

Copyright and Related Rights Law

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WEEK - 04

LECTURE – 18

Literary Work v Dramatic Work - Part 2

Welcome back to this course on copyright and related rights law. This week, we are looking at the subject matter of dramatic works. In the earlier weeks, we discussed three subject matters under copyright law: literary works, artistic works, and musical works. In the sessions that we have already covered in this week, we have looked at the statutory definitions of dramatic work in different copyright Acts in different countries. To do a quick recap, what we have seen in these definitions are examples of some types of dramatic works, such as choreography, and the exclusion of certain types of works, such as cinematographic film. What we had seen in the previous session was a distinction between literary works and dramatic works, which we understood to be a complex distinction and something that we are going to continue in this session as well.

You would recall that we were discussing the case of the Institute for Inner Studies versus Charlotte Anderson, a case decided by the Delhi High Court. The question before the court was whether an exercise routine specifically in this particular case concerning the Pranik healing techniques - Where they are in written form, is it a literary work, and where it is written, can the literary work protect against the performance of what is written, and is the performance itself a dramatic work? In our previous session, we had focused on a preliminary understanding of the focus of literary works, which is specifically on the expression itself and not on what it is expressing. In our literary work discussions, we discussed that copyright does not extend to the protection of facts. Similarly, to say that copyright extends to performances such as exercises that have been expressed in a literary format is difficult for us to place within the realm of copyright.

In this case, the court referred to a UK decision of Designers Guild v. Russell Williams in which two important propositions were highlighted by the court. The first proposition is that copyright work may express certain ideas that are not protected because they have no connection with the literary, dramatic, musical, or artistic nature of the work. Literary work that describes a system or invention does not entitle the author to claim protection

for his system or invention as such. The same is true of an inventive concept expressed in an artistic work, however striking or original it may be.

Others are, in the absence of patent protection, free to express it in their own works. In the previous discussions, we have made a distinction between what is subject to copyright protection and what is subject to patent protection. We have understood that functional considerations or considerations of utility are areas of patent protection. Whereas copyright seeks to protect the expression. Even though the expression is of particular utility, the utility itself is not something copyright can protect against.

In this proposition, this particular distinction comes to the fore wherein whenever we understand or whenever we are faced with the question of whether the subject matter for our consideration is copyrightable or not, we must see whether it is something which is functional or something which is having some utility and then we can make a distinction - between the copyrightable subject matter and subject matter that would fall within patent. So what this proposition states is that if the utility or functionality is not protected within patent law. Then we can have a situation in which the expression can be copyrightable, but the function itself can be used by anybody without any kind of authorization required from copyright owners. The second proposition states that certain ideas expressed by a copyrighted work may not be protected because, although they are ideas of a literary, dramatic, or artistic nature, they are not original or are so commonplace as not to form a substantial part of the world. This second proposition is a step away from the consideration of processes, functionality, or utility; rather, it focuses on the commonplace nature of the information that is expressed.

The information is of such a generic nature that its expression does not lend any credence to its protectable nature as subject matter of copyright. And therefore, any such expression is a representation of commonplace information. There is no copyright protection that such an expression can enjoy. There may sometimes arise cases or instances where, within a work, what appears to be an expression because of its presence in the work as a whole is merely an idea. And the protectable area, which is the manner of expression, lies somewhere else.

What the court expresses, then, is that even within an expression, we could make a distinction between protectable areas and non-protectable areas based on the propositions that we have discussed. You can imagine an expression in which certain portions are devoted to some kind of expression of a system or a process, and certain other parts are not. The expression itself would be something that is capable of copyright protection, but the system itself would not fall within its domain. Similarly, some parts can be so commonplace that they are not copyrightable, but certain other parts could be. Consider this image.

You can see a system of accounting that is usually followed in businesses. Nowadays, this system of accounting or record-keeping is largely digital; nevertheless, what doesn't change is the fact that a certain system or format of record-keeping or bookkeeping is in place. Therefore, in our understanding of the propositions we have discussed, can the expression of such a bookkeeping system protect against the system itself being used without authorization? This interesting question was considered by the US Supreme Court in a seminal case in the late 1800s called Baker versus Seldon. In this particular case, we can see that the defendant arguing against the copyrightability of the system itself was saying that this is not a subject matter of copyright.

Let us see. But if we assume that the system is open to public use, it seems equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book considered merely as a book explanatory of the system. We looked at the proposition that stated that where an expression explains a process or describes a particular system, the system itself is not within the realm of copyright protection; the expressions, but what we see from this passage is that if copyright isn't protecting the system itself, what exactly is copyright protecting? What the court then says is that there is no doubt that a work on the subject of bookkeeping, though only explanatory of well-known systems, may be the subject of a copyright. But then it is only claimed as a book. Such a book may be explanatory either of old systems or of an entirely new system and is considered as a work by an author conveying information on the subject of bookkeeping and containing detailed explanations of the art. It may be a very valuable acquisition to the practical knowledge of the community, but there is a clear distinction between the book as such and the art that it is intended to illustrate.

What do we understand? That a particular system or process can be explained in many different ways. The expression can, in fact, be distinct. But the system would be the same. Therefore, what copyright is looking to protect is the specific manner of expression and against its copying, but it cannot protect the system. Look at this image.

You can see medicines. Now medicines are serving a functional purpose. But imagine a person who is writing a book on medicine. Say a specific medication. What is the ailment that the medicine aims to solve? How is it solved? Imagine if, because of just this writing, the medicine itself and its functionality are protected by copyright.

The US court explains that this clearly lies in the domain of patent law. The expression cannot protect functionality, and as the court explains, in the case of medicines, if the discoverer writes and publishes a book on the subject, he may copyright his book, but that only secures to him the exclusive right to print and publish his book. He does not gain any exclusive rights to the manufacture and sale of the medicine. In taking these two cases and their legal ratio, what Justice Manmohan Singh states in the Institute for Inner Studies versus Charlotte Anderson is that copyright vests in literary work in the language

employed to describe the art and not the art itself. Therefore, it justifies the general proposition that copyright lies in the expression of an idea and not in the idea itself.

In our discussions on literary works, we discussed that the value of a literary work lies in its informational capacity, its instructional capacity, or its capacity to provide pleasure through literary enjoyment. What we see as a deduction here is also the same: the expression of such information can be copyrighted. But in no way can this extend to the function that it is looking to express, or the system that it is looking to express, or any action that it is looking to express. Thus, whenever protection on the premise of copyright is sought. In relation to books and literature, describing useful art, principles, historical facts or events, or modes of performing ancient exercises or any other processes for that matter, the copyright protection shall vest in the language employed.

The selection and arrangement of the facts or asanas and their presence in a sequential manner in the book, wherein the hard work, skill, and labor have been expended by the master in doing so, the reproduction rights to this shall be available exclusively to the masters or persons deriving title from him. However, the protection shall not be extended to include the monopoly right over the performance of the said asanas, yoga, or pranic healing on the strength of the manner of expression as stated in the book. Thus, Justice Manmohan Singh concludes that what will be within the domain of literary work copyright would be just the expression and, therefore, the manner in which the book has been written, the content; the content itself can be subject to copyright, but if the content is expressing physical exercises in the form of pranic healing techniques or asanas generally, then - the copyright in the expression cannot prevent anybody from undertaking those asanas. Another important consideration that we must see here is that a compilation, which is a literary work, can be created, and we had discussed this. The selection and arrangement in a particular compilation can, in fact, be a creative exercise and can be considered a literary work.

But we had also considered that compilations are detachable from the content they compile. What we see here is that just because a compilation is created and is capable of copyright protection does not make the subject matter that it is compiling, which is otherwise uncopyrightable, copyrightable. Therefore, compiling a sequence of steps that are essentially exercise routines does not make those exercise routines copyrightable. Having understood the literary work's consideration with respect to exercise routines and their expression. Let us now come to the question of the dramatic work.

What the quote states is that dramatic work is expressed in section 2(h) in an inclusive manner. Unlike the interpretation of artistic work that we had seen in the Indian Copyright Act, which lays down compartments in an exhaustive manner, the definition of dramatic work does not do so. Because this is an inclusive definition, it is possible that claimants could argue that we could add other things within this, such as exercise

routines. Therefore, as the court states, the consequence of the said inclusive definition would result in the right holders, like the plaintiff, arguing that asanas of yoga or pranic healing are akin to choreography. If the same is written in the form of a script and there is no voice or song along with the dance, it may be similar to pantomime or dance.

But what Justice Manmohan Singh explains is that if we carefully understand what an exercise routine is, and then place it within what a dramatic work as a subject matter is intended to protect; then we would be in a position to say that such exercise routines are not choreographic works. But to understand this, we must understand what it is that dramatic works are intended to do. When we consider recitations of poems or singing of songs, we discussed that there is no requirement for any bodily movement; no action is required for the purpose of such recitation. Therefore, where there is no action in a performance, we can distinguish it from performances in which there is action. On that note, let us look at a very important extract from this textbook on copyright by Copinger and Skone James.

This particular extract from the book has been taken by Justice Manmohan Singh in the case of the Institute for Inner Studies. This is what the excerpt says. The dramatic work is, in fact, constituted of the capability of performance. What does this mean? It is implicit in the structure of the definition of dramatic work. You would recall it states that dramatic work includes a work of dance or mime in the UK Act.

That a dramatic work is distinguishable from other works because it has been identified separately from literary, artistic, and musical works tells us that there is something different about dramatic works compared to literary works. But what the definition doesn't tell us is what exactly this distinction is. And as Copinger explains, the definition does not seek to define what this feature is that makes a work a dramatic work, merely stating that it includes a work of dance or mime. It is suggested that the essential feature of a dramatic work, as the term implies, is that it is capable of being physically performed. This is the crucial portion on which we will focus for the remaining discussion.

Copinger explains that not all works which are capable of being performed are dramatic works. Please pay attention. It is possible, in one sense, to perform a literary work, for example, by reciting a poem, or a musical work, for example, by singing a song. But that possibility does not make such a work a dramatic one. To constitute a work as a dramatic work, something more is necessary than mere capability of performance in this sense.

It is suggested that the work must have been created for the purpose of being performed, such purpose being a matter to be deduced from the form and nature of the work. Thus, a work that was intended to be sung by a singer in character costume, but without action, would not, it is thought, be a dramatic work. The assemblage of a scene to be viewed or

to be the subject of a photograph, even if incorporating human actors, does not constitute a dramatic work as it lacks the necessary element of action. What are we understanding? We see that there is a distinction we can make between a literary work and a dramatic work based on purpose itself.

Imagine a book. When a book is written, its primary purpose is to be read. But what is the primary purpose of a script? The primary purpose of a script is not the same as that of a book. The script is meant to be performed. Therefore, there is a distinction in purposes. There is also a distinction in terms of performance.

A literary work, if it has to be performed, does not require any action. On the other hand, dramatic works such as dance require action. As Copinger continues, he says that the elements or features which may make a work a dramatic work are many and varied. An obvious example of a dramatic work, such as a play or a screenplay, will be readily identifiable by the dialogue and the acting directions usually found in the stage directions. However, in order for a work to constitute a dramatic work, there must be sufficient certainty regarding its subject matter.

In the case of a play or a screenplay, this presents little problem since what knits the separate incidents together is clear. So that they can be performed as an entity, the structure of the work or the plot comprises the setting, the characters, and the interrelationship and development. What does Copinger say? Imagine a play. There will be clear directions on what is expected of the performers on the stage. But there is something that connects these directions together, and that is the plot.

According to Copinger, in dramatic works, there must be a certainty of action through such a connection of directions of action. And therefore, a sports game, does it fit within the ambit of a dramatic work? What about news or current affairs programs? Do they? Imagine a basketball game—this particular basketball game. Does it constitute a dramatic work? You would note that there is a lot of uncertainty when a game is played. The sequence of steps that needs to be followed is generally associated with the rules of the game. But the way in which the game is actually played does not have any kind of certainty.

Therefore, a sports game would not fit within the ambit of a dramatic work. What Justice Manmohan Singh then says is that instances of doubtful certainty include not just sports games; they include aerobics. And by necessary implication also includes yoga and pranic healing techniques. Thus, by applying the test enunciated and well settled by the authorities in England for determining the work as a dramatic work, it can be said that prima facie the asanas of yoga or pranic healing do not fall within the ambit of dramatic work.

On this point, let us also take a look at what the U.S. Copyright Office has stated. They say a mere compilation of physical movements does not rise to the level of choreographic authorship, unless it contains sufficient attributes of a work of choreography. And although a choreographic work such as a ballet or abstract modern dance may incorporate simple routines, social dances, or even exercise routines, As elements of the overall work, the mere selection and arrangement of physical movements do not in themselves support the claim of choreographic authorship. Thus, our discussion has led to clarity in the distinction between literary works and dramatic works. What is this distinction? A literary work is made for the purpose of providing information.

Its primary purpose is to be read. The primary purpose of a dramatic work is to be performed. It's not just any performance. It is a performance of action that makes it an expression of dramatic work and a performance of action also we can distinguish in terms of whether there is certainty of action - which individual exercise steps would not satisfy rather a sequence of steps like dance such as ballet can. The next session will focus on making a distinction between dramatic works and cinematographic films.

Thank you for joining me. See you all in the next session. Thank you.