

## Sum received by international news agency on distribution of news and related photos in India is royalty

**Summary – The Delhi ITAT in a recent case of Agence France Presse., (the Assessee) held that sum received by international news agency on distribution of news and related photos in India is royalty.**

### Facts

- The assessee an International News Agency was having its headquarters in France.
- AFP had been distributing its text news and photos connected with news in India through various Indian News agencies, viz., Press Trust of India and IANS. There were two categories of payments received by assessee from India one for transmission of news and the other for transmission of news photos. It provided daily reports of international events of interest which occurred in the various fields such as politics, sports, economic.
- The Assessing Officer as well as the Commissioner (Appeals) were of the view that copyright subsisted in news-reports as well as photographs distributed/circulated by the assessee in terms of Copyright Act, 1957 and hence, the payments as received by the assessee would qualify as 'royalties' in terms of definition contained in Explanation 2 of section 9(1)(vi) and Article 13(3) of the Indo-France Treaty and, accordingly, the consideration received from Web/FTP subscribers was held to be taxable at the rate of 15 per cent on gross basis.
- The assessee submitted that no copyright subsisted in the work of the assessee as news reports as well as photographs provided by the assessee lacked originality and were devoid of modicum of creativity.

### Held

- On a perusal of Article 13, it could be seen that, the word 'royalties' is being defined to include payments received *for the use of, or the right to use, any copyright of literary, artistic or scientific work etc.* It is evident from a reading of the said Article 13 that, 'royalties' covers within its fold payments pertaining to copyright of literary, artistic work etc. and since the above terms i.e. copyright of literary, artistic work etc. has neither been defined or illustrated under Income-tax Act nor under present Double Taxation Avoidance Agreement between India and France, reliance is to be placed on relevant provisions of Indian Copyright Act, 1957 in order to understand the true meaning and context for usage of the expression copyright of literary, artistic work, etc.
- Therefore, the assessee's submission that, the meaning in respect to the words 'copyright of literary, artistic work' should be given the ordinary literal meaning instead of lending it from the Copyright Act cannot be accepted.

- The stand adopted by the assessee has been that news reports and photographs distributed by it is in the nature of reporting mere facts or current news which at best could qualify as works having literary quality in its generic or dictionary meaning but not the legal connotation as is rendered for 'original literary work' having any copyrightable value in terms of Copyright Act 1957. In this regard, upon a reading of section 13(1)(a) of the Copyright Act 1957 it is evident to note that, any acquisition of copyright for any kind of expression of an event or factual scenario is an automatic process and does not require any rigours of formality for registration or even claim by the author of such work. In since the limited purpose of import of relevant clauses of Copyright Act 1957 into the instant case is clear, the point which required due attention is that in order to qualify as 'Original literary work' in which copyright subsists such works need to satisfy the test of de minimis. The Principle of de minimis is generally used by courts to determine infringement or Copyright violation disputes. To put it simply, the expression de minimis means that law will not resolve petty or unimportant disputes.
- 'Copyright' is referred to (in Salmond's jurisprudence, 11th edition, p. 462) as an immaterial form of property recognised by law, being the product of human skill and labour or of a man's brains. In all the English text books and which it is unnecessary to refer at length, copyright has been regarded as incorporeal movable property and that view has been adopted in our country as well.
- There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts while, copyright would subsist in the form, manner, arrangement and expression of the idea by the author of a copyright work.
- It is a settled legal proposition that in order to determine a copyrightable works or *original literary, dramatic, musical and artistic works etc.* (as in the instant case) the key test to be adopted is that such works should have a 'modicum of creativity' involving considerable skill, labour and capital.
- AFP exercises a great degree of control and strictly regulates its news-content supplied by it to Indian news agencies and most of its information is proprietary-in-nature and copyrighted inasmuch as access to archived data, distribution rights, commercial rights, credit to AFP alongwith copyright symbol 'AFP©' or without copyright symbol 'AFP' (as may be determined by AFP in terms of its internal policy), which can be used except as per terms of AFP.
- Further, in the instant case the news that is distributed by the assessee to various news agencies are obtained from different sources including AFP's own personnel, domestic as well as international news correspondents, and other agencies etc. who have a good amount of experience in news reporting. Such news-stories as obtained by AFP is further evaluated and processed by its editorial team which comprises of a network of senior journalists who are the best journalistic minds in news business possessing specialized skills and are capable of coming out with news-stories having a distinct feature and innate quality. It is for this very distinct feature and innate quality that AFP news is preferred and is revered to as one of the most reliable news agencies in the world since its year of inception i.e. 1835.

- AFP invests substantial amount of its capital in its personnel's, correspondent, editors' etc. and create its own unique quality in news reporting. This understanding could be explicated on the premise of two main points i.e. (a) the news story supplied by it cannot be altered by the Indian news agencies or other distributors and any change in the news reports can only be carried out by AFP itself; (b) the volume of news-stories supplied to each individual user is strictly regulated inasmuch as news-stories above a certain figure per day would cost more and depends upon the package obtained by a user. Also, news-reporting for special events such as Commonwealth Games, Olympics are carried out for special rates instead of ordinary/ regular rates since AFP has to incur costs by way of placing special correspondent i.e. skilled human capital to cover news reporting and mobilization costs for various resources/creation of necessary infrastructure in order to capture photographs during such mega events. In view of the discussion above, the instant case satisfies the elements of labour, skill and capital.
- In addition to the above, the assessee submits that reporting of news or 'hot news' being in the nature of a commercial purpose could not be a disabling factor. The assessee in his own words has taken a diametrically opposite stand in its case against Google Inc. before District Court, Colombia wherein it has argued that, *story headlines and leads are qualitatively the most important aspects of a story and are painstakingly created.*
- In light of the above discussion, apropos 'news' *per se* constitutes reporting of mere facts, current events etc. and thus cannot be copyrighted as it does not fulfil the requirements enlisted under section 13(1)(a) of the Indian Copyright Act 1957.  
(b) Second Category-News story including archived news: Since it is established that news *per se* does cannot be copyrighted it could be stated that, 'There is no copyright over news. However, there is copyright over the way in which a news item is reported.'
- In continuation to the example put forth by the department in the first category above, if a news item or a story is published by anyone, indicating the background of ongoing heat wave, records of temperature, and historical records of rain in the first week of June and also respite from power shortage or progress of monsoon, then this news item/story cannot be reproduced or used by anyone without proper authorization.
- Further, so as to appreciate the distinction between mere reporting of facts from news stories which constitutes a form of expression, it would be worthwhile to analyse the recent reporting about, Malaysia Airlines Flight 370 flight which was on a scheduled international passenger flight from Kuala Lumpur to Beijing that disappeared on 8 March 2014 after losing contact with air traffic control less than an hour after takeoff. In one of the newspapers i.e. 'Strait Times' being one of the most widely read newspapers in Singapore, the catchline read as *Malaysia's MH 370 report shows delayed response, offers no new clues*' while, another newspaper. 'The New York Times' reported this incident with the catchline *Questions Over Absence of Cellphone Calls From Missing Flight's Passengers*'. It is to be pointed out that, the piece reported by the first newspaper consisted of news

inputs as well as photographs from AFP while, the latter consisted of news inputs from 'New York Times News Service'.

- From a reading of the above news-item, it is evident that, even though the factum or news remains to be imbedded in a fact its reporting or form an expression makes it unique. Having discussed the above illustration as well as upon reading of relevant clauses from the subscription agreements, news articles/news story which are distributed by various news agencies around the world including the assessee possess literary quality and does not qualify as news and should rightfully be treated as derivative of news in the form of a news item/headline/story line including photographs (independently in a news context or otherwise.).
- In the result, such news-reports as well as archived data being in the nature of 'original literary works' did not fall foul to the doctrine of *de minimis* and meet at statutory requirements for copyright outlined under section 13(1)(a) of the Indian Copyright Act, 1957. Hence, in light of foregoing facts and circumstances involved in the instant case it could be concluded that copyright subsists in such news item/news story under consideration.
- It could be noted that where photographs taken by a professional photographer of outstanding stature has unique aesthetic merit eloquently depicting human suffering, such a photograph has intrinsic value. Similarly, in the present case the photographs as distributed by the assessee is taken by a professional photographer of high levels of competence thus, on a reading of the subscription agreement, it emerges that the images or photographs as uploaded in the assessee's website cannot be altered with except minor fading effect and resizing. The credit line for assessee's photographs is required to display a specific credit line i.e. AFP.
- Section 2(c)(i) of the Indian Copyright Act, 1957 categorically includes photographs as artistic work. In view of the totality of facts in the instant case as well as terms of usage of assessee's photos for news items or non-news items, it cannot be denied that it has an intrinsic value of its own and when used for 'news items' it helps assist in conveying the message in the news story.
- On a reading of section 2(c)(i) of the Indian Copyright Act 1957 which deems photographs as 'artistic works' keeping in view of the terms of use of such photographs as well as separate commercial value being ascribed to such photographs the same very clearly fits into the sweep of section 13(1)(a) of the Indian Copyright Act 1957 and hence it could be concluded that copyright subsists in such photographs/ image under consideration.
- The assessee has vociferously argued that, reporting of 'current events' is an exception to copyright infringement and draws support from the Berne Convention as well as the various models of Copyright laws prevailing in common law countries like UK as well as USA. Section 52 of the Copyright Act stipulates '*Certain acts not to be infringement of copyright*'. Further, clause b of section 52 stipulates as under:
- From a reading of the clauses of section 52 it could be noted that the clause is being built into the Copyright scheme in order to protect rights of user of copyrightable work. In other words, 'fair dealing' is the rights of user and not of an author or owner of copyright. The whole premise of the

assessee's argument in the present context by drawing the contours of copyrightability over its news-reports or current events in contradistinction to nature of rights possessed by its user's i.e. Indian News Agencies is misplaced.

- The assessee has in the instant case by way of grant of licence to its users obtained a commercial value for distribution of its news which cannot come into the public domain except by virtue of a license agreement. Therefore, the question of 'fair dealing' by the user of information covering bundle of first, second as well as third category of information does not come into play as it is strictly governed by the terms of the subscription agreement and comes for a commercial value hence, the reference to 'fair dealing' in terms of section 52(1)(b) is misplaced to this extent.
- Thus, the Commissioner (Appeals)'s decision was to be confirmed.