

# IFA INDIA YIN Conference at Agra..Nov 2019



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# Who is owner of a property?

➤ Salmond on Jurisprudence (12<sup>th</sup> Edition page 4240)

*“An owner of property has a bundle of rights in it, namely, right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc. In law it is not only possible but also permissible that the various rights and interest may be vested in various persons. While remaining the owner of a property, a person may create a charge on the property, mortgage it or lease it. **In the transaction of sale, all the rights of the owner are transferred to the purchaser** and it is said that the property in the goods passes to the purchaser. In a lease of immovable property, there is a transfer of a right to enjoy such property; “a lease of land and a bailment of chattels are transactions of essentially the same nature.”*”

# What is Royalty?

- **Encyclopedic Britannica:** "the payment made to the owners of **Certain types of rights by those who are permitted by the owners to exercise the rights**. The rights concerned are literary, musical and artistic copyright, rights in inventions and designs, and rights in mineral deposits, including oil and natural gas. The term originated from the fact that in Great Britain for centuries gold and silver mines were the property of the Crown; such 'royal' metals could be mined only if a payment ('royalty') were made to the Crown. .... An individual inventor without capital or plant must licence others to manufacture his invention. **When owners of rights make arrangements for such exploitation by others, the remuneration they receive in exchange is often in the form of a royalty**, usually based on the actual extent of the exploitation"

# Is OECD commentary binding?

- Paragraph 3 and 30 of Introduction of OECD commentary ..... reservation on Article and observation on commentary.....for non members position on article/commentary
- Would India position on various interpretation in OECD commentary not relevant?
- If relevant, what value does it carry?
- Are there other countries who have also put their observation/position?

Members: Mexico, Portugal, **Spain**, Slovak Republic, Greece, Korea and Italy

Spanish SC decision dated 2<sup>nd</sup> October 1999, national court decision 28<sup>th</sup> Feb 1995

Non-members: Argentina, Morocco, Serbia, Tunisia, Brazil, India, Colombia, Malaysia, Bulgaria and India

# Whether use of software is royalty under the Indian Income Tax Act?

- *Explanation 2 to section 9(1)(vi) .. Royalty means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for..... the transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work  
.....*
- *Transfer of rights in respect of copyright is a broad term....SC in Shahdara (Delhi) Saharnpur Light Railway Company Limited vs Upper Doab Sugar Mills limited.... Quoted by Kar HC in Synopsis International Old Limited case along with a few HC judgments*
- *Explanation 4..The above definition includes and has always included transfer of all or any right for use or right to use a computer software (inc granting of a license) irrespective of the medium through which such right is transferred*

# Does it make any difference when we read the definition under DTAA?

- Royalty means payments of any kind received as a consideration for the **use of, or the right to us, any copyright** of literary, artistic or scientific work
- What is use of, or the right to us, any copyright ? Not defined in DTAA...go to domestic law under Article 3(2)...tax law have preference over other laws (para 13.1 of OECD commentary on Article 3(2))
- Under domestic law use or right to use software amounts to use of or the right to use any copyright (expl 4) Though this definition was inserted in 2012 wrt effect from 1976, this position was made public through FM statement in LS on 7/9/1990 and through circular no 588 dated 2<sup>nd</sup> Jan 1991 and circular no 621 dated 19<sup>th</sup> Dec 1991
- Will Delhi HC judgment in New Skies still apply?
- Paragraph 11 of OECD commentary on Article 3(2) also talks about ambulatory approach unless the context otherwise requires (para 12)

# Copyright vs Copyrighted article

- Does end user sign EULA, before using software? If yes, what is there in that agreement? Does initial owner parts with ownership right?
- Are there restriction on uses, number of years, restriction on transfer, restriction on destruction, other restrictions? If yes, how does that compare to copyrighted article like books?
- Whether all rights in that software transferred to end user? End user uses software as an owner or as a licensee?...Important to recall earlier discussion on owner of a property and on royalty.
- Based on above is it use of copyright as licensee or use of copyrighted article as an owner?

# SC decision in TCS case

- The decision was based on AP sales tax Act.. Does it apply to Income Tax...refer SC in Ishikawa
- Facts in that case were sale of software and not licensing of software
- There is difference between disc containing songs and disc containing software. Song can be used immediately and the user is owner of that disk. In case of software it has to be copied and the user is not owner of the software (he may be owner of disk on which software is copied)
- Hence, there is different treatment under copyright Act. Infact SC in TCS refused to look at Copyright Act as it was not relevant. Can we say it is not relevant here?
- SC decisions in State of Orissa vs Sudhanshu Sekhar Misra (constitutional bench), SC decision in Rameshwar Lal Sanwarmal vs CIT
- SC in Grace Collis overruled its own decision in Vania Silk
- SC in Kotak Securities modified earlier decision in Bharti Airtel



# Position under the Copyright Act

- Section 2(o) defines literary work to include computer programmes....
- Section 14 define copyright, in clause (a) it includes following as copyright... **reproducing of the work** in any material form including storing in any medium, **issuing copies** of the work to the public, perform work in public, make any cinematograph film, making any **translation** of the work and **making any adaptation of the work**; **clause (b)** is additional for computer program which include ... **to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program**
- Section 51 prohibits any of these acts without a valid license
- Section 52 makes exception for **lawful possessor** to make copies for utilising the computer program or to make back up copies as protection

# Various models of software licensing accepted by OECD as royalty

- End user has a license to use software only for a limited period of time (para 8.2 of OECD commentary on Article 12)
- Where copies are made except cases of site license
- Where source code is made available to end user who adapts the software or integrates the software into its own products, exploits it develop other software or customize it or modify it
- **In all other cases whether OECD commentary can be relied upon when India has given its position? Or when Indian domestic law brings a different interpretation to the term “use or right to use software”?**

# Other models of software licensing relevant for discussion under Indian context

- When end user has limited geographical right on the software (para 8.2 of OECD commentary on Article 12)
- Simple use of copying on the hard disk and taking back up copy (para 14 of OECD commentary on Article 12)
- Downloading of software... storage on a device
- Making copies under site license or enterprise license or network license (para 14.2 of OECD commentary)
- Distribution of software (as it is right to sell under Copyright Act sec 14) ....also relevant IT Act sec 195, In addition distributor may have right to modify, have access to source code for customization, right to copy, allowing use on more than one computer, it downloads software from internet and stores in multiple devices
- Embedded software (para 17 of OECD commentary on Article 12)

# Does it matter if the software is used for personal use or commercial use

- Is there any distinction in the law?
- When a taxpayer is carrying out business or profession and taking license of software and claiming deduction under section 37, is it for commercial purpose or for personal use?