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India: 'Copying' Not Necessarily Physical Copying For Cinematograph Films : Delhi High Court

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In *MRF Limited v Metro Tyres Limited* [C.S. (COMM) 753/2017 & I.A. 12770/2017], the Delhi High Court (Court) in an order dated 01 July 2019 interpreted the term 'copying' in context of the Copyrights Act, 1957 (Act) for cinematograph films. The Delhi High Court ruled that 'copying' of a cinematograph film will include substantial copying of material to the extent that it resembles the original film and not merely a physical copy of the film created by a process of duplication.

MRF Limited (MRF) is an entity engaged in business of manufacture, marketing and sale of tyres in India and various other countries. It produced an audio-visual advertisement for its MRF NV Series "REVZ" range of tyres which was aired on television in June 2015. MRF claimed that it was the owner of the advertisement which was a cinematograph film and was protected under the Act. It was submitted that this advertisement had a futuristic setting wherein elements such as a spaceship like gate/door, robotic arm manipulating computer screen/electronic panel and etching similar grooves etc., were incorporated. It was averred that these elements made it distinct from the advertisements of the rival companies. In or around October 2016 Metro Tyres Limited (Metro) also produced and published an audio-visual advertisement for its tyres. It was alleged by MRF that the distinctive and substantial elements of its advertisement were also incorporated in Metro's advertisement and the differences in the rival advertisements were minor and immaterial. Therefore, MRF alleged that Metro's advertisement infringed its copyright in its cinematograph film, since it was a substantial and material copy of its advertisement.

MRF informed the Court that it had complained against Metro's advertisement to the Advertising and Standards Council of India (ASCI) however no action was taken by ASCI and the complaint was forwarded to Metro. Upon the receipt of the complaint, Metro filed a suit before the Court against MRF seeking to restrain MRF from issuing groundless threats. The said suit was dismissed, an appeal was filed by Metro however the same is pending adjudication. In the meanwhile, MRF instituted the present proceedings.

MRF's counsel argued that for the purpose of proving copyright infringement in cinematograph films, the test to be applied was of overall impression on the average viewer of the work and not that of a viewer with a discerning eye. Metro's counsel, on the other hand, argued that under the Act, to establish infringement of cinematograph film, a case of an actual copy by way of duplication will have to be established. He also argued that the term 'copy' refers to the act of making a physical copy of the cinematograph film, and that the Act per se grants limited and narrow protection to a cinematograph film and this was supported by a Bombay High Court decision. Furthermore, it was argued that in Section 13(1) the word 'original' was not used with respect to cinematograph films. It was further argued that MRF had merely indicated the isolated scenes for comparing and assessing copyright infringement, which was incorrect, and that isolated concepts in a cinematograph film could not form the 'kernel' or heart of the work. The counsel for Metro also reproduced a table of dissimilarities in the advertisements in question to prove that there was no case of substantial copying in this case. In response to this, the counsel for MRF argued that India was a signatory to the Berne Convention and per the said convention, a cinematograph work was protected as an 'original' work and it was a recorded understanding that cinematograph films would be assessed in the same way as ordinary literary and artistic works. It was argued by Metro, that the terms 'copy' and 'reproduce' were used differently in the Act therefore implying that the two had separate meanings.

The learned Judge held that, while the independent works forming part of a cinematograph film were individually protected under the Act, a separate copyright vests in the cinematograph film as a whole. The learned Judge ruled that even though

under Section 13(1)(b) of the Act, the word 'original' was missing, upon reading Section 13(3)(a) with the definition of the words 'author' and 'cinematograph film', as well as considering previous decisions, it was evident that cinematograph films are original since they are also intellectual creations. The learned Judge observed that since India is party to an international treaty, the Act would have to be given a purposive construction in line with the treaty to fulfil India's international obligations. Therefore, in accordance with the Berne Convention the owner of a cinematograph film will have rights similar to the author of an original work. The learned Judge also ruled that the term 'to make a copy' under Section 14(d)(i) of the Act would not be confined to only making physical copies but would also include imitation or reproduction of the work. Furthermore, he ruled that nothing in the Act per se suggested that the term 'copy' would have a narrower meaning as purported by Metro's counsel. Therefore, the scope of protection for cinematograph film was at par with other original works under the Act and therefore the test of substantial and material similarity would have to be applied to ascertain copyright infringement. However, in the present case it was ruled that there was no substantial similarity between the advertisements therefore no interim injunction was granted.

The Court's conclusion is contrary to the Bombay High Court's earlier decision in the case of *Star India Private Limited vs Leo Burnett (India) Private Limited* [2003 (2) BomCR 655] wherein it was held that the term 'copy' with respect to cinematograph film would only refer to an act of making physical copy of the film by duplication. This difference in the interpretation of the term 'copy' by the two courts of concurrent jurisdiction would now require adjudication by the Supreme Court.

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