"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

RIGHTS ADVOCACY

Accessible book format for the persons with visual impairments

Mohammad Ataul Karim

INTELLECTUAL property (IP) system often faces ethical conundrums when it comes to serve the poor segment or to secure larger societal goals instead of protecting corporate interests. Likewise, book famine for visually impaired persons or persons otherwise with print disability has been a longstanding pressing issue all over the world. The prevailing copyright system has somehow not been conducive for the reproduction of accessible format of books for them. It is, however, a news of hope that the World Intellectual Property Organisation (WIPO) has adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled in 2013 with effect from 2016. This treaty is unique at least in four aspects. Firstly, it departs from traditional author-centric IP proposition by setting the users-centric approach, namely focusing on the mandatory copyright exceptions and limitations for the persons with visual impairments. Secondly, the treaty is mainly motivated by the broader social goals than protecting the private rights of the authors or publishers. Thirdly, it is the first international IP treaty that explicitly recognises users' rights and sets the primary goal to protect and facilitate the same. Finally, it has explicitly recognised and reinforced the core human rights norms, including the principles of equality, non-discrimination, equal opportunity and so forth while setting its goals.

The Marrakesh Treaty has been devised with obligations for member States to mandatorily set up the exceptions and limitations in their respective domestic copyright laws so that accessible book format can be available for the blind, visually impaired and otherwise print disabled (article 4). The persons who are with visual impairments are called beneficiaries (article 3). Despite the major disagreements between representatives of developed and developing worlds, it is agreed that "literary and artistic works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media" shall be covered under this treaty. The treaty allows the authorised organisations, be it governmental agencies or non-profit organisations (designated by the member State), to make and exchange those accessible book format within its own jurisdictions and territories of other members of the treaty (article 5). Thus, this will create an atmosphere of cooperation and collaboration between the member States of the treaty which will ultimately increase the volume of accessible books for the persons with visual impairments. Most importantly, this will reproduce, distribute, make available to the public of copyrighted works yet will not be deemed infringement because of the exceptions and limitations enshrined in the national copyright law in pursuant to the treaty. Even, this treaty allows the importation of accessible format copies without the authorisation of right holders (article 6). It also addresses the right to privacy issue of the beneficiaries and directs that technological circumvention in any manner must not hinder the enjoyment of rights of the beneficiaries (articles 7-8). The treaty has left the discretionary powers to the member States to adopt and implement own practices in dealing with the significant matters concerning the accessibility of book format for the persons with visual impairments and its implementation mechanisms.

The WIPO has established "information access point" for this treaty to ensure sharing of information by the members and facilitate cooperation among the members. Obviously, it will help in better implementation of the treaty both in domestic arena and across borders. In addition, it has also initiated Accessible Books Consortium (ABC) project to create and make available accessible formats in braille, audio and large print.

In Bangladesh, we have been facing the dearth of accessible format of books or other educational resources for the persons with visual impairments. Many libraries of our educational institutions do have required educational and research materials for visually impaired students and researchers. Moreover, the copyright issues are dealt with in the Copyright Act, 2000 according to which making accessible format without author's authorisation may constitute an infringement (section 71) even though there are certain exceptions and limitations covering 'fair use' or 'educational use', etc. (section 72). Without specific legislative exceptions or limitations in the existing copyright law (which Bangladesh would be able to put in if it joins the Marrakesh Treaty), any endeavours of transforming accessible book format may infringe the original right of reproduction, distribution, making available to the public of copyrighted materials. Considering the significance and benefits of the treaty, many jurisdictions such as the UK, the EU, China, Canada and India, have already become parties to the treaty.

After serious analysis of pros and cons, Bangladesh should consider actively to accede to the Marrakesh Treaty, thereby making necessary legislative changes in the domestic copyright law enabling the accessible format of books or other resources for the persons with visual impairments.

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FOR YOUR INFORMATION

REMEMBERING THE VICTIMS OF TERRORISM

THE primary responsibility to support victims of terrorism and to uphold their rights rests with the States themselves. The United Nations (UN) has been working to provide resources, mobilise the international community and better address the needs of victims of terrorism by sensitising the States. The UN has an important role in supporting the States to implement Pillars I (addressing the conditions conducive to the spread of terrorism) and IV (measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism) of the UN Global Counter-Terrorism Strategy through standing in solidarity.

The General Assembly, in its resolution of 2017, established 21 August as the International Day of Remembrance of and Tribute to the Victims of Terrorism in order to honour and support the victims and survivors of terrorism and to promote and protect the full enjoyment of their human rights and fundamental freedoms. The Resolution built on existing efforts by the General Assembly, the Commission of Human Rights and the Human Rights Council to promote and protect the rights of victims of terrorism. This proclamation reaffirmed that the promotion and the protection of human rights and the rule of law at the national and international levels are essential for preventing and combating terrorism.

This year, the second commemoration of the International Day of Remembrance of and Tribute to Victims of Terrorism) will focus on the resilience of victims and their families.

COMPILED BY LAW DESK (SOURCE: UN.ORG).

LAW VISION

Non-compete clause: Can employer impose restraint upon former employees?

Fahad Bin Siddique

USUALLY, employers use the post-employment restraint clauses or non-compete clauses to defend their business interests after an employee departs their company. Non-compete clause is notably added in the employment contract seeking to refrain an employee to compete or explore employment in the same type of business for a certain period of time and within certain geographical limits after leaving the company. Since non-compete clauses are very much conventional in employment contracts of our country, companies do not find difficulty with getting their employees to sign this type of agreements.

The employment contracts of employees are governed by the Contract Act 1872, and section 27 of this Act declares all the agreement in restraint of trade, lawful profession or business as void, except in the cases specified in the exception. Although an agreement of service by which an employee ties himself during the period of his employment, not to compete with his employer directly or indirectly, is not in restraint of trade, profession, or business.

The contract of service may have a negative clause by which employee may be restrained from participating in any business in direct competition with that of his/her employer during the employment period. In the case of *Niranjan Shankar Golikari* v *The Century Spinning and Mfg. Co. Ltd.* (1967), the Supreme Court of India ruled that "a contract of service preventing an employee from working elsewhere during the course of employment, is not void. The employee shall abstain from taking up other employment for the remainder of the fixed term period." In another case of *Charlesworth* v *Macdonald* (1898), the Court explained, "an agreement of this class does not fall within section 27. If it did, all contracts of personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for anyone else than the person with whom he so agrees." However, it is to be noted that, the decision of these cases should be considered as an exception of section 27 of the Contract Act 1872.

Nevertheless, an agreement of service which restrains an employee from competing with his employer after the end of the employment period may not be allowed by the court. While, post-employment restraint is assumed to be unenforceable and void under section 27 of the Contract Act 1872 unless the employer who is looking to enforce it, it is enough competent to illustrate that the non-compete clause was reasonable and logical at the occasion when it was agreed. In the case of *Buckley* v *Tutty* (1971), the High Court of Australia states that, "Unreasonable restraints are unenforceable as it is contrary to public welfare that a person should be unreasonably prevented from earning a living in whichever lawful way he chooses and that the public should be unlawfully deprived of his services."

A non-compete clause should not be used as a weapon to impose a restraint upon former employees and to protect the employer from the competition. Although, if the employee holds confidential information or has personal contract with employer's customers, then the employer is entitled to get reasonable protection against exploitation of trade secrets [*Younger LJ in Attwood* v *Lamont* (1920)]. To establish the reasonableness of the non-compete clauses, the employer needs to prove the legitimacy behind the restraint, and the period of restraint should be measured in a sensible manner. The English Court observed in

the case of *Herbert Morris Ltd* v *Saxelby* (1916) that, "a restrictive covenant will not be enforced unless the protection sought is reasonably necessary to protect trade secrets or to prevent some personal influence over customers being abused in order to entice them away."

Recently, the Federal Court of Australia held the post-employment restraint as reasonable and enforceable in the case of *HRX Holdings Pty Limited* v *Pearson* (2012). The Court identified some factors upon which the success of the enforcement of post-employment restraint depends. According to the Court, the employer should conduct a formal discussion with the employees regarding non-compete clause and monetary or other compensation, which will be provided. Prior to signing the contract obtaining legal advice from experts in relation to the restraint is vital because it shows that the employee took enough time to think and the employer did not put stress upon him/her to sign the contract. Additionally, the non-compete clause should be carefully worded, and reasonable restrictive provisions are required to draft an employment contract.

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YOUR ADVOCATE

SERVICE OF NOTICES BY REGISTERED POST

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies. Our civil and criminal law experts from reputed law chambers will provide the legal summary advice.

Query

I am a tenant of a commercial plot in Tejgaon, I have recently received a notice of termination of my lease from my landlord through registered post. However, upon reading the notice, I found out that the notice was issued one month ago but I received it just recently as I changed my office address and it took a while for the people at my previous address to deliver it to me. Hence, I would like to know about the law relating to the service of such notices.

Zafar Ahmed, Dhaka.

Response

Thank you for your important query. Issues related to postal delivery are very common but it is merely analysed as to the importance of the delivery and receipt of notices, letters, etc. and their impact on crucial legal matters. Hence, in order to answer your queries, it is necessary to look into the legal provisions regarding the said matter. As per Section 27 of the General Clauses Act 1897, "[w]here any [Act of Parliament] or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Thus, the law above delineates that in order for a service [of notice, letter, etc.] to be effective, proper addressing, pre-payment and postal by registered post must have taken place, and it shall be deemed to have been effected at a time expected to have been delivered in the ordinary course of posting. However, the question as to determining the time of delivery is to be established. Therefore, section 27 is a presumption and this presumption under section 27 is rebuttable and the burden of proof lies on the addressee (in the given scenario, you) of the notice. Note that this legal provision does not exclude evidence in rebuttal of the presumption.

Furthermore, as per section 114 of the Evidence Act 1872, "the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Hence, in the absence of evidence in rebuttal, the fact is proved and no other evidence is necessary to prove it. You may, however, prove with burden of proof lying on you, that it never reached you. If you deny

its receipt, or there is evidence in rebuttal, the Court may even then not accept it as being sufficient to rebut the strong presumption. As per *Nurul Islam (Md)* v *Md Ali Hossain Miah being dead his heir Amir Hossain* 50 DLR (AD)114, notice sent to the tenant by post at the address of the suit premises having been returned unserved with the remark of the postal authority 'left' was presumed to be good service. As per *Dr. Jamshed Bakht* v *Md Kamaluddin* 1981 BLD 97, mere denial of the tenant that he did receive the notice or that the notice was not tendered to him is not sufficient to rebut the presumption. Furthermore, the Supreme Court has held that where the landlord sent a notice to the tenant to terminate the tenancy, through registered post to the correct address, he must be held to have complied with the statutory requirement and the notice will be valid even if it is returned unserved. However, note that mere dispatch of notice does not amount to 'giving' of notice. When a notice is sent by registered post it should be delivered personally to the lessee or to one of his family or servants.

Where a postal notice is returned with the endorsement 'refused' on it, there are a number of authorities in favour of raising a presumption and holding that a registered cover had been refused by the addressee, and this presumption should normally be drawn. Furthermore, section 27 would apply to the service by hanging and affixation, provided it is established that the relevant place was the ordinary place of residence or last known address of the opposite party. On the other hand, if a document is properly addressed, pre-paid and sent by registered post, a presumption of due and proper service could be raised by the landlord.

Although, if the notice reached your address in the proper time, it is supposed to have been served, it must be borne in mind that this section does not lay down any inflexible or conclusive presumption as to service of notice by registered post. What it states is that the court might presume service to have taken place within the ordinary course of post, if those circumstances were present, unless the contrary was proved.

The above is subject to any other contrary provision in the lease agreement, e.g. if the lease agreement states that the notices must be given in person or by email only, then registered post may be not the appropriate method of service.

I hope the provided information shall be able to aid you in finding a solution to your problem.