.<sup>36</sup>

Institutional arbitration centres have been set up in various states aid and assist in efficient conduct of arbitration, with structured rules, panel of arbitrators and infrastructure. In view of development in the field of arbitration, the parties entering into a copyright contract are opting arbitration as the dispute resolution mode by waiving their right to approach Courts. Since contract gives party autonomy to choose jurisdiction, it must be upheld, unless the claim is regarding validity of copyright or orders may adversely affect public policy.



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<sup>36</sup> Yashraj Samant & Chirag Balyan, *Specialized Arbitration*, (Thomson Reuters, Legal, India, 2021) 359-360.