LAW WATCH

Who owns what?

The copyright of judicial opinions

In performing this sacred duty, a judge of the court is to undergo a long-drawn intellectually rigorous process. The duty of a judge is to discover the newer ways of interpreting the statutes in an attempt to deliver justice to the people. Therefore, the use of creativity and application of innovative thoughts in interpreting the law is now a usual judicial practice, and this often produces an original work, i.e., enunciates a principle and supplements what is there in the statutes.

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More often than not, the statutes remain silent or they do not have enough words to meet the requirements of establishing justice. What could a judge do at this situation? As the common law dictates, when there seem to be no letters of law, still there is a law and that is the law of conscience and equity. It is said that a crime cannot go unpunished and the justice cannot be undone even though there is no law or rules or regulations in writing. The judges of the courts are hereby destined to find out the ways to ensure that the justice is done; more precisely, "justice should not only be done, but also seen to be done."

In performing this sacred duty, a judge of the court is to undergo a long-drawn intellectually rigorous process. The duty of a judge is to discover the newer ways of interpreting the statutes in an attempt to deliver justice to the people. Therefore, the use of creativity and application of innovative thoughts in interpreting the law is now a usual judicial practice, and this often produces an original work, i.e., enunciates a principle and supplements what is there in the statutes.

In this sense, the judicial opinions are creative solutions to specific problems of the society like the solutions to various sets of technological problems in the patent system of the intellectual property law regime. This leads to raise the most possible question, i.e., can the judges of the courts claim the copyright protection of their judicial opinions? If the lectures and speeches, fixed in form, of the law professors are copyrightable, why should not the copyright of judicial opinions be protected too?

Nearly two centuries ago, Henry Wheaton, a prominent lawyer and the third reporter of the decisions of the Supreme Court of the United States of America (USA), claimed the copyright protection for the judicial opinions, and hereafter, sued Richard Peters, an American attorney and the fourth reporter of the court's decisions, for infringing the copyright of a law digest. In *Wheaton* v *Peters*, 33 US (8 Pet) 591 (1834), Wheaton argued that 'the judicial opinions must have belonged to someone because they were new, original, and much more elaborate than law or custom required and the judges of the courts are authors of the judicial principles as such copyrightable'. In the first ruling on the copyright law in the USA, the court pronounced that '[i]t may be proper to remark that the court is unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right.'

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Around half a dozen cases following the *Wheaton* decision were pronounced by the Supreme Court of the USA regarding copyright-ability of the courts' decisions and legislation. In the wake of the 20th century, the USA enacted its Copyright Act 1909 declaring that no one owns the judicial opinions and legislations.

The Berne Convention 1886, an international treaty dealing with the protection of literary and artistic works, leaves its state parties at liberty to legislate regarding the ownership of the judicial opinions and laws.

"The government edicts doctrine", a century-long legal principle, evokes that the judges, as vested with the authority to make and interpret the law, cannot be the author of the works they prepare in the discharge of their judicial duties; in the same way, the legislators, acting as such, cannot be either. This has played a vital role in shaping the nation-states' copyright laws.

On the eve of the Covid-19, this doctrine has been discussed elaborately in *Georgia* v *Public.Resource.Org, Inc.* 140 S. Ct. 1498, 2020. According to this doctrine, no public officer who is salaried and paid by the government can claim the copyright of works they prepare and discharge in performing their official duties. The spirit of this doctrine hits the works in fixed form of the professors of government colleges and public universities during performing their duties, but the Berne Convention and the Copyright Act 2000 of Bangladesh allow the lectures and speeches of the academics to be copyrighted, while the latter, i.e. the 2000 Act excludes the judicial opinions and pieces of legislation from the protection of copyright. This exception within the spectrum of the copyright law might make judges, legislators and public officers insecure regarding their intellectual work and contributions. Probably, their hearts bleed when they hear their intellectual works remain the copyright free. It may as well seem paradoxical when one ensures the people's copyright and prevents the infringement of the same, there is nobody and no law in the world to protect his/her copyright over his/her intellectual creation.

Here is a solution that judges, legislators and public servants may consider to protect their intellectual work. The Berne Convention, the USA Copyright Act of 1976, and the Copyright Act of 2000 of Bangladesh unanimously admit and ensure the copyrightability of any book either fiction or aesthetic. Therefore, if a judge writes a book compiling his/her judicial opinions or weaves a memoir filled with official experiences and expressions of work all through his/her life, that may be copyrighted; and he may sue if anyone infringes his/her rights.

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RIGHTS ADVOCACY

Pornography and violence against women

The law defines "identity information" as "external, biological or physical information or any other information which singly or jointly can identify a person or a system". The DSA has provisions which confer upon the Director General of the Digital Security Agency the authority to request the BTRC under section 8(1) for removal of, or for blocking access to any information which hampers digital security.

BY LAW DESK

Earlier this year, research report titled "Impact of easy accessibility of pornography on the internet and its relevance with violence against women and girls in Bangladesh" was published by Manusher Jonno Foundation (MJF). The research found that 82 percent of the respondents' considered increased viewing of pornographic content causes increase in the incidence of violence against women and girls. The research stated that derogatory portrayal of women in pornography strengthens prejudicial perceptions of 'good' girls and 'bad' girls, and the derogatory treatment of women shown in pornography is often reproduced in real life. The research also found that although porn websites have been blocked in Bangladesh, the production of local alternatives for pornographic content, which are widely circulated on popular platforms, has gone up.

Bangladesh has in place the Pornography Control Act of 2012 which, in its preamble, identifies pornography as a cause for depreciation of social values and incidence of various kinds of offences. The 2012 Act makes it an offence to produce pornographic content; to enter any agreement with any men, women or children for the production of pornographic content; to force or induce any men, women or children to participate in any pornographic content; to capture any image or video of any men, women or children without their knowledge, for production of pornography. The Act also penalises the use of pornography to defame a person or to extort money through coercion, and penalises the supply of pornographic material through digital media. However, the law does not contain any provision which can be used to remove, or prevent further distribution of any pornographic content upon complaint of the victim. In Bangladesh, the publication of intimate videos or images as a form of revenge is widely practiced; and under the current law, such practice can be penalized. However, further reproduction of such content cannot be restrained. Certain provisions of the Digital Security Act (DSA) of 2018 may also be of relevance.

The DSA has the provisions for punishing the publication of false information to malign a person. It also penalises the unauthorised collection or distribution of identity information, which may be of relevance when individuals are recorded without their knowledge, or if information from their digital devices or social media accounts are distributed without their authorisation, for production or distribution of pornographic content. The law defines "identity information" as "external, biological or physical information or any other information which singly or jointly can identify a person or a system". The DSA has provisions which confer upon the Director General of the Digital Security Agency the authority to request the BTRC under section 8(1) for removal of, or for blocking access to any information which hampers digital security. This can broadly be interpreted to cover the offences delineated within the DSA, and may include unauthorised distribution of intimate images or videos. Under section 8(2), the law enforcement agencies too may request the BTRC, through the Director General of the Digital Security Agency, for removing/blocking access to any information which "hampers the solidarity, financial activities, security, defence, religious values or public discipline of the country or any part thereof, or incites racial hostility and hatred" – the distribution of pornographic content does not clearly fall within any of these grounds.

While the Pornography Control Act of 2012 and the Digital Security Act of 2018 may be employed to reprimand production and distribution of pornographic content, neither law fully reflects an understanding of how pornography can be linked to violence against women. For example, being coerced into filming pornographic material is penalised, but there are no provisions in the law for the protection of the victim. Furthermore, pornography may be linked to intimate-partner violence, where a partner may be coerced to perform certain derogatory sexual acts and to be recorded. These are acts of sexual violence but not properly addressed in the Pornography Control Act of 2012. The Domestic Violence (Prevention and Protection) Act of 2010 broadly defines "sexual abuse" as "any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of the victim" which may cover such acts. However, the law is only applicable to partners within marriage. Even for victims within marriages, the Domestic Violence (Prevention and Protection) Act of 2010 does not make sexual abuse an offence punishable with imprisonment or fine and instead provides for certain protective orders. The law is largely underutilised and victims are not likely to come forward with allegations of such abuse.

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The taboo around discussions on sexual abuse makes it far less likely that the existing laws will be utilised to provide remedy to victims who have been subjected to violence/have suffered damage due to pornographic content. At the same time, a blanket ban on pornography without sufficiently incorporating sexual education within the education system would not be efficient in curbing the demand and distribution of pornographic material.