Judicial approach to the concept of 'Originality'

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The research paper is based on the topic Concept of 'Originality': a study of judicial response. In this project, the main aim of the concept of originality has been discussed and the reasons behind copyright in original works and its aspects and how the judicial responses in each of the cases arising out of copyright infringement differs in its context and as to why there is a concept of originality involved in the copyright law. Hence, Originality is a precondition to copyright protection. If the work of a person is not original but a mere copy of someone else`s original work, then copyright protection cannot be granted to such a person. Thus, for a work to be original it is important that it shall not be a copy from another work. Protection of copyright in a work is necessary for the purposes of protecting a person's creative expression. A theoretical discussion about the position of U.K and The U.S is also involved to make it easier to understand the concept more clearly.

Statement of Problem

One of the problematic conditions in the originality arises, when it comes to ideas and expressions, this means that it is hard to identify and find out the truth about ideas of a person and the reason for no copyright in ideas, because there are some ideas that are capable of being copyrighted which will be discussed in the project. The judiciary plays an important role in the cases of originality so it is important to note that in deciding the cases, how the courts respond to these types of situations.

Research Questions

- Why there is a controversy in the doctrine of sweat of brow?
- Why only the expressions are capable of copyrighted not the ideas?
- How the courts respond in the questions of originality?

Meaning

Copyright generally means the right to copy.

The main objective of the copyright is not to reward the labour of authors, but to promote the progress of science and art. Copyright assures the author the right to their original expression but encourages others to build freely upon the ideas and information of the work. It is an established principle in copyright law in India and other countries too that only original works are capable of copyright protection and not the copied works. With this concept of Originality, an inference drawn that originality plays a vital role in the copyright law and nothing else can defeat it. Only original works has to be protected as an intellectual property. The sole reason behind being anyone can copy a work but it is hard to find original ideas into expressions. As stated above the concept of "originality" is a foundational concept of copyright law in England, America and India. The word "original" in copyright law which is purposively left undefined, has intended to incorporate without change the standard of originality established by the courts under the present copyright statute[1]. In copyright laws, the word "original" does not have its ordinary dictionary meaning and courts have interpreted the concept very loosely. The work does not have to be unique, or even particularly meritorious. Rather, originality is a move concerned with the manner in which the work has been created and is usually taken to require that the work in question originated from the author, its creator, and that it was not copied from another work. The word "original" in this connection, does not mean that the work must be an expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of a "literary work", with the expression of thought in print or writing. The originality that is required relates to the expression of the thought. However, the Act does not require that the expression must be in an original or novel form, but the work should not be a copy from another work - that is, it should originate from the author. To establish copyright, the creativity standard applied is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is the basic requirement. [2] Now, when the researcher further discusses in detail about the principles of originality in detail then it will be easier for readers to understand the concept of novelty in the original works.

Provisions of Copyright Act 1957 and position in U.K and the U.S

The provisions of the copyright act, 1957 provides that only original literary works be protected under the copyright law. Section 13(1) (a) protects original works whereas sections 13 (1) (b) protects derivative works. Under the copyright act, copyright subsists only in original literary, dramatic, musical and artistic works. The UK copyright acts of 1911 and 1956 also require the originality of the literary works for the protection under copyright. In the United States, originality is the constitutional requirement under the copyright clause of the constitution and is a *sine qua non* of the copyright ability. Earlier, in the United States, the judicial trend,

[1] The word "original: has been used in Section 13(I) of the Indian Copyright Act. 1957. Section 13(I) reads thus : "Subject to the provisions of this section and other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say- (a) original literary, dramatic musical and artistic works. (b) cinematographic films. and (c) sound recording." However, the word "original" has not been defined in the Act.

[2] Eastern book company vs. D.B. Modak, (2008) 1 SCC 1.

to trace out the elements of originality in a given work was to focus on the "Sweat of the brow" test or the industriousness. However, there has been a consistent shift from this approach towards a test based on "creativity". Although the specific requirements for perfecting a copyright have changed over the years, the process has always begun when an author generates an original expression.[3] The Indian judiciary also has analysed the concept of "originality" in a number of cases. In the Macmillan Company case, the Court held that the word original does mean that the work must be the expression of original or invented thoughts. However, the work shall not be a copy from other works. Any new and original plan, arrangement or compilation of material will entitle the author to copyright therein whether the materials themselves can be old or new.[4]

Original Works

The copyright act, 1957 has provided, the original literary, dramatic, musical and artistic works are protected, under the law. So, to start with let us first understand the original literary works because under this all the concepts of originality are covered. Copyright as discussed subsists in an original work. It is not necessary that the work should be the expression of the original or inventive thought, but with the expression of the thought. An original literary work is the product of the human mind which consists of a series of verbal or numerical statements capable of being expressed in writing, and which has been arrived at by the exercise of substantial independent skill.[5] The Supreme Court in case of *EBC vs. D.B. Modak*[6] has laid down two classes of literary works:

- Primary or prior works- This means that the work is new and there exists no work in the field.
- Secondary or derivative works- This means there exists same work in the field.

Test of Originality

One of the basic concepts is that for a work to be original the work has not been copied from other works. Almost all the copyright laws are concerned with the expressions rather than the ideas. However, the Law of copyright does not require that the expression must be in an original or novel form, it only requires that the work is not a copy from another work and it should originate from the author and from other persons. In case of *Rupendra kumar vs. Jiwan Publishing house*[7], the court held that the word 'originality' in section 13 of the copyright act, 1957 did not imply any originality of ideas but merely meant that the work in question should not be copied from other work and should originate from the author being the product of his labour and skill. Thus, the term 'original' in reference to a work means the particular work 'owes it origin' to the author.

The enquiry of originality of the work from the author and passing the test of originality in each case relating to copyright infringement where it is a disputed question is a basic thrust on which the copyright claim of the party rests. The said concept of originality has an immediate nexus with another limb of enquiry, which is significant in each case that is the distinction between the idea and expression of an idea. This is due to the reason that the copyright vests not in an idea but in an original expression of an idea. In short, protection in the copyright law is not merely an idea but the original way or manner of presentation of an idea.[8] Now, after a close look into the concept, there are many cases in which the courts have tried to explain the principles as to the originality in the copyrighted works, one of the landmark case being *Macmillan & Co. Ltd. Vs. K. & J. Cooper*[9], where the court tried to explain this concept and said that, a product of the labour, skill and capital of one must not be appropriated by another, this means that the award for labour and skills of one person must be given to the person whose work it is, not the one who claims it. Thus, a work may be 'original' if the author has applied his labour and skill into it even though he has drawn that work based on the knowledge from other works. Following are the most important points for the test of originality:

- The work be original and not copy of some other work.
- The idea and expression must be original. Though the idea is not protected under copyright law, only the expressions are protected under it.
- Labour and skill of the author should be kept into mind.
- The work's origin must be from the author himself.

Doctrine of Sweat of Brow

The "sweat of the brow" doctrine relies entirely on the skill and labour of the author, rendering the requirement of "creativity" in a work nearly redundant. The doctrine was first adapted in the UK in 1900 in the case of Walter v Lane, where an oral speech duplicated verbatim in a newspaper report and the question was whether such verbatim reproduction would give rise to copyright in the work. The court held that because the reporter expended skill and labour to reproduce the speech, the work merited copyright protection. This is still the position in the UK, and countries such as New Zealand and Australia are largely following the UK's footsteps and applying the sweat of the brow doctrine to determine originality in a work.[10] In contrast, the US Supreme Court in Feist *Publications Inc. vs. Rural Telephone*

[3] Syndicate of The Press of The University of Cambridge on Behalf of The Chancellor, Masters and School vs. B.D. Bhandari & Anr. (03.08.2011 - DELHC) : MANU/DE/7256/2011.
[4] Macmillan Company Ltd. v. K. & J. Cooper. AIR 1924 PC. 75 at p. 81.
[5] V.K. Ahuja, Law of copyright and neighbouring rights, 2nd edn., p.18.
[6] (2008) 1 SCC 1.
[7] 1996 (16) PTC 439 (Del).
[8] Institute for Inner Studies & Ors. vs. Charlotte Anderson & Ors. (10.01.2014 - DELHC) :MANU/DE/0084/2014
[9] AIR 1924 PC 75.
[10] www.vantageasia.com/originality-concept-under-indias-copyright-regime/

Service Company Inc.[11] (1991) discarded the sweat of the brow doctrine and held that a "modicum of creativity" or a "creative spark" in the end product is an essential condition for a work to qualify as original, as mandated under the US constitution. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright law, means only that the work was the independent creation by the author (as opposed to copy from other works), and that it possesses at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. A work may be original even if it resembles other work.[12] There are three requirements for a compilation to qualify for copyright protection[13]:

- The collection and assembly of pre-existing data;
- Selection, coordination or arrangement of the data;
- The resulting work that comes into being is original, by virtue of the selection, coordination or arrangement of the data.

The Supreme Court of India reviewed the concept of originality in detail in *Eastern Book Company and Others vs. D.B. Modak*,[14] prior to this case the Indian courts, implicitly, followed the English approach to originality. The appellants in this case were the publishers of Supreme Court Cases (SCC), a series of law reports that contains all the Supreme Court's judgments. The appellants alleged that the respondents, who had created software packages that contained Supreme Court judgments, had copied the contents of their publication verbatim. The appellants copy-edited the raw judgments and provided various inputs such as headnotes, cross-references, standardization and formatting of the text, paragraph numbering, verification, etc., which in their view required considerable skill, labour, expertise and expenditure. The appellants claimed that SCC constitutes an "original literary work" under section 13 of the Copyright Act and the respondents had infringed their right under section 14 by copying their work. The Supreme Court diverted from its standard practice of following the English sweat of the brow doctrine and adopted the view that "Novelty or invention or innovative idea is not the requirement for protection of copyright but it does require minimal degree of creativity." Applying the "creativity" standard, the court held that mere copy-editing of the judgment would not merit copyright protection as this involves labour and nothing else. However, since some creativity is involved in the production of headnotes, footnotes, editorial notes, etc., these would qualify for copyright protection and the respondents were not allowed to copy them.[15]

The selection and arrangement maybe viewed as typical and at best, the result of the labour, skill and investment of capital lacking even minimal creativity. It does not as a whole display sufficient originality as to amount to an original work of the author.

The Idea Expression Dichotomy

The idea expression dichotomy is the concept, discussed above. The concept of 'originality' is based upon the idea and expression, there are many conflicts that arise due to these concepts, the plaintiff might claim that expressions which are used by the defendant in his works are the copy of his ideas, but no relief can be given to him by the courts as it is clear from the landmark cases that the ideas are not capable of being protected under the copyright law, the expressions of those ideas are only capable because they are in a tangible form and they do no remain mere ideas. Expressions are the ideas those, expressed in some form so that it must be in tangible form. Such kind of idea expression problem arises in the cases of derivative works where the work contains the historical facts collated from the history or ancient times or in cases where the work consists of methods of construction. The said concept of idea expression problem has been evolved firstly by the courts in US are also recently been recognized by the courts in UK. India is still in the process of accepting the said proposition as the courts are in the process of facing the factual situations wherein the dividing line between idea and expression is blurred through some cases in India shed some light on the subject by quoting the international cases relating to idea expression problems but do not clearly spell out the problems relating to idea and expression in so many words as laid down in the said judgments in US and in UK.[16] One of the landmark cases in this area is *R. G. Anand vs. Delux Films Ltd*[17]. Where the Appellant, R. G. Anand, was an architect by profession and a playwright, dramatist and producer as well. He had written and produced a play called 'Hum Hindustani' in 1953, which received huge success and was re-staged numerous times. With the increasing popularity of the play, the second Respondent, Mr. Mohan Sehgal, got in touch with the Appellant. During the Appellant's meeting with the second and third Respondents, the Appellant narrated the entire play 'Hum Hindustani' to the second and third Respondents. Appellant had elaborate discussions regarding filming the play in January 1955. However, no further communication made to the Appellant post the discussion. Respondents in the month of May 1955 commenced the making of the film 'New Delhi', which the Appellant believed to be based on his play. Nevertheless, the Respondents guaranteed him that the movie had no resemblance and not related to his play. However, after watching the movie in September 1956 the Appellant comes to the conclusion that the movie

[11] 499 US 340 : 113 L Ed 2d 358 : 111 S Ct 1282 : 18 USPQ 2d (BNA) 1257 (1991).
[12] V.K. Ahuja, Law of copyright and neighbouring rights, 2nd edn., p. 21.
[13] Key publications Inc. vs. Today publishing Enterprises, Inc., 945 F 2d 509 (2d Cir 1991).
[14] (2008) 1 SCC 1 at p. 131.
[15] https://www.vantageasia.com/originality-concept-under-indias-copyright-regime/
[16] Institute for Inner Studies & Ors. vs. Charlotte Anderson & Ors. (10.01.2014 - DELHC): MANU/DE/0084/2014
[17] AIR 1978 SC 1613

was indeed a copy of his play and consequently filed a suit for permanent injunction seeking a restraint against the Respondents from infringement his Copyright in the play 'Hum Hindustani'. The Trial Court along with the High Court decided in favour of the Respondents asserting that the act of the Respondents (of producing/exhibiting the film 'New Delhi') is not a copyright infringement. However, despite all this the court in this case laid seven principles:

- There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement are expression of the idea by the author of the copyright work.
- Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case, the courts should determine whether the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work were nothing but a literal limitation of the copyrighted work with some variations here and there, it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one, which at once leads to the conclusion that the defendant is guilty of an act of piracy.
- One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
- Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.
- Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.
- As a violation of copyright amounts to an act of piracy, it should be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.
- Where however the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, a wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is a copy of the original play, violation of the copyright maybe proved.

A Judicial Approach to 'Originality' under Copyright Act, 1957 in India

Now, when the concept of originality is discussed in the light of idea and expression dichotomy, we are in a position to know the procedure of courts in dealing with the cases of copyright. Where almost all the questions are to be decided upon the fact of ideas and expressions, because as being one of the most controversial topic of the copyright law sometimes there is a situation where the balance of convenience will lie upon the party who has used the work without prior permission of the author. To make it simple the courts rely on the tests and principles laid down in the R. G. Anand case, because those are the sole methods to satisfy the judges about the ideas and the expressions of the authors and its usage. The discussed topics in this paper serve as the basis for the originality concept under the law of copyright. Not only India, but also the foreign law related to copyrights are same in this concept. This statement is justified by the case of *Donoghue vs. Allied Newspapers Ltd.*,[18] it was held by Farewell J. that, the idea, however brilliant and clever it may be, is nothing more than an idea and till the time it is not put into any form of words, or any kind of expression such as a picture or a play, then there is no such thing as copyright at all. The view of courts has been critically different in the cases of copyright and this has to be accepted as a clear point that whatsoever the case may be the main agent of deciding the case is the idea and its expressions. It may be a situation when an idea has been shared to a friend in general conversations, but he in due course uses that idea and makes it into a work, and take protection under the intellectual property laws. However, it may sound like one-sided law but it should be kept in mind that the intention of the legislature must be taken care of and in this situation, it is clear that the legislature intends to protect the expressions of the ideas and not more than that. It is a critical point and even a controversy as to protection only of the expressions and not the ideas, the reason being simple that many persons might have same ideas in a particular topic and the one who registers its expression is the one who get the benefit of copyright protection. It also maybe said that there is no such machine as to find out the truth as to who got the idea first and he should get the protection. Therefore, it can be the general framework for all that only the expressions have to be protected under the copyright laws.

There are cases in India, as stated above where the courts are able to identify the difference between ideas and expression promptly without any overlap between the two like plots, themes of the play as against the manner of the presentation of the plays where such distinctions are clearly to be evident without any further enquiry. On the other hand, there are cases where the courts have to draw a line between ideas and expressions of an idea,

[18] (1973) 3 ALL ER 503 (Ch D)

themselves by indulging into the depth enquiry into the work. In order to identify first, what may constitute idea in a particular work and what is an expression of idea where the originality resides in order to delineate the scope of the protection of work and dissecting it from the ideas.[19]

Conclusion

Hence, by all the discussions above this is clear that the judiciary in response to the concept of originality is a little liberal because the interpretation to be given in a broader perspective. The courts in every case in which the originality is in question, apply the tests as stated to know exactly that what is the current position of the parties and the matter that needs to be decided.

[19] Institute for Inner Studies & Ors. vs. Charlotte Anderson, 2014 (57) PTC 228 (Del.), at p. 286.

