

Kluwer Copyright Blog

Defense of ‘De Minimis’ in IP matters in India

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The principle of ‘de minimis’ is a common law principle that has been derived from the Latin maxim ‘*De Minimis Non-Curat Lex*’, which essentially means that the law does not care for, nor take notice of, very small or trifling matters, and therefore does not require judicial scrutiny. This principle has not been statutorily recognized by most countries in the world; however, it has been recognized by the courts in India. The first Indian judgment to apply the ‘de minimis’ principle in the field of intellectual property was the decision of the Division Bench of the Delhi High Court in the year 2012 in the case of *India TV Independent News Service Pvt. Ltd & Ors. v. Yashraj Films Private Limited*. A decade after that judgment, a Single Judge of the Bombay High Court has further advanced the jurisprudence on the subject, in the case of *Shemaroo Entertainment Limited v. News Nation Network Private Limited*. This post analyzes the evolving principles of the ‘de minimis’ principle laid down by the aforesaid judgments.



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In the *India TV Independent News Service Case* of 2012, the Division Bench of the Delhi High Court was concerned with two joined cases. In the first case, the Plaintiff had alleged that the Defendants had used the first line of the popular Bollywood song ‘Kajra Re Kajra Re’ in an

advertisement broadcast during a television show. In the other case, during a chat show named ‘India Beats’, a budding singer sang nine stanzas from nine songs which had made her famous. In both these instances, the Plaintiffs claimed that the Defendants infringed their copyright in the sound recordings.

Both the joined cases mentioned above were first brought before the Single Judge of the Delhi High Court, who – without delving into the principle of ‘de minimis’ – opined that it is only Section 52 of the [Indian Copyright Act 1957](#) which privileges the use of copyrightable works by any person without express authorization by the author and that this section does not include derivative copyrightable works. The Single Judge held that any appropriation by the Defendants, even in the minutest form, of the Plaintiff’s sound recording would constitute infringement of the Plaintiff’s copyright and proceeded to issue an injunction prohibiting the Defendants from reproducing the sound recordings concerned. Thus, the Single Judge did not delve into the principle of ‘de minimis’ claimed by the Defendants.

The Defendants appealed the decision before the Division Bench of the Delhi High Court from the decision of the Single Judge against the common order passed in the two matters. The Division Bench laid down the following five factors for determining the defense of ‘de minimis’:

1. The size and type of harm;
2. The cost of adjudication;
3. The purpose of the violated legal obligation;
4. The effect on the legal rights of third parties; and
5. The intent of the wrongdoer.

Applying the above principles to the facts in question, the Division Bench held that the harm in the first instance was the use of a mere five words from a song having five stanzas, used in a consumer awareness advertisement and not for any personal financial gains. Further, in the second case, the court held that the chat show in question was of 45 minutes duration, out of which the singer sang, at different points in the show, only nine songs and the total time consumed by the singing was less than 10 minutes. The court also noted that the intention of the Defendants was only to inform the viewers as to how the budding singer was introduced into the music industry and the milestones she accomplished in her career span. In both instances, the Division Bench held that the infraction by the Defendant being trivial attracted the defense of ‘de minimis’.

Earlier this year, the Bombay High Court in *Shemaroo Entertainment Limited v. News Nation Network Private Limited* again dealt with the principle of applicability of ‘de minimis’ to an intellectual property matter. The background facts were as follows: in the year 2019, an agreement was executed between the parties under which the Plaintiff granted a non-exclusive license to the Defendant to broadcast and exploit its catalogue of cinematographic works on the Defendant’s news channel. Subsequently, in 2020, the Defendant conveyed its inability to continue with the said license and the agreement was terminated. However, despite such termination the Defendant broadcast the Plaintiff’s catalogue of cinematographic works on its channel. In addition to claiming that such use of the cinematographic works, being for reporting current events, qualifies as fair use and hence falls under an exception to infringement of copyright, the Defendant also, in the alternative, raised the defense based on the principle of ‘de minimis’ and in this regard relied on the judgment passed in the *India TV Independent News Service* case discussed above.

The Single Judge of the Bombay High Court considered the above judgment and elaborated upon

the qualitative aspect of the defense of ‘de minimis’. The court held that it is not only the duration of exploitation that matters but the qualitative element, that is, the purpose of use of the copyrighted work, is also crucial in deciding whether the principle of ‘de minimis’ will be applicable or not. The court stated that examination could not be reduced to just a quantitative test of minutes and seconds de hors the qualitative aspect.

Further, the Bombay High Court noted that it was not the Defendant’s case that the nature of exploitation of the content had changed during the subsistence of the license agreement and after the termination thereof. The court noted that the Defendant was engaged in a business where advertising constitutes the primary source of revenue and that the onus lay on the Defendant to demonstrate that the content was used only for the purpose of reporting of current events and affairs, however no such evidence was presented by the Defendant. Instead, the Plaintiff was able to demonstrate that the content was used in programmes which were not in the nature of reporting of current events.

Based on the above and taking into account the similar nature of use of the content by the Defendants under the earlier license regime, the Bombay High Court concluded that such use of the Plaintiff’s works would not amount to fair dealing and that such use of the content cannot be condoned on the basis of the principle of ‘de minimis’ either.

Upon analysis of both the judgments referred to above, it appears that while the Delhi High Court laid out the factors on which the ‘de minimis’ principle should be applied, the Bombay High Court went a step further and highlighted the importance of the qualitative element, in addition to the quantitative element, when dealing with the defense of ‘de minimis’. As evident from the discussion above, the jurisprudence on the principle of ‘de minimis’ continues to evolve. In the opinion of the authors of this post, it can be concluded that cases of this nature cannot be viewed through a narrow lens and a single set of factors cannot be applied every time a defense of ‘de minimis’ is raised by the Defendant; instead, the analysis in this regard will largely depend on the facts of each case.

“The views of the author(s) in this post are personal and do not constitute legal / professional advice of Khaitan & Co. For any further queries or follow up please contact us at editors@khaitanco.com.”

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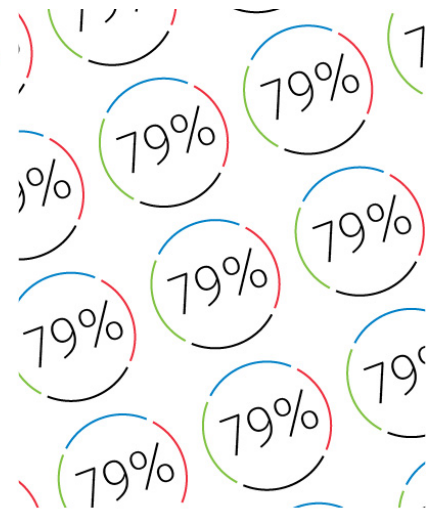
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