

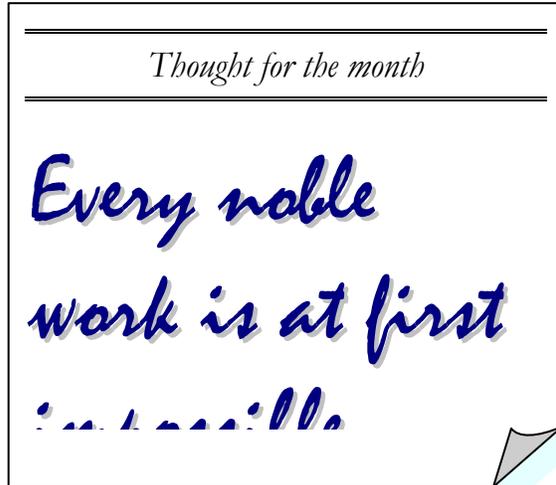
# LEGAL EYE

YOUR PEEK INTO THE INDIAN LEGAL SCENE

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Attn: «NAME»



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### *Note from the Editor*

Intellectual property rights are an important asset to both corporate individuals, or for that matter any sort of entity. With the advent of globalisation and liberalisation era in India, issues such as brand name and logo copyrights are becoming more significantly relevant than during the yesteryears.

Legal Eye, yet again, throws some light on these issues which are of paramount importance to one and all. Our endeavour has always been to make our readers aware of such issues vis-à-vis the laws currently prevalent in India. Legal Snapshots as always brings you a variety of information.

We look forward to receiving your comments and suggestions.

We also take this opportunity to urge our readers to take prompt and timely action in registering as well as protecting their IPR rights!

We trust that this new Samvat year (Hindu New Year) which has been ushered in brings you joy and happiness.

- Rajesh N. Begur, Editor, Legal Eye

## Brief overview of the Copyright Act, Industrial Designs Act, & Trade and Merchandise Marks Act.

- LEKHESH DHOLAKIA, ASSOCIATE, A.R.A. LAW

### Copyright Act, 1957

Copyright means the exclusive right to do or authorise others to do certain acts in relation to (1) literary, dramatic or musical works, (2) artistic work, (3) cinematography film and (4) sound recording. Basically, copyright means the right to copy or reproduce the work in which copyright subsists.

#### Literary, dramatic, musical works

The term '*literary work*' would cover all work expressed in writing whether it has any literary merit or not and 'originality' for the purpose of copyright law relates to the expression of thought, but such expression need not be original or novel. What is essential is that the work must not be copied from another work.

A '*dramatic work*' includes any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form which is fixed in writing or otherwise but does not include a cinematograph film (because it is a separate subject matter for copyright).

Adaptation in relation to a dramatic work means:

- 1) Conversion of the work into a non-dramatic work;
- 2) The abridgement of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, newspaper, magazine or periodical.

Choreography is the art of arranging or designing ballet or stage dance in a symbolic language. It is a form of dramatic work. In order to qualify for copyright protection it must be reduced to writing usually in the form of notation and notes.

Scenic arrangement or acting form must be fixed in writing or otherwise. Representation of scenic effects in drawings can also be considered as artistic works.

'*Musical work*' means a work consisting of music and includes any graphical notation of such work, but does not include any word or any action, intended to be seen, spoken or performed along with the music. An original adaptation of a musical work is also entitled to a copyright. Adaptations of musical works are usually called arrangements e.g. an orchestral work arranged for piano, or conversely a song written with piano accompaniment orchestrated for voice and orchestra. In popular music there are many arrangements of original song made to suit a particular performer or a particular language version of the text. Each such adaptation or arrangement is a musical work provided there is sufficient element of intellectual creation.

If a musical arranger so decorates, develops, transfers to a different medium or otherwise changes the simple music of a popular song as to make his arrangement fall within the description of an original musical work, such arrangement or adaptation is capable of attracting an independent copyright. There is no need for the ideas embodied in the arrangement to be novel.

Copyright law confers upon the owner of the work, a bundle of exclusive rights in respect of the reproduction of the work and other acts, which enable the owner to get financial benefits

by exercising such rights. If any of these acts relating to the work is carried out by a person other than the owner without a license from the owner, it constitutes infringement of copyright in the work.

Registration of a copyright is not mandatory. Copyright subsists as soon as the work is created and given a material form. It is not necessary to have registration of a copyright in order to seek an injunction against infringement.

### **The Industrial Designs Act, 1911**

‘Design’ has been defined to mean only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined which in the finished article appeal to and are solely judged by the eye; *but does not include any mode or principle of construction or anything which is in substance, a mere mechanical device, and does not include any trade mark or property mark* (emphasis supplied).

The words “judged solely by the eye” show that the customer must be influenced only by the eye and not by the suitability of the article for any particular purpose. This means that not all shapes or configurations or patterns are registrable designs, but only those which meet the visual test of the customer. It is quite immaterial for the purpose of registration whether a design is useful or devoid of utility. All that the statute requires for the registration and protection of a design is that the design is new or original and not previously published. The person registering the design acquires no exclusive right except in respect of the shape and configuration of his design.

Thus the purpose of the Designs Act is to protect novel designs devised, to be applied to (or in other words, to govern the shape and configuration of) particular articles to be manufactured and marketed commercially. Although the nature of relief is common under the Designs Act and common law (i.e. injunction), the action maintainable under common law is that of ‘passing off’ whereas the action maintainable under the Designs Act is that of “infringement”.

### **Trade and Merchandise Marks Act, 1958**

Trademark means a mark used or proposed to be used in relation to goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark.

When a person counterfeits or makes a colourable imitation of another person’s trademark, which is registered, the person counterfeiting or imitating the mark is called the ‘infringer’, and the action is termed as ‘infringement’.

The relief available to the registered owner of the mark against an infringer is to institute an action for injunction to restrain the infringer from infringing the mark.

In order to establish a prima facie case for grant of injunction, the registered owner of the mark will have to demonstrate that:

- (a) The plaintiff has been using his trading style and trademark for quite a long period and continuously, whereas the infringer has entered into the field only recently;
- (b) There has not been much delay in filing the suit;
- (c) The mark of the registered owner has acquired a distinctiveness and is associated in the mind of the general public as the mark of the plaintiff;
- (d) Nature of activity of the plaintiff and the infringer is same or similar;

- (e) The goods of the plaintiff and the infringer, to which the trademark is associated, are same or similar.
- (f) The user of the said trademark or trade name by the infringer is likely to deceive or cause confusion in the public mind and injury to the business reputation of the plaintiff.
- (g) The sphere of activity and the market of consumption of the goods of the plaintiff and the infringer are the same; and
- (h) The customers of the plaintiff, inter alia, include uneducated, illiterate and unwary customers who are capable of being deceived or confused or misled. ❖

## Copyright Law and Cine Films

- VRINDA SHARMA, NLSIU, BANGALORE

Ever wondered how the makers of Indian movies seem to be able to get away with 'drawing inspiration' from other films with impunity, with respect to the story line, songs, dialogue and other aspects of filmmaking? And is it not ironic that the same industry that commits innumerable copyright violations in the above manner is itself plagued by copyright violations in the form of large-scale piracy of its records? The following article examines the scope of intellectual property law as far as copyright violations *by* and *against* filmmakers are concerned.

### Copyrights in Films

A "Cine Film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanied by such visual recording and shall be construed as including any work produced by any process analogous to cinematography.<sup>1</sup>

A Cine Film, except in the case of live performances like sporting events or other public events or natural events, etc., would ordinarily be based on some literary, dramatic, or musical work in which copyright may subsist. It is also possible that a film may incorporate work that is part of *another film*.

The exclusive right to make or authorise the making of any cine film or sound recording in respect of a literary<sup>2</sup>, dramatic<sup>3</sup> or musical work<sup>4</sup> (which is not a computer program) or any substantial part thereof lies with the copyright owners.<sup>5</sup> Hence the producer of the film must obtain a license from the copyright owners of such work.

The rights of copyright owners include the right to make any translation or adaptation of the work.<sup>6</sup> Consequently it can be deduced that making a cine film out of an adapted or

<sup>1</sup> S.2 (f), of the Copyright Act, 1957, hereinafter referred to as 'The Act'.

<sup>2</sup> 'Literary Work' covers work which is expressed in print or writing. Copyright subsists for original literary work.

<sup>3</sup> Copyright subsists in original dramatic work and its adaptation.

Although a cine film is not a dramatic work the script or scenario for a cine film is a dramatic work.

<sup>4</sup> Copyright subsists in original musical work. When a person makes a pianoforte score of the music of another's opera, he will be the author of a new composition. Similarly if a person puts new words in a non-copyright melody or song it may constitute a new composition.

<sup>5</sup> S.13(1)(a) read with S.14(a)(iv) of the Act.

<sup>6</sup> S.13(1)(b)and(c) read with S.14(a)(iv) of The Act.

translated version of the original work is also included in the exclusive rights of copyright owners. No Copyright exists for a song.<sup>7</sup>

A copyright also subsists in a Cine film itself.<sup>8</sup> The copyright in the cine film is separate from the copyright in lyrics or music in the sound track, the copyright in the literary work from which the film is made, the copyright in the dialogue and so on. Thus, the producer of the film which is incorporating/copying/adapting any part of another film in which copyright subsists cannot do so without a license.<sup>9</sup>

However, a copyright will not subsist in a Cine film or a dramatic, literary or musical work if a substantial part of it is an infringement of the copyright in any other work. For instance, if a cine film (say, Film A) is based on a copyrighted literary work without a license from the owner of the copyright in that work, it is an infringement of the original work (Film B). Film A will not be entitled to a copyright.

The cine artists who act in the film are not protected by copyright law for their acting. The actors and performers in the film are conferred certain special rights called performers rights.<sup>10</sup>

### Who does the copyright vest in?

The author is the owner of the copyright in a work and the author can only be an individual and not an entity. As to who is the author of a work depends on the nature of the work. It can be broadly categorized as follows:<sup>11</sup>

NATURE OF WORK	AUTHOR
Literary or dramatic work	Creator of the work
Musical work	Composer
Cine Film	Producer

<sup>7</sup> There is no copyright in a song because a song is not one of the types of work in which a copyright subsists. A song has its words written by one person and its music by another; its words have a literary copyright, and so has its music. But these two copyrights are entirely different, and cannot be merged. It follows that the song itself has no copyright.

In the exceptional case, where the words and music are written by the same person, or in the case where the copyright in both the words and the music are written by the same person, he would own the copyright in the song. But no third and separate copyright in the combination of words and music subsists and the song is not a collective work. The position may be different in the case of a complicated work comprising musical and literary compositions such as opera.

<sup>8</sup> See Narayanan, P., *A Guide To Intellectual Property Law*, 2<sup>nd</sup> edn., Eastern Law House, Calcutta, 1997.

<sup>9</sup> **License** - A license is an authorization to do certain acts that, without such authorization, would be an infringement. The owner of a copyright may grant a license to do any of the acts in respect of which he has an exclusive right to do. Licensing usually involves only some of the rights and not all of them.

Apart from granting licenses, Copyright can also be economically exploited in the following manner:

**Assignments** - The owner/author of a Copyright may assign the whole or part of his rights to others to exploit economically for a lump sum consideration. In the alternative, he may license some or all of his rights to others, usually on the basis of royalty payments.

**Transmission** - Copyright is a kind of personal immovable property. It can thus be transferred, by a testamentary disposition or by operation of law as in the case of similar properties. When the owner of the Copyright dies the Copyright will pass to his personal representatives if he dies intestate.

<sup>10</sup> See S.38, The Act.

<sup>11</sup> S.2(d), The Act.

Sound Recording

Producer

### How long is the copyright granted for?

In the case of literary, dramatic, musical or artistic work (other than a photograph), when published during the lifetime of the author, copyright subsists during the lifetime of the author, plus sixty years. For a Cine Film or a sound recording, the term is sixty years from the date of publication.<sup>12</sup> After the term of copyright in the film (i.e. 60 years from the date of publication) has expired, exhibition of the film is permitted even though the copyright in the literary work etc. on which it is based has not expired.

Where the owner of a cine film has committed an offence relating to film censorship and is liable to prosecution for the offence, it will not affect the subsistence of copyright in the film or the enforcement of remedies against the infringement.

The question whether a cine film is an infringement of the copyright in another film depends upon the circumstances. Much will depend on whether the plot, story and writers are taken from a copyrighted work or from the public domain, the extent of the similarity and whether the labour and effort bestowed upon the producer of another film has appropriated one film. The owner of the copyright in a dramatic work has the exclusive right to make any cine film or sound recording in respect of an adaptation of the work. A film producer may take the central ideas from the work and make such alterations in the scenario, story, plot and incidents in making the film so as not to infringe the copyright. The case of *Anand v. Delux Films*<sup>13</sup> is an excellent illustration of the difficulties involved in establishing that a cine film is an infringement of a dramatic work.

### Copyright violations against the Film Industry

As has been stated above, a Cine Film is capable of acquiring copyright.

The owner of the copyright in a cine film has the exclusive right to do or authorise the doing of the following acts in respect of the work or any substantial part thereof:<sup>14</sup>

- i) to make a copy of the film, including a photograph of any image forming part thereof;
- ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- iii) to communicate the film to the public.<sup>15</sup>

A Cine Film thus is prone not just to copyright violations in the form of other films copying it but can also be targeted by piracy. Technological progress may have made the reproduction of copyright material easy and cheap, but at the same time it has made the piracy of copyright work simple and difficult to control. Piracy in copyright work including Cine Films increased manifold after the development of gadgets like tape recorder,

<sup>12</sup> S.22, The Act.

<sup>13</sup> AIR 1978 SC 1613.

<sup>14</sup> S.14(d), The Act.

<sup>15</sup> "Communicate to the public means making the film available to the public for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion and regardless of whether any member of the public actually sees, or hears or otherwise enjoys the film so made available. The communication may be made through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of the hotel or the hostel."

---Ss 2(ff) and 2(dd), The Act.

videocassette recorder, magnetic tapes and reprography. Reprinting individual pictures from a film as still pictures is infringement of the copyright in the film.

Piracy in movies obviously violates the rights of the producer, the owner of the Copyright in the film, which have been listed above. However, exhibition of the film in private is not an infringement of the copyright in the film.

### **Criminal Remedies with respect to Copyright violations**

In addition to civil remedy<sup>16</sup> the Copyright Act enables the owner of the Copyright to take criminal proceedings against an infringer.<sup>17</sup> Knowledge (*mens rea*) is an essential ingredient of the offence.

These two remedies (civil and criminal) are distinct and independent and can be availed of simultaneously. The offence of infringement of copyright is punishable with imprisonment which may extend from a minimum period of six months to a maximum of three years and a fine ranging from Rs. 50,000 to Rs. 2 lakhs. A police officer of the rank of police inspector or above is given the power to seize without warrant, all infringing copies of the work and accessories for making infringing copies, wherever found, to be produced before a Magistrate.

All infringing copies in which Copyright subsists and all plates used for the production of such copies are deemed to be the property of the owner of the copyright in the work. The Court trying the offence may order that all copies of the work appearing to be infringing copies or plates for making infringing copies in the possession of the alleged offender be delivered to the owner of the Copyright without any further proceedings. This is so whether the accused is convicted or not. However, for compensation with respect to conversion of infringing copies the owner of the copyright will have to resort to civil proceedings.

The Copyright Act requires certain particulars to be displayed on records and video films and containers thereof. These include the name and address of the person who has made the record, name and address of the owner of the copyright and year of first publication and in case of a video film, a copy of the certificate granted by the Board of Film Certification for the cinematograph film, the name and address of the person who has made the film and the name and address of the copyright owner. Any person who publishes a record or a video film in contravention of the above requirements will be punished with imprisonment, which may extend to three years with a fine. ❖

## **Copyright Protection including for Software Technology**

- ALIFF FAZELBOY, PARTNER, A.R.A. LAW
- SHARDULSINGH BAYAS, ASSOCIATE, A.R.A. LAW

### **What is a copyright**

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<sup>16</sup> The main civil remedy available would be a suit for infringement. The following persons can sue for infringement of Copyright:

- the owner/co-owner of the Copyright;
- the assignee of the Copyright;
- the legatee in case of testamentary disposition of the Copyright;
- a licensee if the owner of the Copyright is made a joint plaintiff or defendant;
- in case of an anonymous or pseudonymous work, the publisher of the work.

<sup>17</sup> Chapter XIII, The Act.

Copyright means the exclusive right to do or authorize others to do a certain act in relation to literary, dramatic, musical and artistic works, cinematography film and sound recordings. Basically, a copyright is the right to copy or reproduce the work in which the copyright subsists.

### **Copyright and technology**

Technological progress has made the reproduction of copyright material easy and cheap, but at the same time it has made piracy of copyrighted work simple but difficult to control.

### **International convention**

Various countries have joined to form conventions for the protection of copyright owned by its nationals in other countries. Accordingly, Indian copyright owners can protect their copyright in almost any country in the world. Consequent to India signing the GATT and entering the global market economy, a number of changes have been made in the Copyright Act of 1957 by amending the Act of 1994, to give effect to the obligation arising from the signing of the GATT and to make the Indian law more aligned with existing laws in many of the developed countries.

### **Statutory position**

The law of copyright in India is contained in the Copyright Act 1957 as amended subsequently from time to time. Infringement of a copyright can be stopped by an action for infringement. The remedies available are an injunction and damages. Infringement of copyrights is also a criminal offence punishable with imprisonment and fine.

### **Extension of copyright**

In a rapidly changing technological environment, copyright protection is being extended to many areas of creative work, particularly in the computer industry, relating to software and databases. This has found recognition in the 1994 Amendment Act.

Computer software piracy is a worldwide phenomenon. To act as a deterrent against such piracy, the provisions relating to protection of computer software have been tightened by substantially enhancing the punishment for infringement of software and increasing the scope of such infringement.

### **Computer software and program**

Algorithms, frequently used in computer programming, cannot be copyright protected. System programs are generally regarded as literary work. Magnetic tapes and disks, including floppy disks, which contain information recorded by means of electronic impulses, may be considered as databases and accordingly, literary work by definition.

### **Infringement of copyrights**

Definition of infringement - Section 51: Copyright in any work is deemed to be infringed,

1. when any person without a license from the owner of the copyright, or the Registrar of Copyrights, or in contravention of the conditions of a license granted or any condition imposed by a competent authority under the Act
  - does anything, the exclusive right to do which is conferred upon the owner of the copyright, or
  - permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work,

unless he was not aware and had no reasonable grounds for believing that such communication to the public would be an infringement of copyright, or

2. where a person,

- makes for sale or hire, or sells or lets for hire or by way of trade displays or offers for sale or hire any infringing copies of the work, or
- distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, any infringing copies of the work, or
- exhibits to public by way of trade any infringing copies of the work, or
- imports into India any infringing copies of the work except one copy of any work, for the private and domestic use of the importer.

In general it is the commercial exploitation of the work in any form by a person without authority that constitutes infringement.

### **Essential ingredients of infringement**

Depending upon the kind of copyright work, infringement involves one or more of the following acts:

- reproduction of the work in a material form,
- publication of the work,
- communication of the work to the public,
- performance of the work in public,
- adapting and translating the work and doing any of the above acts in relation to a substantial part of the work.

### **Remedies against infringement of copyrights**

There are three kinds of remedies against infringement of copyright; namely, civil, criminal and administrative. Civil remedies include injunction, damages or account of profits, and damages for conversion. Criminal remedies provide imprisonment of the accused or imposition of a fine or both, seizure of infringing copies and delivery-up of infringing copies to the owner of the copyright. Administrative remedies consist of applying to the Registrar of Copyrights to ban the import of infringing copies.

### **Jurisdiction of courts**

A suit or other civil proceedings relating to infringement of a copyright should be instituted in the District Court or High Court within whose jurisdiction the plaintiff resides or carries on business of the defendant. The court within whose jurisdiction the cause of action has arisen also has jurisdiction to entertain the suit. The period of limitation for filing the suit is three years from the date of infringement. Where there has been no actual infringement but a real threat of infringement, a *quia timet* (an action brought to prevent a wrong that is apprehended) action may be instituted.

### **Parties to the suit for infringement**

The following persons can sue for infringement of copyright:

- the owner of the copyright or a co-owner,
- the assignee of the copyright,

- the legatee in the case of testamentary disposition of the copyright,
- an exclusive licensee if the owner of the copyright is made a joint plaintiff or defendant,
- in case of anonymous or pseudonymous work the publisher of the work, or
- a non-exclusive licensee provided he joins the owner of the copyright.

### Procedure

The procedure before the court in a suit for infringement of copyrights is governed by the Code of Civil Procedure. The plaintiff has to establish the following:

- he is the owner of the copyright,
- copyright subsisted in the work infringed at the same time the defendant committed the infringement,
- particulars of the alleged infringement,
- what the defendant has done constitutes infringement of the copyright,
- the nature of damage suffered by him or likely to be suffered, if any.

The defendant may set up one or more of the following defenses:

- no copyright subsists in the work alleged to be infringed,
- the plaintiff is not entitled to sue,
- the alleged copyright work is not original,
- the alleged copyright is not entitled to protection being immoral, seditious or otherwise against public policy,
- the defendant's work is independent and is not copied from the plaintiff's work,
- the defendant's action does not constitute infringement of the plaintiffs and is permitted under one or more of the exceptions to infringement,
- the suit is barred by limitation,
- the infringement is innocent and the plaintiff is only entitled to the profit made by the defendants on the sale of the infringing copies.

### Interlocutory injunction

In order to secure immediate protection from a threatened infringement or from the continuance of an infringement, a plaintiff may apply for an interlocutory injunction pending the trial of the action or further orders. An application for such relief is made along with the plaint supported by affidavit evidence. Very often an *ex parte* injunction is also sought.

For obtaining an interlocutory injunction the plaintiff has to establish a *prima facie* case and that the balance of convenience is in his favour and that if the interim order is not granted it will cause irreparable injury to the plaintiff.

### Criminal proceedings

Knowledge or *mens rea* is an essential ingredient of the offence. The offence of infringement of copyright is punishable with imprisonment, which may extend from a minimum period of six months to a maximum of three years and with a fine of Rs. 50,000 to Rs. 2,00,000. A police officer ranked a Sub-inspector or above is given the power to seize without warrant, all infringing copies of the work and accessories for making infringing

copies wherever found, to be produced before a Magistrate. Ordinarily, the police act only when the owner of the copyright or any person who has an interest in the copyright, e.g. licensee, files the complaint. The conduct of the criminal proceeding is governed by the Criminal Procedure Code. A criminal complaint cannot be dismissed on the ground that the dispute is civil in character.

### **Statutory provision**

Sections 63 to 70 of the Copyright Act, 1957 deal with the offence relating to infringement of copyrights. The Court may use its discretion to reduce the minimum term of imprisonment and minimum fine for adequate and special reasons - s.63.

### **Computer programs**

Special mention has been made in the Copyright Act on the copyright piracy in an effort to curb the practice. The penalties have also been significantly enhanced. Any person who knowingly uses an infringing copy of a computer program will be punishable with imprisonment for a term which will not be less than seven days but which may extend to three years and fine which will be not less than Rs 50,000 but which will not exceed Rs. 2,00,000.

Where, however, the computer program has not been used for gain in the course of trade or business the court may, for adequate and special reasons, not impose any sentence of imprisonment and may impose a fine of less than Rs. 50,000 - s.63. ❖

## **LEGAL SNAPSHOTS**

### **Industry Ministry proposes 100% FDI in banks, defence**

The Department of Industrial Policy and Promotion (DIPP) has proposed 100 percent foreign investment in defence. The DIPP has also suggested that the foreign equity cap in the banking sector be raised from 40% to 100%. The DIPP prescription for the new round of liberalisation includes doing away with reservation for public sector units for the manufacture of certain items such as railway transport, atomic energy, and arms and ammunition. The proposal also envisages abolishing the minimum capitalisation norms for foreign direct investment (FDI) ventures in the non-banking financial and film sectors.

The proposal will be taken to the group of ministers set up to review the FDI policy for approval. Once the group gives its nod, the proposals will be presented to the Cabinet for final approval.

The current proposal in respect of the defence sector is subject to certain security conditions. As this is a sensitive sector, the Defence Ministry

could evolve a set of guidelines covering the security aspects for such ventures. ❖

### **Cabinet clears Companies Second Amendment Bill, 2000**

The Cabinet has cleared the Companies Second Amendment Bill, 2000 (the 'Bill'). The Bill was referred to a select Committee. Some of the important recommendations of the Committee are:

- **Change of registered office by a company:** Change in registered office would require confirmation only where the registered office is shifted from the jurisdiction of one registrar to another.
- **Minimum paid-up capital:** The Bill has created entry barriers for formation of companies. It is proposed that private companies should have a paid-up capital of at least Rs 1 lakh and public companies should have a similar capital of Rs 5 lakhs. If companies do not have such minimum capital and do not attain it within the time allowed, their names will be struck off the register. Only

non-profit making companies may be exempted from this provision.

- **Deemed public companies:** The Committee has also made a proposal to remove the provision regarding 'deemed public companies'. The Bill proposed that the relevant provision (section 43A) be inapplicable from the enactment of the provision.
- **Postal ballots:** Items that require a postal ballot should be specified in the provision itself, while detailed rules for conducting postal ballot may be notified later.
- **Audit Committees:** An audit committee is to be formed to consider certain matters relating to finance. If the audit committee's recommendations are not accepted by the Board then it should be communicated to the shareholders. In such a case the view of the shareholders shall be final. ❖

#### **Nariman panel for empowering ICE regulator**

The Nariman sub-group on convergence headed by Fali Nariman has recommended sweeping powers for the proposed Communications Commission of India (CCI), the super regulator for the information, communications and entertainment (ICE) sector. The group has suggested that CCI should have the powers to issue licenses for providing services in the ICE sector. As recommended by the group, CCI should also have the power to levy a license fee, formulate and enforce the licensing conditions and grant the frequency spectrum to the service providers. CCI will be responsible for determining the regulations, codes and technical standards. It shall also determine the tariffs for the various ICE services. ❖

#### **ISD, domestic long-distance telecom charges cut 16-23%**

The Telecom Regulatory Authority of India slashed the domestic and international long-distance telecom charges. The rate cuts range between 16% and 23% for domestic long distance (DLD) and between 16% and 20% for international calls (ISD). The revenue of the state-owned monopoly international telecom carrier Videsh Sanchar Nigam Ltd is likely to go up by about 15% due to lowering in the ISD call rates by up to 16%. However, the revenues of the Department of

Telecom Operations (DTO) may go down by around Rs 500 crores due to the new tariff order. ❖

#### **FDI norms for IT eased**

The government relaxed the conditions for automatic approval of foreign direct investment (FDI) in the Information Technology (IT) sector to simplify the procedure and facilitate greater investment in this sector. New foreign investment proposals in the IT sector will now be entitled to automatic approval irrespective of whether the investment has an existing joint venture or technical collaboration in the country. This implies that IT companies with an existing joint venture or a technical collaboration would henceforth not have to seek a 'no-objection certificate' from their existing joint venture partners/associates to float a new business. ❖

#### **Venture capital funds must register with SEBI to get tax benefits**

According to SEBI guidelines, venture capital funds (VCF) have to register with the Securities & Exchange Board of India (SEBI) to avail of the tax benefits. They shall not get the tax 'pass through' benefits if they are not registered with SEBI.

VCF's registering with SEBI would require a reasonable track record that establishes authenticity of the entity. The VCF's would need to meet all the investment criteria being laid down by SEBI. Funds that register with SEBI will get the benefit of being able to automatically bring in their investments without going through the Foreign Investment Promotion Board, provided their investments are within the overall ceiling fixed for that sector. ❖

#### **SEBI guidelines set Rs 5 crores minimum corpus for VCFs**

The Securities & Exchange Board of India (SEBI) is set to put a minimum investment requirement of Rs 5 lakhs per investor in a venture capital fund (VCF). According to the new venture fund guidelines, the minimum corpus of a venture fund would have to be Rs 5 crores. There would be a one-year lock-in from the date of investment in a venture capital undertaking. ❖

#### **Government withdraws 1995 Venture Capital Guidelines**

The Government has withdrawn the Guidelines for Overseas Venture Capital Investment in India, 1995. The Securities and Exchange Board of India (SEBI) will now be the single point nodal agency for both domestic and overseas venture capital funds. ❖

### **Uncertainty over VCF exit clause**

The Finance Ministry had mandated that venture capital funds would have to exit from venture capital undertakings within a year of an initial public offering in order to avail of tax benefits. The Government has now decided to scrap the restriction. The SEBI regulations have not yet been amended to reflect this change. ❖

### **SEBI asks VCFs to disclose investment strategy**

The Securities and Exchange Board of India (SEBI) has said that venture capital funds (VCFs) - domestic and foreign – will have to disclose the investment strategy they intend to adopt, in terms of the sectors that they would like to invest in and the time horizon of their investments to SEBI at the time of seeking registration. SEBI has done away with the need for these funds to file placement memoranda prior to raising funds from investors. They would now only need to inform SEBI after raising the funds. ❖

### **Court jurisdiction to be decided by place of offence, rules SC**

The Supreme Court has ruled that the place of an offence will define the court's territorial jurisdiction in a case. It was held that, with reference to a criminal offence, the main factor to be considered is the place where the alleged offence was committed. This decision shall block all attempts by a party to an offence to misuse the law by seeking relief from a court, which is favourable to him, but far from the place of occurrence. ❖

### **MFs allowed to invest in venture funds**

The Securities and Exchange Board of India (SEBI) allowed mutual funds to invest in venture capital funds (VCF). An exit route was also provided to the VCFs by allowing them to invest in unlisted shares through the Over the Counter Exchange of India (OTCEI).

A fund's investment in a single company will be limited to 25% of its investible corpus. Moreover, a fund cannot invest in associate companies of the ventures it finances. The VCF will also be eligible to participate in the initial public offering through the book-building route as a qualified institutional buyer.

A mutual fund can invest up to 5% of its corpus in case of open-ended schemes and up to 10% of its corpus in case of close-ended schemes. ❖

### **SEBI sets up sub-group to govern online capital markets**

The Securities & Exchange Board of India (SEBI) has decided to get cracking on enforcement and surveillance in the Internet environment. The aim is to check possible abuse of the medium to perpetrate stock market frauds. A high powered group has been constituted to address the issue, which includes the key issue of bringing investment advisory services offered over the Internet within the ambit of SEBI. The group will look into the issue of preventing frauds on investors through investment advisory portals. ❖

### **FDI regulations for infrastructure projects eased**

The Indian government has simplified the foreign investment norms and procedures both at the central and state levels to encourage private sector investment in infrastructure projects. There was also a proposal to simplify the visa regime for transit transport, and most favoured nation (MFN) treatment and national treatment with regard to duties and taxes. ❖

### **ADR, GDR-linked ESOPs for pharma, biotech sectors also**

The Indian government has liberalised the norms on ADR/GDR-linked stock options by companies in the knowledge-based sectors. The sectors identified for availing of this benefit include information technology and entertainment software, pharmaceuticals and biotechnology. Any other activity within the knowledge-based sector as notified by the government from time to time would also fall under the purview of these norms.

The norms would be available to multi-product diversified companies which do not conform to the criteria of 80% of their turnover from the identified

sectors, if they fulfill the condition of an average annual export earning of Rs. 100 crores from these sectors in the three previous financial years. ❖

### **NRIs/OCBs and foreign companies to be given same benefits**

The Indian government is proposing to bring non-resident Indians (NRIs)/overseas corporate bodies (OCBs) on par with foreign investors by permitting them to fully repatriate profits and capital. This proposal for liberalising norms for NRIs has been made so as to increase the foreign direct investment (FDI) to 10 million annually. The government wants to give an impetus to FDI vis-à-vis foreign currency deposits. It has been recommended that all NRI/OCB investments be treated alike and NRI's be brought on par with foreign investors in case of profit and capital repatriation. ❖

### **Justice Bhagwati gives final touches to key changes in Takeover Code**

The Justice P.N. Bhagwati Committee on takeovers has recommended that, in the event of a change in management, exemption from the Takeover Code be backed by a special resolution with 75% of shareholders voting in favour. Conditional offers will not be permitted. Every open offer must be for a minimum of 20%. Acquirers will be allowed to offer shares of other companies as instruments for acquisitions; and the offer price will be frozen seven days prior to the close of the offer. If the promoters had more than 75% of the holding, then the offer could be for less than 20%. ❖

### **RBI plans loan securitisation norms for banks**

The Reserve Bank of India (RBI) is planning to allow banks to securitise their loan portfolio, with a rider that the banks as originators will have no equity stake in the special purpose vehicle (SPV). The SPV is formed to service the investors of securities which are floated against future receivables arising out of the underlying assets.

The proposed norms will apply in case of non-banking finance companies (NBFCs) and to some extent financial institutions also. By not allowing banks to have a stake in SPVs, RBI is attempting to prevent them from hiving off their non-performing assets (NPAs) under the guise of securitisation, thereby denying them the chance of window-dressing balance sheets. In this regard, RBI will give banks the go-ahead to securitise their loans only if their asset quality is certified by auditors. ❖

### **Government notifies new IT rules**

The rules under the Information Technology Act, 2000 have been notified. The rules lay down the eligibility criteria for granting licenses to certifying authorities. For this purpose, three categories have been created – individual (citizen of India), company and firm. Foreign equity will be allowed up to a maximum of 49%. For an individual, the criteria has been set at capital of Rs. 5 crores and a performance bond or bank guarantee of Rs. 5 crores. For a company to be eligible, it should have a paid up capital of Rs. 5 crores, subject to the condition that it is one year old. A company would be required to furnish a bank guarantee of Rs. 5 crores. In order to be eligible, a partnership firm must be one year old, have a subscribed capital of Rs. 5 crores and a net worth of Rs. 50 crores. ❖

### **Automatic approval for FDI in insurance, 26% cap to continue**

The government has removed the multi-stage clearances necessary for foreign direct investments (FDIs) into the insurance sector. This was done by moving FDI in the insurance sector to automatic approvals. The sectoral cap of 26% would continue to apply to FDI in the insurance sector but clearances from the Foreign Investment Promotion Board would no longer be required. The joint venture insurance companies will henceforth be required to only inform the Reserve Bank of India of the foreign equity participation. ❖

**Meet the A.R.A. LAW Team**

*In each issue, we will be profiling one person who is part of A.R.A. LAW. They will also be sharing their experience of working at A.R.A. LAW.*

**K**rishna Patel obtained her Law Degree from the Government Law College (University of Bombay) in 2000. She is a keen elocutionist and has taken part in debates and Moot Courts at inter-college and state level on topics ranging from constitutional law to personal law, throughout college. At college, Krishna specialised in the law of insolvency, company law, commercial law, intellectual property law and public international law. She joined A.R.A. LAW in June 2000. This is what Krishna thinks about work at A.R.A. LAW –

*Working at A.R.A. LAW is a unique and continuing learning experience. Apart from gaining a foundation in all the fields of corporate law, I have been very fortunate to be a part of the A.R.A. LAW team which stands for and imbibes in all of us professionalism, efficiency, pro-activeness and discipline.*

*What is stressed upon at all times is the need to constantly develop and improve ones legal skills by enhancing legal knowledge, fine tuning research and analytical abilities, and stressing on meticulous and methodical work. Thus what is ultimately encouraged is the continuous desire and initiative to learn!!*

*Over and above all of this, what has been the main ingredient of the overall success of the firm is the A.R.A. LAW team, which continues to strive for the optimum growth of the firm and for maintaining it as the embodiment of legal and professional excellence in the international legal community. ❖*

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