

**October 2013**

# *Ensouth*

**The E-magazine brought to you by**

***N South***

**Advocates**

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## **Managing Partner's message**

India continues to experience tumultuous times! For my money though, what matters is not that the dollar went up but that it wasn't only Mr. Om Prakash Chautala who went down. Mr. Lalu Prashad Yadav now joins him. That's two Chief Ministers in jail in a society who's "system" does not work!

At this defining moment, for you to hear the argument as the first piece in our Video Section that **Corruption is necessary for India democracy** may push the boundaries of credibility. Still, there is a method to this ironic madness and the moral construct that sustains widespread corruption needs to be addressed. In the next video, we approach the same issue from a different viewpoint, now arguing that our experience with economic development lies at the heart of the answer to **Why is India so corrupt?**

Moving to our Comment Section, we have two legal insights for you. First, in **Are you a Corporate Pirate?**, we caution you on the IPR laws you may be breaking and the consequences that flow from routine corporate activity. Next, in **Bleeding by arbitration**, we demystify the hoopla around alternative dispute resolution and share with you the plain truth about arbitration as a remedy for your legal ills. Finally, in the last of our Comments, we return to the topical and the issue we addressed in the Video Section. In **IPL, Natural Disaster and Morality**, we revisit the problem inherent in the Indian view of what constitutes moral behavior.

Happy Reading

Ranjeev C Dubey  
Managing Partner

## **Section I - Videos**

### **Video: Corruption is necessary for Indian Democracy.**

On how the dominant Indian moral construct supports corruption. This video sets out reasons for corruption being so rampant throughout the country.

The Video may be viewed at:

<http://www.youtube.com/watch?v=yIVPDDkvcVY>

### **Video: Why is India so corrupt?**

The current state of India's democracy makes corruption inevitable. This video sets forth the point that we cannot evolve away from our scams without dealing with certain development imperatives first.

The Video may be viewed at:

<http://www.youtube.com/watch?v=llQyhWqh5m8>

## **Section II – Print Media**

### **Fine Print: Are you a corporate pirate?**

**What is an infringement of Copyright and the consequences that flow from it?**

**Ranjeev C. Dubey**

We live in times where you need to do very little to be accused of a serious crime. For example, if you are one of the overwhelming majority of jet set corporate hot shots who cut-copy-paste to save time as they move the decision making process through the corporate jungle, the chances are pretty good that you have infringed on someone's copyright. The real questions are these: when is this cut-copy-paste artistry illegal and what consequences flow from doing it. To get a sense of perspective into this, I will answer the second question first.

The consequence can be severe. If you cause the owner of the copyright to lose money, you have to compensate him for it. In countries where damages are awarded to make an example out of the law breaker and long prison sentences are imposed, this is a huge deal. To understand how huge, recall the case of Aaron Swartz who was arrested by MIT police because he downloaded academic articles from the JSTOR digital library and then got hit with charges carrying a cumulative maximum penalty of a million dollars in fines and 35 years in prison. Two years after his arrest, on Jan 11, 2013, he hanged himself. When you cut copy paste, you don't know whose copyright you are infringing. What happens to you on your next trip to America may come as a surprise to you.

In India, no one cares half a rat's hind about civil cases because courts only compensate for actual damage caused which is likely to be limited at best. The criminal law consequence is more serious. If you knowingly infringe or abet the infringement of a copyright in a work, you can be punished with jail for a period not less than six months but for as much as three years and you could also be ordered to pay a fine of between Rs. 50k up to 2 lakhs.

Okay, now that I hopefully have your attention, let's talk about what is an infringement of a copyright! Short answer is this: it is illegal to copy anyone's copyright material at all except when it constitutes what is, in law, called "fair use". It's a simple principle. If you take my book and quote something in it on Facebook (please do!), clearly, you are fairly using it. If instead, you extract an entire paragraph and use it in another article you are writing, so long as you acknowledge my authorship, that is okay too. But if you photocopy entire chapters and start circulating them to your friends, you are skating on very thin ice. How many of us have photocopied entire reports from experts and used them as supporting material for presentations to boards, in training workshops, or as reference material for an upcoming event? Maybe you have done this at an event that

had a participation fee: like a conference you were addressing to build your brand. Do you think that you have no problem because you are just the talking head and it's the organiser that is collecting participation fees? Houston, do we have a problem?

Ask poor old Rameshwari Photocopy Services because he thought he had the bases covered. This guy was licensed by the Delhi School of Economics to photocopy "course packs" which included selected chapters from a number of copyrighted textbooks. The Universities Presses of Oxford and Cambridge was not amused at all because their customers were buying these packs, not their text books. Rameshwari tried to hide behind his D School license. D School in turn threw Rameshwari to the wolves, saying maybe they made a mistake but they are really good guys and never intended to violate any laws. Lost in all this was any right that students may have to get a decent education at a half decent price. Unfortunately, this kind of argument doesn't fly for a corporate honcho projecting himself to his superiors, colleagues or community so I will kiss it goodbye right here. But there is data here you could use. This case was last heard on May 8th, 2013. The copyright owners have argued that Rameshwari needs to take out a reprographics license from the Indian Reprographic Rights Organisation (IRRO), a body of publishers, which is generally computed as a percentage of revenue. You could do this too, in which case, you can photocopy upto ten per cent of a text book. There are a bunch of other limitations attached to this license so you have to figure if you can take advantage of this or not. I would doubt that you can: the corporate environment doesn't give you time to get licenses so it's back to fair use for you.

I will summarise fair use law for your reference. If you are caught copying someone else's work, the court is basically going to ask three questions: (a) what was the purpose and character of the use, (b) how much of the copyrighted work did you use? and (c) what is the impact of your activity on the potential market where this work is sells. These are subjective tests: results vary with the personality of the court hearing the case, but on one subject, we can all be clear: if you copy parts of my book to sell its chapters to someone else, the knives are out for your throat. No, I need to qualify that. There is an exception. In the 2011 decision of the Delhi High Court in Super Cassette Industries, the Delhi High Court said that commercial use of a copyrighted work does not itself make it unfair. There's has to be more. That more is substance.

The truth is that many cases of copyright violations are what lawyers call *deminimus* which is gobbledygook for "the minimum". When you make photocopies of a cartoon and distribute it to friends at the Old Boys School meet, or when you burn a DVD of "Gangs of Wassaypur" and give it to a friend, or when you take a picture of Atul Bakshi's next glass installation and use it as a wall paper on your sexy new mobile, it's not that you are not violating the owners copyright. You are, but the law still won't come looking for you because of the *deminimus* principle. The maxim basically means that some violations are chickenfeed and the law will not resolve petty disputes.

In recent years, with the rising cases of copyright violations, this principle is acquiring huge importance. Courts now test the facts against five criterion to decide whether your actions are *deminimus* or not: (a) what was the size and type of the harm, (b) what is the cost of adjudicating it, (c) what is the purpose of the violated legal obligation, (d) what is the effect on the legal rights of third parties, and (e) what did you intend when you violated this copyright. For sure, we are back in subjective country so being careful is the smart play in town.

Rajshree Chandra, author of the seminal work 'Knowledge as Property' and one of India's leading conscience keeps in the IPR space has, in the context, drawn attention to the larger philosophical issue blowing in the wind. She believes that laws are always open to moral disputes but she argues that laws must serve both private interest and the purpose of social justice. In her view, when the right to private Intellectual property (and bear in mind that property is at best a very weak right in India) is used to defeat social good as in health and education, the balance every society should achieve between private and public interest is tilted too far over. What is the social utility of IPR protection when it prevents the dissemination of knowledge? She argues that if IPR laws do not answer this basic question, they abdicate all moral responsibility. The answer seems simpler when you look at poor students thirsting for a realistically priced education. What would you say when you look instead at corporate hotshots preparing presentations?

Frankly, I don't see the distinction too well. We have been so indoctrinated into the absolutely inviolable sanctity of IPR that we don't stop to ask basic questions; questions about the ever greening of patents so that companies can rip off terminally ill patients; questions about movies that want five rupees from each impoverished farmers to provide a couple of hours of escapist fare so that producers can pay Crores to artists who star in them; questions about being forced to buy ten songs in a compact disc because you want just one. We should ask such questions, whatever our answers. India needs trained manpower. If you take someone's course book and photocopy part of it to train up a couple of hundred youngsters so that they can contribute to a growing economy, you would be entitled to ask the law to weigh the youngsters' right to this education against the loss to the owner instead of protecting the owner and the devil take the rest.

But that is not where the law is today. Given where the world is headed, that's not where the law will be tomorrow either. Where does that leave you with your 'cut copy pasting'? Not in a very good place methinks. If you are making marginal use of a small proportion of material to benefit a small audience in a more or less private clubby environment, I'd say that you are pretty okay. When you take the same material and start to train up rather larger batches of kids within your organisation, I'd say you were running close to the edge. But when you take more than a little of the same material and start to hand it out at paid conferences and workshops, I'd say you had better run and take cover.

### **Fine Print: Bleeding by arbitration**

**Arbitration in India should not be run using domestic retired judges and without a strong arbitration secretariat with clear rules supervising procedures.**

**Ranjeev C. Dubey**

The legal world has, like every other, an ever changing flavour of the month. One that has endured is called Alternative Dispute Resolution. This means that if you had your butt kicked and need help, or if you want to kick butt, you don't go to court: you go to a private dispenser of justice. Considering that the courts in India are frequently all that lies between you and your utter and irredeemable descent into anarchy, should you be paying the slightest attention to the idea that justice needs privatising? The answer is a lot more complicated than the question.

So back to first principles: what is the case for using arbitration to settle disputes? If you ask a lawyer, you will hear variations of some of the following. It is cheaper because you don't pay court fees; it is quicker because you get frequent dates of hearing at convenient times; you will; get better results because you can pick the right and relevant expert as an arbitrator; and finally, it's simpler because formal court procedures and you don't get stuck with a lot of procedural stuff. That is an impressive list. It's also largely balderdash in the *desi* context!

Why sayeth I? I am going to put my client's money where my mouth is with five examples, all culled from my own law practice so each is true (if only because you can't make this stuff up!). In arbitration under Indian law between a Telecom PSU and a service provider featuring a Rs 300-crore claim, we had one Supreme Court judge as arbitrator. Each party spent about 30 lakh in fees but we had 60 sittings over half a decade and then the arbitrator died. It took all of 15 years to see the end of this one, in which time I went from being the *bastavakeel* (the bag carrier!) to the managing partner of a law firm! Here's another case. In a Rs 20-crore arbitration under Indian law between a leading real estate developer and the owner of a commercial plot of land, we had three judges as arbitrators. Seven years and 40 hearings on, each party has spent Rs 20 lakh in costs, one judge became increasingly deaf and resigned and the saga continues.

For my domestic arbitration case, I take you to a wildly exaggerated Rs 250-crore claim between an Indian and a European joint venture partner pertaining to a company with a capital of some 3 Crores! Over six years, the three judges had 103 sittings to get to the final arguments before award stage. At this point, they allowed an amendment which increased the claim to 450 Crores and the witness statement procedure started

again. In this period, the arbitrators have accepted 1.5 Crores in fees and the client is the poorer by some 7 Crores in total litigation cost with no result in sight.

As opposed to this, let me cite two international arbitrations. In a Rs. 15 Crore claim between an Indian Internet company and a PE Fund under ICC rules, the Sri Lankan arbitrator decided the case in five months, taking eight continuous days to record all evidence and hear arguments. It cost the client Rs. One Crore but it recovered its claim within the year. Here's another. Between an Indian and a British JV partners where Rs 50 Crores was demanded in compensation for breach of contract, a senior British lawyer acted as the arbitrator under UNICITRAL rules and decided the case in 17 months holding only three sittings! It cost each party about 50 lakhs.

The question that shakes us by the scruff of the neck is this: what makes arbitrations in India so difficult and tardy? After 33 years of law practices, I put it down to the 5 Great Paradigms of Desi Arbitration. Behold the tedium to disclose what everybody already knows!

First up are the Wages of **Buffalo Jurisprudence**. You will find the foundation of this domestic school of jurisprudence explained in my book "Bullshit Quotient". In essence, it means that if you wish to assert control over the village buffalo, you must grab it and take it home before the legal conflict begins. In any legal conflict, your first task is to go grab the property, withhold payment of what you owe, unreasonably invoke a bank guarantee if you have one, trespass into the disputed property and so forth. The main trick is to anticipate and pre-empt the opposition. Naturally, when this happens, the other guy goes to court and then you get yourself a first rate war for stay orders from which appeals lie and then appeals lie from appeals. By the time the warriors have stabilised the "interim situation", some years have passed. This is when the parties heave a sigh, admit they can't change the reality on the ground and start the arbitration. Shorn of the embellishments, the point is this: since our legal system works best for the guy who exhibits bad faith, arbitration is doomed to delay.

Next up is the Indian Arbitrator Paradigm. In our low trust society, no one settles for less than a high court judge as an arbitrator, frequently three. That's thrice the cost and thrice the logistic complexity. It does not help that these judges are trapped in the code of civil procedure mind set, meaning that the reasons that delay court proceedings also delay arbitrations. These judges are retired which means that they are on a leisurely (and lucrative) time-pass. The revenue stream is too attractive not to perpetuate, and the mind is too *vanprastha* oriented not to priorities family affairs and vacations over work. Indian judges' start arbitration work after the Constitution of India thinks they are too old to administer justice! Given the years these things go on, you could be addressing a Teflon mind to which nothing sticks. Heavens help you if you find yourself confronting a Rogue Arbitrator, meaning not necessarily someone corrupt but someone with a great sense of self-worth, a natural tendency to consider everyone else a fool and a mind that is slip sliding away. Indian law make him hard to remove and besides,

the judiciary may not be too sympathetic to an attack on someone so accomplished in his declining years. Basically, he can go on forever, till death do you part.

Third, there is the Indian lawyer paradigm. There are no specialist arbitration lawyers in India, meaning guys who won't do something else even if they could. What the code of civil procedure does not protract, the priority given to court work does. Arbitration hearings are structured after court hours, on weekends, during vacations, after vacations. Variable fee structures are always a disincentive to quick disposal of cases. Since it is not the karmic burden of a defence lawyer to help the plaintiff, 50 per cent of the bar is always obstructive anyway so perhaps we should demand no more.

That takes us to Paradigm Four: Indian legal costs. Indian High Court arbitrators charge in the ball park of Rs. 25,000 to 50,000 per sitting and sittings don't last longer than 2 hrs. Given the retired status of the arbitrators, 25% of the time is spent in the tea-pakora-cookie breaks and another 25% in tedious renditions of *hamare zamane mein* stories. In that one hour, you have to find a way to achieve any result at all. I will tarry on the sense of entitlement. Everyone in the game demands luxury hotels, quality meals and first class facilities. If it's an outstation visit, you can add super luxury suites, business class tickets and exotic Islay malts. The lawyers are no cheaper so you end up with a burn rate of 2 lakhs for a local brief, three times as much if the arbitration is out of station. The same guys will argue a case all day in a court without air conditioning and then eat a crappy dal fry with roti in the lawyer's canteen on the normal working day.

This brings us finally to the last of them: the Indian courts paradigm. It could be skulduggery - in which we as a nation so dearly love to believe - or it could be just a deteriorated mind but the quality of many arbitration awards is deeply suspect. So while we all want courts not to interfere with arbitration awards in theory, I for one am delighted that Indian courts are happy to do so because truly, arbitrators do some very strange things. Year after year, the scope of challenge to arbitration awards is widening as courts look at weirder and weirder awards. The upshot is that protracted arbitration hearings are followed by protracted court procedures. As often as not, the arbitration award is upturned meaning that you can now crank the circus up all over again.

Where does that leave the incomprehensible idea that arbitrations work because they are cheaper and quicker? As a manic nationalist, it brings me no pleasure to say this but yes, arbitrations work on foreign shores. We have seen that foreign arbitrations are not cheap in rupee terms but they are quick. This is the best there is by way of alternative dispute resolution. The logistics are good (few hearings), Indian courts cannot by law interfere and enforcement is painless if enforced abroad. An arbitration award against a resident Indian is of course another kettle of aging sushi suffering a power cut in a Jaisalmer summer.

The upshot of this is that if arbitrate you must, write a clause that takes you out of India. You can rely on Indian law – our law of contracts is okay – but you can't have the arbitration in India using domestic retired judges. You also cannot run arbitration if there is no strong arbitration secretariat with clear rules overseeing the procedural side of things. For my money though, my firm doesn't recommend inserting arbitration clauses in domestic contracts at all on the principle that the exotic buffet spreads and the single malts after the hearing are just fun and games on the way to a review of the entire arbitration by a court. For all its failings, it just makes sense to cut to the chase and go to court in the first place.

### **Fine Print: IPL, Natural Disaster and Morality**

#### **IPL and the unfair moral indignation in which our public discourse is structured**

**Ranjeev C. Dubey**

When Lord Krishna advised Arjun to follow the warrior' dharma and kill his uncles because they were ranged against him on the field of battle regardless of blood ties, he raised a fundamental question about the nature of personal morality that we are yet as a society to resolve. I found myself leisurely mulling this question over summer vacations as the IPL match fixing controversy raged back home in India.

Let's acknowledge the Bullshit Quotient of 20-20 cricket for a start. The rise of consumerism in India in the last 20 years has resulted in reconfiguring cricket from a sport to pure entertainment. The format has been mutilated to a point where it doesn't represent the skills of either team: the "glorious uncertainties of cricket" has become a euphemism for roulette with an asymmetric ball. So much is played and with so many unexpected results, that it can't but be fun, games, merrymaking and a little bit of skullduggery. You would have to admit that it is ultimately a spectacle, like professional wrestling, the pay-off being in the process so to speak and not in the perfect fairness of the outcome. Once that perception seeps into the collective unconscious, it is inevitable that matches would be fixed. It helps that cricket is a game uniquely easy to fix because, unlike football, you don't need to fix many to make a lot of money.

Now that cricket as entertainment is here, can cricket as a source of fast irregular bucks be far behind? Neither players nor team owners are immune to the financial implications of this radical shift in the point of the game so to speak. Years ago, I once sat on a meeting where it was argued that the business case for IPL was poor at best and that you would need a substantial revenue stream from the outcome of each match for it to be worth your while to have a team. But there's cricket aplenty out there with owners aplenty too. So why would anyone buy a team?

The viewer side of the equation is not so different. Once you acknowledge that cricket is entertainment, why should you, or the police, care whether someone made money under the table to provide the entertainment, or how? Do the vast majority of

spectators believe the game is fairly played? Considering that a cricket scam hits the headlines more often than it rains in the plains of Spain, is that a fair belief to have and to hold? I would think not and the proof of it is in the fact that Sreeshanth and his merry men have been granted bail and the freak show on TV and print media has moved on. As with the game, it seems revelations of skullduggery in the game are also ultimately a spectacle designed for entertainment!

So where does that leave all the high pitch shrieking and breast beating about the horror and the depravity? I would argue that the vast bodies of cricket lovers don't actually care about the "immorality" of what goes on in the game. I would argue that the public condemnation and nervous breakdowns are a unique type of national group therapy: spiritual cleansing through emotional purgation, or some such. I would also argue that this is so because the 'Indian' definition of morality bears no relationship to morality as it is commonly understood in many other cultures.

Let me explain this by a scenic route. I had a fascinating illustration of Indian morality at work last month when some of the residents of our colony got together to put up a community generator in one of the common spaces in the colony. There were subscribers aplenty to the scheme but no one wanted the machine within 50 yards of their own house. Bonhomie and camaraderie gave way to hostility and ugly exchanges of letters in no time. Clearly, socially cohesive action and the promotion of the larger interest of the community are laudable goals just so long as they take nothing away from what we have as individuals, even if what we have is a public park fifty yards away that doesn't particularly belong to us. Worse was to follow from people who wanted generator power but found it unaffordable: they opposed generator installation anywhere in the colony's public spaces.

Some of the high pitch opposition was pretty vile. These are the same people who stand around in Gucci clothes, Mojito in hand on any Friday night in Gurgaon bitching about the self-serving perversion of politicians. I can confirm that Indian elites don't do irony! But it does raise this question: where does one draw the line between self-interest and the larger interest of the largest number? Nearly as I can tell, the line is drawn at that point where the individual begins to suffer the slightest inconvenience because of the larger societal interest. Clearly, no individual believes he has a moral or ethical obligation to care about the interest of his neighbor in excess of his self-interest. So why should Sreeshanth or any team owner for that matter, care how squeamish a cricket fan may be about match fixing? Players have girlfriends to spoil, and owners have a business to run, and that is their dharma!

Last week, the newspapers were awash with a report put out by the Save Life Foundation disclosing that 88 per cent of the people in most Indian towns won't help an accident victim. Why not? For one, if you take a victim to hospital, the police naturally suspect that you hit the guy. Second, once you have the battered victim on your hands, you then have to pay his registration charges and so forth before the hospital will take

him in. This is, of course, quite apart from the time you invest in this common decency, time that could stretch indefinitely if the police decide to investigate you more closely.

The same basic construct informs the actions of those we accuse of windfall money making amidst the debris and the cries of lament of flood ravaged pilgrims caught unaware by the cloudburst in Uttaranchal in June. If my business is selling biscuits so that I can feed my own family, what is wrong in selling them at a twenty times mark up to very hungry flood victims? And so it is with taxi operators asking for half the price of a car to transport a starving just-rescued pilgrim from Rudraprayag to Delhi. If profit is my dharma, and I do a good job, what is it that I am accused of? Forget natural calamities, whoever makes super profit anywhere in the world without overpricing something that someone needs for good reasons or bad? Unless we are prepared to place the larger interest of society above our obligation to feed our family, and perhaps the girlfriend too, I don't see how generic social altruism at the cost of immediate family obligations is morally defensible.

This should lead us to question the unfair moral indignation in which our public discourse is generally structured. I will not repeat the argument about the blameless casting of the first stone but I will contextualize it in the corporate commercial space where a great many readers probably find their karmic compulsions. To cut to first principles, the corporation is a brilliant vehicle designed to maximize profit while radically limiting risk. Coincidentally, it is also an ideal vehicle to avoid moral responsibility because the law doesn't easily lift the corporate veil, nor do we. Our colleagues in the pharmaceutical industry for instance don't equate the price of AIDS or diabetes drugs with the price of biscuits in Uttarakhand after the cloudburst. That a corporation may engage in conduct we would not accept in an individual is now tacitly and widely accepted. After all, it is unfair to expect any corporate entity to do anything but maximize profit. Indeed, the shareholders - people like you and me - will tear it limb for limb if it doesn't.

Come to think of it, we are entirely comfortable with the idea that a corporate may, in pursuit of its objectives as set forth in its Memorandum of Association tear other people's lives up limb for limb. How else would any mining company make a living without chucking masses of people off the land and then ripping the land asunder in search of minerals? We never ask if we are responsible for this. When the corporation acts with blatantly perfidy - like establishing a private army to terrorise local residents (read Salwa Judum) - we blame it and we condemn the politician for supporting it but we never stop quietly enjoying the dividend the corporation sends us... or the product it sells. I am yet to hear of an India company that was boycotted to its death because as a society, we didn't agree with its policies or actions.

Now that I think about it, I also don't know a single guy who was socially boycotted because he made his money by dodgy means. How could we? Most people are doing dodgy things around us. If anything, the strutting fat cat showing off his Ferrari (which

he managed to import duty free through a travel agent) is an object of envy and admiration, not derision. Dodgy guys get groupies, not social sanction. Heck, we don't even socially boycott the pervert who won't pay the Resident Welfare Association's dues. When a society is structured around an undeniable admiration for acquisitive jiggery-pokery, where is the argument that it is wrong to engage in immoral conduct? Clearly, everyone cares about the final result of what you do, not the process by which you got there. To me the conclusion is obvious: in our hearts, we don't really buy into the moral platitudes we mouth: our dharmic obligations march to the beat of another drummer.

The net-net of this rant comes down to this. When social elites endorse immoral conduct, society cannot have moral underpinnings. When social elites don't act on their professed ethical constructs, pointing fingers at politicians and celebrities at best comes off as part of weekend time pass. If we want a society that genuinely strives to a better and higher moral standard, we will have to put the interest of the group taken as a whole above our dharma, as a warrior, a corporate executive or even as a father. That is a huge cultural shift and till we can all get there, all the indignation and the hysterics is just purgation.

-X-