

Copyright Law in the Changing World

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Paper dwells at length on evolution of copyright law and its basic principles. It examines concept of originality in the law and raises the issue on the conflict between patent and copyright protection of software.

Advent of modern printing technique invented by Johannes Gutenberg replacing the woodblock printing, ushered in a new era of mass production and mass circulation of newspapers, periodicals, books and other literary works. Soon after William Caxton founded his printing press at Westminster in 1476, the Crown began to exercise unlimited authority over printing in England through the Star Chamber which had the power to issue decrees regulating printing and the number of presses with supreme jurisdiction and continued its rigorous enforcement till its abolition in 1640 inspite of the enactment of the Statue of Monopolies, 1623 on the strength of a saving proviso on printing. The interests of the publishers rather than protection of the author's right prevailed although common law consistently protected an author's right of first

printing and publishing his own works (*Donaldson v Beckett*, 1774¹. The first statutory protection conferring copyright for literary works saw the light of the day not until 1709 when the Statute of Anne was passed. "Common law copyright is that right which author has in published literary creations, a kind of property whose extent is to give him control over first publication of his work or to prevent its publication" (*Hemmingway's Estate v Random House Inc*)². Thus, while common law copyright is perpetual in nature, statutory copyright is only for term of years.

Basic Principles

The basis for protection of literary and artistic works in civil law countries is justified by the tenets of natural right theory which holds that authors should receive protection for their creations, not

¹4 Burr 2408 HL, 2 Bro Pc 129

²53 Misc 2d

because they need protection as an inducement for their efforts, but rather because they deserve it as an inherent natural right. This view greatly influenced by John Locke and G.W.F. Hegel, had been readily accepted in civil law nations. By contrast, in common law countries, the jurisdiction and rationale behind protection of intellectual property have been advanced and supported by pragmatic reasons grounded on social and economic value. Jefferson rejected the natural-rights theory in intellectual property rights and regarded that it was in the nature of a reward, an inducement to creation of new knowledge. On the nature and purpose of the patent monopoly Jefferson's ripened view can be harvested from his instructive letter to Isaac McPherson (August, 1813):

“Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver can not dispossess himself of it. Its peculiar character, too, is that once possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine, as he who lights his taper at mine, receives light without darkening me. That

ideas should freely spread from one to another over the globe, for the moral and the mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to will and convenience of the society, without claim or complaint from anybody”.

Similar kind of reasoning was advanced by Macaulay in his speech delivered in the House of Commons, 4 Feb 1841 on Copyright Bill: “The advantage arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright”. That is how Nathaniel Shaler's statement appears to be congruent when he said, “the man who brings out of the nothingness some child of his thought has rights therein which cannot belong to any other sort of property...”.

Purpose of Copyright Law

The ultimate purpose of copyright law is to foster the growth and advancement

of learning and to build a rich heritage of culture for the public welfare by means of recognizing exclusive rights to authors for a limited time. In the United States, copyright legislation is footed in the constitutional foundation as provided in Art 1, Sec. 8. This constitutional provision does not establish copyrights, but provides that the Congress shall have the power to grant such rights if it thinks best. The enactment of copyright legislation, therefore, is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. In *Jefferys v. Boosey* (1854)³ the final decision of the House of Lords also was not that copyright did or did not exist at common law, but that, if it ever did, it had been abolished by Statute of Anne 1710 which conferred copyright for a tenure of years.

The primary purpose of copyright law is to foster the creation and dissemination of intellectual works for the benefit of the public. Hence, it assures reward to authors as a matter of justice. It supports a system, a macrocosm in which authors and publishers compete for the attention and favour of the public.

The secondary purpose is to recognize the brainchild of the author, his contribution to society in the form of some bonus or reward that is likely to stimulate or emulate the skill of writing. The prospect of remuneration is a nourishing factor in bringing out more creativity intellectual products in the

market. Ancillary to that is the indirect encouragement to publishers and distributors to invest their resources in the business of printing and publishing. As the poet Wither spoke of the publisher – “He is the caterer that gathers together provision to satisfy the curious appetite of the soul...” Copyright also fosters variety of opinions, experience, vision and statement of truth and error. In *Harper & Row v. Nation Enters* (1985)⁴ Justice O’ Connor observed: “it should not be forgotten that the framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”. Thus, copyright serves the purpose of encouraging the creation of a more diverse, robust array of expression, to a richer cultural milieu of society. At the same time “put succinctly the dilemma but with the legal monopoly too little of information will be used”, said R. Cooter and T. Ullen in *Law and Economics* (1988). In *An Unhurried View of Copyright* (1967) Benjamun Kaplan made a rather frontal attack on copyright when he observed, “copyright has the look of being gradually secreted in the interstices of the censorship”. But this argument is unsustainable in view of the fact that the spark of copyright is extinguished obitually after 50-60 years from author’s death and the works add to the pool of public domain. Tagore’s literary works are no longer shielded by the copyright

³4HL C 815

⁴471 US 539 (1985)

regime. In a recent judgement James Joyce estate failed on the claim of copyright infringement of *Ulysses*, which has expired in 1991 although successfully sued MacMillan Publishers in English High Court for copyright infringement of his works published in 1970's and also in respect of certain other drafts, manuscripts, proof and versions of the novel. Copyright is a legal device granting the authors the exclusive right to exploit the reproductive fertility of their intellectual creations expressed in aural, visual or audiovisual channel of mass communication which are protectable from unauthorized copying of the original work for unfair or unjustified use. Therefore, copyright is the right to literary property, which is recognised and sanctioned by positive law. Copyright restricts reproduction of the original work in any material form of publication performance in public, broadcasting, and transmission over a diffusion service and making of an adaptation. "Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. Works of authorship may not be limited to multinomial generic terms like "works of literature, music and art". Literalism is no limit on copyright protection. In the U.S. for example, "writings" include paintings, sculptures and other works of art including photographs after 1865's statutory amendment. Copyright in photography has myriad possibilities. At

least four elements are in the focus, the camera, the owner of the camera, the owner of the film and the object. In normal course, it is the owner of the film who owns the copyright in the photograph and not necessarily the camera owner. So, it hardly matters who is the real photographer or the object which may be inanimate or living. But if the photography is commissioned it is the hirer who will retain copyright in the product. Problem nowadays that is cropping up is with regard to filmless digital photography which is Internet deliverable leading to the vanishing point of photofinishing copyright as we know it.

Concept of Originality

The soul of copyright is originality. Originality does not, however, mean or demand for novelty, ingenuity or aesthetic merit. Any ordinary piece of painting can merit copyrightability. 'Original' in reference to a copyrighted work means that the particular work "owes its origin" to the "author". Original means only that the work has independently created by the author and not copies from someone else's works. The name of the character *per se* is not protected unless it constitutes the story being told. Professor Goldstein suggested that "A literary character can be said to have a distinctive personality, and thus to be protectable, when it has been alienated to the point at which its behaviour is relatively predictable so that, when placed in a new plot situation, it will react in ways that are at once distinctive and unsurprising". The less developed the

characters, the less they can be copyrighted. In *Warner Bros Inc. v. Columbia Broadcasting System* (1954) it is stated:

“It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright. Even if the owners assigned their complete rights in the copyright to the *Falcon*, such assignment did not prevent the author from using the characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story”.

The characters at issue both in *Nichols* and *Warner* were purely literary characters. The characters appearing in visual as well as conceptual or literary coat, for example comic or cartoonish characters enjoy a better protection by reason of their clarity in concretization. In *V.T. Thomas v. Malayala Manorama*⁵, the character and image in the cartoon was found to have been well developed and the author's right to continue and carry on with the same after leaving his employment with Malayala Manorama has been upheld (similar rights may arise in case of a painting that has been sold out for good. The visage of the painting can still be used as prints for commercial circulation by the Painter emanating from his original right in the work). In *Nichols*, Judge Hand laid down the standard for protection of fictional characters in the following terms:

“We do not doubt that two plays may correspond in plot closely enough for infringement. How far that correspondence must go is another matter. Nor need we hold that the same may not be true as to the characters, quite independently of the “plot” proper, though, as far as we know, much a case has never arisen. If *Twelfth Night* were copyrighted it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's “ideas” in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's Theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted, that is the penalty an author must bear for making them indistinctly. “The act that secures copyright to author guards against the piracy of the words and sentiments, but does not prohibit writing on the same subject”, said Lord Mansfield in *Sayre v. Moore*⁶. Thus, copyright may extend to the arrangement of the words not the words on their own. An author's safety net against imitation of characters in literary or dramatic works is to develop them well on strong footage, as the name of the character *per se* is not protected unless it constitutes the story being told. The story again can be similar

⁵AIR 1989, Ker 49

⁶1 East 361, 101 Eng Rep 140

but retold in a different manner. In the U.S., this basic requirement of ‘originality’ is constitutionally mandated.

Copyrightable works cover and include an expanse of items which can be broadly classified under the rubric of artistic works (figurative, applied and fine arts), architectural works (building plan), musical works (vocal and instrumental, operas, musicals, bands and orchestras – both solos and choruses), dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works and sound recordings.

Indian Copyright Law

India is a signatory to the Berne Copyright Convention and the Universal Copyright Convention 1952 as revised in 1971 at Paris by virtue of which any copyright registered in a signatory country is deemed to be valid and enforceable in India and *vice versa*. In this context, one of Judge Hand’s last decisions delivered in the 1960 case of *Peter Pan Fabrics, Inc. v. Martin Weiner Corp*⁷ makes an interesting insight into the problem of applying the tools of literal interpretation of the words of a statute. In that case, the plaintiff manufactured fabrics. The defendant, who had copied the fabrics, claimed that the plaintiff had permitted the fabric to be sold without notice affixed. The fabric has originally included a strip containing the notice but, because of the requirements of some fabric customers,

notice was removed in order to make clothing. Judge Hand refused to invalidate the copyright and delivered a decision that was contrary to the specific language of the statute. If the infringement is willful, said Judge Hand, the absence of notice could be used as a defence only if the copier could prove that placing the notice did not impair the market value of the copier. Judge Hand observed, “literal interpretation of the words of a statute is not always a safe guide to its meaning”. Judge hand’s decision predated the changes brought about the Berne amendments (i.e., that an infringer who was not misled by the lack of notice should not be able to profit by such copying).

According to Section 57 of the Indian Copyright Act, the author can claim the authorship (paternity right) of his work. He can also claim the right of integrity for his work as a moral right, which is designed to work as a safeguard against the misuse and distortion of an author’s work, now being made available through umpteen numbers of communication channels. This very special protection of copyright is sanctified by the fact that the remedies in the nature of a restraint order or damages can be obtained even after the assignment either wholly or in part of the said copyrighted product⁸.

In giving effect to Article 14.5 of the TRIPS Agreement, India has extended the duration of copyright in a performer’s right as contained in the provisions of

⁷274 F.2d 487 (2d Cir. 1960)

⁸Smt. Manu Bhandari v. Kala Vikas Pictures Ltd., AIR 1987 Del 13
Wiley Eastern Ltd, V. IIM, 58 1995) DLT 449

Section 38 of the Copyright Act, 1957 from 25 years to 50 years. In this regard, copyright in the performance shall be counted from the beginning of the calendar year following the year in which the performance is made. Similarly, computer programs and compilation of data are now copyrightable in India as expressly provided by necessary amendments having been carried out in consistent with the provisions laid down in Article 10 of the TRIPS Agreement. However, the Government of India has been empowered to restrict the rights of foreign broadcasting organisations and performers and broadcasting organisations in the corresponding jurisdictions.

Patent and Copyright Relationship in Software

India has fully complied with the TRIPS Agreement in the field of copyright and there is no room left for a controversy but the problematic areas are required to be probed such as computer programs which are not barred from patenting (*Sate Street Bank & Trust C. v. Signature Fin Group Inc.* 1998). “Anything under the sun that is made by man” constitutes patentable subject matter (*Diamond v. Diehr*, 1981)⁹, laws of nature, abstract ideas and physical phenomenon excepted. Mathematical algorithm defined as “a procedure for solving a given type of mathematical problem” is not patentable as much as Einstein’s formula, $E=mc^2$. However, a computerized process for curing synthetic

rubber, which contained a mathematical formula, constitutes patentable subject matter because it attempts to protect an industrial process. There are elements of convergence and divergence in the field of copyright and patent and they tend to blur the border with enormous possibilities of subtle distinctions. Literal elements (source code and object code) of computer program are surely the subject matter of copyright protection. Since computer programs are literary works, copyright law may or may not protect the non-literal elements (structure, sequence, or organisation) of computer programs. In considering the copyrightability of non-literal components, doctrines of copyright are to be explored afresh in tune with the changing time. The U.K. for example, has introduced a measure of statutory reforms giving effect to the EC’s directive in the form of Copyright (Computer Programs) Regulations, 1992 (S.I. 1992/3233). As a result, it has adopted a *sui generis* form of protection for the contents of electronic databases. Computer Programs as audio-visual works have implications in the area of copyright law and the evolving scenario will unfold a much wider spectrum of myriad possibilities looming large on the horizon such as sound recordings, digital sampling and photographs or films. An image generated through the operation of a computer has the likelihood of being classified as a still photograph or in the case of moving images as films. The arrival of digital cameras made it possible for images to be recorded directly onto a computer disk

⁹450 US 175

viewed on a computer monitor. Is it a recording of light or of other radiation? Paul Goldstein writes: "Science and technology are centripetal, conducting toward a single optimal result. One water pump can be better than another water pump, and the rule of patent and trade secret is to direct investment toward such improvement. Literature and arts are centrifugal, aiming at a wide variety of audiences with different tastes... The aim of copyright is to direct investment toward abundant rather than efficient expression". In the emerging scenario, computer-generated works are likely to be closely contested for tailor-made legal umbrella. The guiding light can be sourced from the CONTU Report which is based on sound reasoning and is quite instructive: "Computers are enormously complex and powerful instruments which vastly extend human powers to calculate, select, arrange, display, design, and do other things involved in the creation of works. However, it is a human power they extend. The computer may be analogous or equated with, for example, a camera and the computer affects the copyright status of a resultant work no more than the employment of a still or motion-picture camera, a tape recorder, or a typewriter. Hence, it seems clear that the copyright problems with respect to the authorship of works produced with the assistance of a computer are not unlike those posed by the creation of more traditional works..."

Patent and copyright law protections have coexisted uneasily for some time in

the software arena. Copyright law is mismatched to software, in part, because it does not focus on the principal source of value in a program.

That calls for in-depth research on continuous basis for strengthening our legal regime covering this very fertile field.

Conclusion

The Indian Copyright Act, 1957 has been amended for the third time in 1999. The 1999 amendment has changed the definition of literary works, which includes, *inter alia*, the meaning of copyright in respect of computer programs and Section 2 defines "computer software" also but question mark still peeps on the head of website pages. To add to the burden, Section 79 of The Indian Information Technology Act, 2000 has provided for immunity to the service providers in derogation to the rights of the copyright holder whereas they may be found liable as a contributor in case of any infringement in other jurisdictions. There is no remarkable output of case law on this issue in this country yet. "Copyright is a beneficial interest in movable property"¹⁰. A small amount of copying in the statutory provisions spelling out the entire gamut and drawing out the fringe on the contour. We really need to ponder and guard our interests from all sides in this new setting.

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