LAW OBSERVATION

Feasibility of Data Protection under the Copyright Act 2023: A New Approach?

Copyright protection is given to database and digital work under section 14 of the Act and as per section 26, such protection will extend to 60 years after first publication of the digital work.

MOZAMMEL HOQUE

In order to get intellectual property (IP) protection, a product ought to be a creation of mind. In this regard, at times, a product must also fulfil other criteria, such as novelty, utility, originality etc based on the kind or manner of IP protection. Raw data does not invite IP protection as it is not creation of human mind. On the other hand, public interest supports that raw data shall be kept open to all as opposed to anything that shall be protected through IP mechanisms. However, business data differs from raw data in many respects. Business data helps analyse the market and take decisions on consumers and other relevant market aspects. Therefore, those data ought to be kept out of reach of the competitors, thereby indicating that business data does have economic value. Similarly, human efforts go into transforming raw data into business data, such as data compilation, data analysis, creative arrangement, annotation and selection of data, database etc.

Copyright mechanisms within IP law is used to protect data compilation in many jurisdictions. Normally two systems are dominant. One is the EU model of database protection where database is protected through copyright; and if data compilation does not fall under the definition of database but involves human efforts and creativity, then protection is rendered through *sui generis* system. The other system is to bring database and data compilation within the scope of literary works and to render protection if data compilation meets other conditions of copyright such as originality, expression.

The Copyright Act, 2023 is a new legislation that deals with copyright matters in quite a sophisticated way by repealing the earlier Copyright Act of 2000. The Act of 2023 incorporated the EU model of data protection (though not entirely). The Act includes database as copyrightable work under section 2(11)(h). The term 'database' is defined under section 2(16) as collection of original works arranged in electronic or any other methodical way which is the expression of the talent of the creator, and which is accessible through electronic or other means. The definition stipulates three elements of database; firstly, it is a collection of independent works in electronic or other methodical way; secondly, the expression of talent of the creator is evident in the work; and thirdly, the work is accessible through electronic or other means.

Definition of database under the Act is less inclusive than that of the EU model because the EU definition considers collection of independent works, data, or other materials within the scope of database whereas the Act sees database as collection of independent work. For this reason, a creative data compilation with business value will potentially be out of the scope of database. Again, the Act has taken a new approach to deal with the work in digital arena. The repealed Copyright Act of 2000 followed the Indian approach of bringing digital work within the purview of literary work but in the new Act, digital work is independently defined and made copyrightable with some special provisions.

Section 2(10) defines information and technology oriented digital work as a creative work made or used by computer, mobile phone, other digital machine by processing data and information for the purpose of obtaining specific results. Here digital work is widely defined that will include all digital machine oriented creative works such as software, data compilation, data analysis, creative arrangement, annotation, and selection of data etc.

Section 2(23) states that owner of the database and digital work will be the creator of the work which can be both natural and juristic persons. Copyright protection is given to database and digital work under section 14 of the Act and as per section 26, such protection will extend to 60 years after first publication of the digital work. Owner of the copyrighted work gets right to sue for compensation, injunction, and other civil remedy in case of infringement of copyright. District Judge court is set as forum to seek the civil remedy for copyright infringement and section 100 provides for a penalty up to four years of imprisonment or fine up to TK four lacs for sale of copyrighted digital work for profit. If not for profit, the penalty will be imprisonment up to three months or fine up to TK 25 thousand. For each repeated offence, the offender shall be liable to imprisonment up to five years or fine up to TK 5 lacs.

The writer is Assistant Judge, Bangladesh Judicial Service.

LAW ANALYSIS

Rethinking Affirmative Actions in BANGLADESH

NOOR AFROSE

The concept of affirmative action, also known as positive discrimination encompasses a range of policies and practices implemented by the government or other organisations to address the inadequate representation of specific groups of people. The issue of affirmative action has been discussed within the realm of constitutional law, giving rise to a continuous debate over the course of several years. There exists a faction that endorses affirmative action, contending that it serves as an essential element to the principle of equality. Conversely, another faction considers it a form of reverse discrimination and is skeptical about the efficacy of affirmative action measures in eliminating inequality.

In Bangladesh Constitution, the inclusion of affirmative action is rooted in the principle of 'compensatory' or 'remedial' discrimination. This principle endorses the implementation of these measures to tackle existing inequalities that stem from both past discrimination and present prejudices. Articles 28(4) and 29(3) allow for special consideration for women, children, and any backward sections of citizens as historical evidence underscores discrimination against such groups, resulting in societal inequalities.

However, a notable issue with affirmative action in Bangladesh is that our constitution does not expressly enunciate this principle with respect to the private sector. Article 29(1) of the Constitution prohibits discrimination in the service of the republic. Furthermore, Article 29(3)(a) speaks about making of special provisions to ensure adequate representation of any backward section of citizens in the service of the republic. The fact that the Constitution does not expressly envisage incorporate affirmative

actions for the private sector further contributes to its limited efficacy in empowering marginalised groups.

Also, legal scholars have raised concerns regarding the potential of arbitrariness in the preference system if a specific reasonable classification approach is not established. The example of India can be cited in this context. In the case of *R.K. Garg* v *Union of India* (1981), the Supreme Court ruled that while the principle of equality in the Indian constitution prohibits discriminatory legislation, it does allow for a reasonable classification of objects, persons, and transactions to meet specific legislative objectives. In the case of *Saurabh Chaudri.* v *Union of India* (2003), the Supreme Court of India established two conditions for reasonable classification. The court held that the classification should be based on clear differentiating factors that separate individuals or things that are grouped from those that are excluded from the group. Additionally, there should be a connection between the purpose of the action and the criteria used for classification. If a classification made by the legislature lacks reasonabeness and justification, it should be deemed discriminatory.

Moreover, a significant development in the United States' jurisprudence was that the courts developed the 'strict scrutiny' test, which permitted the use of racial categorisation only in cases where there were 'compelling governmental interests' and specific objectives. Recently, in *Students for Fair Admissions, Inc.* v *President and Fellows of Harvard College* (2023) resulted in the prohibition of race-based affirmative action programmes in the context of university admissions. Nevertheless, it is important to note that the normative efficacy of the test may be called into question due to the ideological gap among justices of the US Supreme Court (Republicans viewing it as discrimination and Democrats as promotion of substantive equality).

In essence, the objective of an affirmative action program should be to enable and promote transformation, rather than impede any potential development. Therefore, affirmative action must be implemented both in the public and private sectors in our country. And lastly to prevent arbitrary decision-making in affirmative action policies, it is imperative to establish nuanced reasonable classification tests.

The Writer is Official Contributor, Law Desk, The Daily Star.

RIGHTS WATCH

Our Rights to Assemble and Protest

SADMAN YEASAR ALAM

Public assemblies play a crucial role in holding the authorities accountable and to voice demands on issues that matter. While it is important that a balance be struck between citizens' right to assemble and other counterbalancing interests, the very essence of the right to assemble ought to be safeguarded. Section 29 of the Dhaka Metropolitan Police Ordinance 1976, and section 144 of the Code of Criminal Procedure 1898 (CrPC) grant the police commissioner and other authorities the power to impose restrictions on public assemblies if deemed necessary. The central question here is to what extent can the authorities exercise this power.

Article 37 of the Constitution grants citizens the right to assemble and participate in peaceful public meetings and processions without arms. However, Article 37 also allows the government to impose reasonable restrictions on such gatherings in the interest of public order or public health. In the case of Oali Ahad v Govt. of People's Republic of Bangladesh (1974), one Oali Ahad, a political activist from Bangladesh, challenged an order issued under section 144 of the CrPC. This section allows certain authorities to issue orders to prevent disturbances of public tranquility and other similar situations. The petitioner challenged the order, arguing that it violated his fundamental rights, specifically the right to peacefully assemble and participate in public events, as Article 37 of the Constitution guaranteed. He argued that the order, which banned the exercise of these fundamental rights for an indefinite period, was unreasonable and not in the interest of public order.

The High Court Division (HCD) of Bangladesh held in favor of the petitioner, saying, "It would be inconsistent with this expression of the intention of the Legislature that a Magistrate should pass under this section an order meant to have more than a temporary duration...such restraint ought clearly not to be indefinite in terms or to have effect beyond the urgency which it was intended to provide for."

To assess the reasonableness of restrictions on these rights, the court highlights the importance of establishing a clear connection between the restricted acts and potential harms to public peace. Additionally, restrictions under section 144 of the CrPC and similar provisions restricting public gatherings must directly relate to maintaining public order.

The HCD also stresses the need to balance the fundamental right to assemble and to maintain public peace. To assess the reasonableness of restrictions on these rights, the court highlights the importance of establishing a clear connection between the restricted acts and potential harms to public peace. Additionally, restrictions under section 144 of the CrPC and similar provisions restricting public gatherings must directly relate to maintaining public order. They should not be based on hypothetical or remote considerations. Unless there is a clear and direct connection between the restriction and the preservation of public order, such limitations will be unreasonable and against the interests of public order. Lastly, the judicial observation clarifies that the power exercised under section 144 ought to be a judicious one, subject to scrutiny for its necessity, effectiveness, and scope when applied.

The importance of striking a balance between safeguarding citizens' fundamental rights and maintaining public peace is crucial. The case of Oali Ahad exemplifies the importance of this delicate equilibrium, particularly in the context of public gatherings and assemblies. It underscores that while authorities possess powers to restrict such gatherings in the name of public order, they must be firmly grounded in concrete evidence of an immediate threat rather than vague or hypothetical concerns.

The author is a student of Law, North South University.