

CHAPTER II

COPYRIGHT

An Overview

Copyright is a right of diversity. Copyright law governs the commercial exploitation of products born out of culture in the course of day to day human activity. Copyright subsists in respect of a wide variety of works such as literary, dramatic, musical and artistic works, cinematographic films, sound recordings, drawings, paintings, photographs and sculptures, and architectural designs. It protects books, films, music, artistic works, computer programs and multimedia works. The inventions and developments in the mechanical, electronic and digital world have influenced the growth of copyright law throughout the course of history and without which the copyright law would have remained stagnant.¹ The essence of copyright is that the work must be the original expression of the author and it must be fixed in a tangible medium. Thus the three basic requirements for copyrightability are:

- a work must be original;
- a work must be fixed in a tangible form of expression; and
- a work must be a work of authorship.

It gives a right to the authors/creators to exclude others from copying their work. However, there are other rights that are distinct from reproduction, which the copyright law protects, such as the right to reproduce the work, perform or communicate the work to the public, translate the work and adapt the work etc., and hence copyright is generally considered as '*bundle of rights*'. These rights can be assigned or licensed separately and are mutually non-exclusive in their transmission.

Copyright law protects expression of ideas and not ideas in themselves. To be protected as copyright, idea has to be expressed in

¹ See generally Kevin Garnett Q.C, Gillian Davis and *et. al.*, *Copinger & Skone James On Copyright* (Sweet & Maxwell, 2010).

an original way. Originality is usually an easy condition to satisfy. Originality means that the work exhibits independent creation and some minimal degree of creativity either in the expression of underlying facts or ideas or in the selection or arrangement of those facts. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts, etc. The objective of requiring works to be original is to prevent existing works from being the subject-matter of any further copyright, if there are no additional contributions done to it. The word *original* does not mean that the work must be the expression of original or inventive thought. The originality which is required relates to the expression of the thought. The law does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author himself.²

When copyright exists, it subsists from the moment of creation and vests in the author of the work. The central right which the law confers is to prevent unauthorized persons from copying a work and thus inspire creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.³ In *Gramophone Company of India Ltd. v. B. B. Pandey*,⁴ the court held that an artistic, literary or musical work is the brain-child of an author, the fruit of his labour and, so, considered to be his property. It is so highly cherished by all civilized nations, that it is thought worthy of protection by national laws and international conventions relating to copyright.

It is considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large. In the development of modern copyright laws, the economic and social arguments are given more weight in Anglo-

2 *University of London Press, Ltd. v. University Tutorial Press Ltd.*, (1916) 2 Ch 601.

3 See, Ministry of Human Resource Development, Government of India, *A Hand Book of Copyright Law*.

4 (1984) 2 SCC 534.

American laws of common law tradition, whereas, in Continental law countries with civil law systems, the natural law argument and the protection of authors are given first place.⁵ The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest. The ownership of a valid copyright protects the author from unauthorized use of his work, including copying, adaptation, public performance, translation, modification, etc.

The copyright confers both economic and moral rights on the owner. The foremost objectives of copyright is to ensure the creation of a strong public domain- previously protected subject-matter/works under copyright fall into the public domain after expiry of the prescribed term of copyright - where large variety or culture and information are created and disseminated for socio-economic well being of the society. Through the exercise of economic rights, the copyrighted work can be commercially exploited. Apart from the economic rights, the author has certain moral rights including, *droit de divulgation* (right to decide whether to publish the work or not), *droit a la paternite* (right of paternity) and *droit au respect de loeuvre* (the right of integrity). The author has right to prevent any alteration that may damage his reputation. These rights remain with the author even after the transfer of copyright.⁶

Copyright confers, by the doctrine of fair dealing, a privilege in others, than the owner of the copyright to use the copyrighted material in a reasonable manner without his permission. By the application of the doctrine of fair dealing, the law of copyright balances private and public interests.⁷

Copyright is a constant balancing act between the author and his rights and the entrepreneur who exploits copyright works and his right. This is inevitable as they are heavily interdependent.

Rights Conferred by Copyright: Economic and Moral Rights

As previously stated, copyright is a bundle of rights which include the right to reproduction, distribution, communication to public, public

5 Copinger and Skone James, *On Copyright* 27 (2005).

6 *Supra* note 1.

7 *Theberge v. Galerie D'art DuPetit Champlain Inc.*, 2002 SCC 34 (Canada).

performance rights, translation rights and adaptation rights. In case of certain protected subject matters like computer programme there is another right termed as rental rights. Communication rights of certain protected subject matter include broadcasting, cable casting and webcasting rights. Performers and broadcasting organizations also have certain bundle of economic rights.

As all intellectual property rights copyright too is a creation of statute. In India the rights are conferred by the Copyright Act, 1957. The copyright confers both economic and moral rights on the owner. Section 14 of the Copyright Act enlists the economic rights granted to owners of copyright and section 57 guarantees certain special rights to the authors of copyright. The rights are identified based on nature of commercial exploitation of a particular work and they are subject matter specific.⁸ As per section 14, 'copyright' means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof.....

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
- (ii) to issue copies of the work to the public not being copies already in circulation;
- (iii) to perform the work in public, or communicate it to the public;
- (iv) to make any cinematograph film or sound recording in respect of the work;
- (v) to make any translation of the work;
- (vi) to make any adaptation of the work.

As stated earlier, apart from the economic rights, the author has certain special rights. These special rights are independent and separate from the economic rights of authors. The author of a work has the *paternity right*- right to claim authorship of the work and the *integrity right*- right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work, if such distortion, mutilation, modification or other act is prejudicial to his honour or reputation. Section 57 of the Act deals with *author's special rights* in India. According to this section, independently of the author's copyright and even after the assignment either wholly or partially of

⁸ See Gopalakrishnan and Agitha, *Principles of Intellectual Property* 223 (Eastern Book Co., 2006).

the said copyright, the author of a work shall have the right-

- (a) to claim authorship of the work; and
- (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:

Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of sub-section (1) of section 52 applies.

This section is to provide due recognition to authors' reputation. "Section 57 lifts the author's status beyond the material gains of copyright and gives it a special status. An author's right to restrain distortion etc. of his work is not limited to a case of literary reproduction of his work... The language of section 57 is of the widest amplitude and cannot be restricted to 'literary' expression only. Visual and audio manifestations are directly covered."⁹

Authorship and Ownership

The concept of 'authorship' and 'ownership' are vital when the question of propriety over the copyright arises. As copyright is a property right, this raises important questions about ownership and the mechanisms for exploiting copyright. Authorship and ownership are, in relation to copyright, two distinct concepts, each of which attract their own peculiar rights: The author having moral rights, and the owner of the copyright possessing economic rights. Sometimes, the author of a work will also be the owner of the copyright in the work, but this is not always so. Many a times, certain works have separate authors and owners as far as copyright is concerned. Ownership generally flows from authorship. The person who makes the work is normally the first owner of the copyright in the work, provided that he has not created the work in the course of his employment.

9 For moral rights, see *Smt. Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, AIR 1987 Delhi 13. Also see, *Amarnath Sehgal v. Union of India* (2005) PTC 253 (Del) and *KPM Sobharam v. M/s Rattan Prakashan Mandir*, AIR 1983 Del. 461 and *Wiley Eastern Ltd. v. Indian Institute of Management*, 61 (1996) DLT 281. Also See Chapter III of this book for amendments in moral rights.

The author is the person who actually writes, compiles, composes or draws the work in question, although the idea of the work may have been suggested by another. The word 'author' is defined under section 2(d) of the Copyright Act, 1957. Author in relation to various categories of works as defined in section 2(d) is as follows:

- literary or dramatic work- the author of the work,
- musical work-the composer,
- an artistic work other than a photograph-the artist,
- photograph- the person who takes the photograph,
- cinematograph film- the producer,
- sound recording-the producer, and
- literary, dramatic, musical or artistic work which is computer generated- the person who causes the work to be created.

The author of a compilation is the person who gathers or organizes the material contained within it and who selects, orders and arranges that material.¹⁰ The author does not have to be the person who carries out the physical act of creating the work, such as by putting pencil to paper. An amanuensis taking down dictation is not the author of the resulting work. The author of a work does not have to exercise penmanship but something akin to penmanship is required.¹¹

Ownership of a physical object is separate and distinct from ownership of the copyright embodied in the material object. Purchasing a manuscript or letters written by a famous person gives the purchaser ownership of those 'physical objects' alone. Unless copyright has been explicitly conveyed with those physical articles, the original authors generally retain all other rights associated with the works, including the rights to perform and reproduce them and any other exclusive rights granted to copyright owners under section 14 of the Copyright Act. Determining ownership is critical because the exclusive rights of reproduction, performance, display, and so forth belong to the copyright owner.

Firstly, an author may create a work in his own behalf or at the instance of another person or in the course of employment by another person. In the first case the author is the owner of copyright in the

¹⁰ *Waterlow Publishers Ltd v. Rose* [1995] FSR 207.

¹¹ *Robin Ray v. Classic FM Plc.* [1998] FSR 622.

work. Authors who write books, compose music are persons who come under this category. Secondly, an author may create a work at the instance of another person for valuable consideration. Examples: a photographer taking a photo at the instance of another person or a painter drawing a portrait at the request of another person for valuable consideration. In such cases, in the absence of any agreement to the contrary, the person at whose instance the work is made is the owner of the copyright in the work.¹² Thirdly, an author may create a work in the course of his employment under a contract of service or apprenticeship, i.e., as an employee for an employer. In such cases the employer in the absence of any agreement to the contrary is the first owner of the copyright.

Although the general rule is that the person who creates a work is the author of that work and the owner of the copyright therein, there is an exception to that principle: the copyright law defines a category of works called works made for hire. If a work is "made for hire," the author is considered to be the employer or commissioning party and not the employee or the actual person who created the work. The employer or commissioning party may be a company or an individual.

There are two types of works that are classified as works made for hire: Works prepared by an employee within the scope of employment and certain categories of specially ordered or commissioned works.

Copyright in works prepared by employees are presumptively owned by their employers. For example, if an employee is tasked with creating a computer program by his or her employer, the resulting work is owned by the employee. The general principle is that when something done or produced by a person in the employment of another, and what he does or produces is part of the business or duty assigned to him as that other's employee, the copyright in the work so produced will, in the first instance, be the property of the employer.

The copyright in a work done by an employee on his own time and not in the course of his employment is in the employee. However, questions arise whether the person creating the work is an "employee" (such that his or her creations belong to the employer) or whether the person is an "independent contractor" (such that his or her creations belong to him or her as the owner/author). This question often arises when freelance artists prepare works for others.

12 *Apple Computer v. Cooper* [1993] FSR 280.

In *Community for Creative Non-Violence v. Reid*,¹³ the court held that the term *employee* for purposes of determining authorship of works made for hire should be interpreted according to general common law agency principles. If the person doing the work is an employee under common law agency principles and the work was done in the scope of employment, the employer (not the employee) is the copyright owner/author.

The court identified certain factors that characterize an employer-employee relationship:

- Control by the employer over the work: If the employer has a voice in how the work is done, has the work done at the employer's location, and provides equipment and tools to the person to create the work, such tends to show an employer-employee relationship.
- Control by the employer over the employee: If the employer controls the worker's schedule in creating work, has the right to have the worker perform other assignments, determines the method of payment, and/or has the right to hire the worker's assistants, such evidences an employer-employee relationship.
- Status of employee: If the employer is in business to produce such works, provides the worker with benefits similar to those received by other workers, and withholds taxes from the worker's compensation, such is supportive of an employer-employee relationship.

Employer is the proprietor of copyright of a work produced by the employee in the course of employment. In *V.T. Thomas and other v Malayala Manorama Co. Ltd.*,¹⁴ the dispute was between a publishing house – Malayala Manorama Co. Ltd. and a reputed cartoonist, Tom. The petitioner was the author of artistic works. The court observed that the term 'author' occurring in section 17 (c) was defined under section 2 (d). That term has to be understood in relation to a work. Two different entities were visualized in the sub-section, the author and the 'employer'. It was impossible to imagine that in relation to any artistic work, the same person would simultaneously be the author and the employer. It was therefore, unassumable that as regards the cartoons and caricatures produced by Toms, Manorama was the author.

¹³ 490 U.S. 730 (1989).

¹⁴ AIR 1989 Ker 49.

Toms was the person who clothes the idea in the form. He was not a mere shorthand writer transcribing an author's stenographed words. Toms was the person who impregnates an idea; one who actually executes a design. It was Toms hands which fixed the picture upon paper. Toms was therefore the author. In absence, his authorship of the content and form of the carton series way back in 1957 (at a time when he was not the employee of Manorama) ordinarily entitled him to the copyright. The court laid down that the artistic work of an author made as employee, and while in course of his employment, pass on the employer in contingencies postulated *inter alia* in section 17 (c). This process came to an end on termination of service. In case of termination of the employment, the employee was entitled to the ownership of copyright in the works created subsequently and the former employer has no copyright over the subsequent works so created.

When a cinematograph film producer commissions a composer of music or a lyricist for reward of or valuable consideration for the purpose of making his cinematograph film or composing music or lyrics, i.e., the sounds for incorporation or absorption in the sound track associated with the film which are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other.¹⁵

In the case of a work made in the course of the author's employment under a contract of service or apprenticeship, the employer (not being the proprietor of a newspaper, magazine or periodical), in the absence of agreement to the contrary, is the first owner of copyright.¹⁶

Ownership in derivative or collective works: Collective works include encyclopedia, dictionary, year book, newspaper, magazine, or generally a work in which works or parts of works of different authors are incorporated. In case of collective work copyright subsists in the work as a whole and the first owner of such copyright is the person who has collected, edited and organized the work.

If a work such as a book is created by one person who intends it to be complete at the time and illustrations are later added to it by another,

15 *Eastern India Motion Picture and Others v. Performing Right Society Ltd.*, AIR 1978 Cal 477.

16 S. 17(c).

the work cannot be a joint work because there was no intention of the parties to create a unitary whole at the time of their creation. In such a case, the new work, consisting of text and illustrations, is a derivative work. The author of the original book has rights only to his or her work and cannot reproduce or perform the derivative work without permission. Similarly, the author of the derivative work cannot create further works based on the original book without permission and cannot reproduce the original work (or exercise other copyright rights) without permission.

Multiple ownership rights may also arise if separately copyrightable works are compiled into a collection. For example, in case of essays written by various authors, the original authors retain their exclusive rights- such as rights to reproduce, distribute, and perform- in their respective essays. No joint work is created because there was no intent at the time the separate essays were created to merge them into a unitary whole. No derivative work is created because the original works have not been transformed in any way and nothing new has been added to them.

Transfer of Copyright

Like other kinds of intellectual property, copyright owner's exclusive rights can be transferred. The transfer of exclusive rights is valid only if the transfer is in writing and signed by the owner. Copyright can be transferred either by way of licensing or assignment. Licensing under the copyright law can be either voluntary or non-voluntary. Licensing can be done with respect to the existing work as well as with respect to the future works. Non-voluntary/compulsory licensing can be invoked under statutory provisions with respect to both published works and unpublished works. It can also be obtained for the production and publication of the translation of works. For example, if the owner of a published Indian work refused to re-publish or allow the republication of the work or has refused to allow the performance of the work in public and by reason of such refusal the work is withheld from the public the Copyright Board can grant compulsory licensing under the provisions of the Copyright Act if the copyright owner's refusal is not reasonable.

The owner of Copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereof.

An assignment of copyright is an outright transfer of some or all of the exclusive rights of the copyright owner. However, in case of future works, assignment will take effect only when the work comes into existence. Legal representatives of the assignee also included if the assignee before the work comes into existence. Moral rights are generally not assignable. A copyright can also be transmitted or an author can relinquish copyright in his work.

Doctrine of Fair Dealing

The rights of a copyright owner are subject to certain limitations. The fundamental objective of copyright is to ensure a balance between incentives for authors to create new works by giving them the exclusive rights for commercial exploitation and *limiting* the rights so that the works themselves are useful to the public. One of the most important limitations to the exclusive right of the owner of copyright is the doctrine of fair use. By the application of fair use doctrine the public gets the right to use copyrighted works in certain situations without infringing the authors' exclusive rights.

Certain acts do not constitute infringement of copyright though the owner of copyright has exclusive right for that. Section 52(1) of the Indian Copyright Act states that the following acts shall not constitute an infringement of copyright, namely:

- (a) a fair dealing with any work not being a computer programme for the purposes of-
 - (i) private or personal use, including research;
 - (ii) criticism or review, whether of that work or of any other work;
 - (iii) reporting of current events and current affairs including the reporting of a lecture delivered in public;

While no definition of fair dealing is to be found under the Act, Indian courts have relied on the decision of *Hubbard v. Vosper*¹⁷ which held that "it is impossible to define what is 'fair dealing.' It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair

dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions”

Many facts are to be considered in determining whether a particular use is covered by the doctrine of fair use, *inter alia*, the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.

Though the fair use doctrine has been originated as a judge-made doctrine through case laws¹⁸ later it has been codified and given statutory recognition in various jurisdictions. The Copyright Amendment Act, 2012 has widened the scope of ‘fair dealing’ in India by inserting *inter alia* provisions for disabled persons etc.

To strike an appropriate and viable balance between the rights of the copyright owners and the interests of the society as a whole, there are exceptions in the law. Many types of exploitation of work which are for social purposes such as education, religious ceremonies, and so on are exempted from the operation of the rights granted in the Act. Copyright in a work is considered as infringed only if a substantial part is made use of unauthorisedly. What is ‘substantial’ varies from case to case. More often than not, it is a matter of quality rather than quantity.¹⁹

18 *Folsom v. Marsh*, 9 F.Cas. 342 (1841).

19 *Supra* note 3.