

## **Copyright and Related Rights Law**

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**WEEK - 04**

**LECTURE – 19**

### **Dramatic Work v Cinematograph Film**

Welcome back to this course on copyright and related rights law. This week, we are looking to understand the subject matter of dramatic works. In the previous sessions, we have looked at the statutory definitions of dramatic works in various copyright Acts in different countries. We have also looked at the distinction between literary works and dramatic works. In today's discussion, we are going to make a distinction between dramatic works and cinematographic films. To put this in context, take a look at this image.

You can see the process of shooting a film taking place. Keep in mind that a film which is seen on OTT platforms such as Netflix or Prime Video, as we are used to seeing, or in cinema halls - recording is made with the help of equipment such as a video camera, as seen in this image. The underlying component of such a film could be the performances that are based on dramatic works. What we are looking to understand is whether the film itself can be considered to fall within the broad framework of dramatic work.

Or, can cinematographic films be distinguished and considered as a subject matter in themselves? Let us look at some definitions we have already seen this week when we were examining the statutory definitions of dramatic work. We have used these definitions in the previous two sessions to help us understand the difference between literary works and dramatic works. We will use these definitions now to help us make the distinction between dramatic works and cinematographic films. Take a look at Section 2(h) of the Indian Copyright Act. It states that dramatic work includes any piece for recitation, choreographic work or entertainment, and dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, but does not include a cinematograph film.

For our purposes in the previous two sessions, we had focused on the types that are included within dramatic works such as choreography and dumb show. What we will

look at is the exclusion. The exclusion, as you can see, is of a cinematograph film. Now, a cinematograph film under the Indian Copyright Act is a separate subject matter. Let us look at the Canadian Copyright Act.

Look at the provision which says that dramatic work includes any piece or recitation, choreographic work or mime, scenic arrangement or acting form that is fixed in writing or otherwise, any cinematographic work, and any compilation of dramatic works. Instead of excluding cinematographic films or cinematographic works from dramatic works, the Canadian Copyright Act includes them. We also find an interesting inclusion in the form of a compilation of dramatic works. In what manner is cinematographic work defined under the Canadian Copyright Act? It states that cinematographic work includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack. Cinematography is a process of recording a series of images to create an output that has visual continuity; to understand what a cinematographic work is, perhaps a focus on the process itself and not the output is necessary.

Let us understand that what we see in a film, in a cinema hall, or on an OTT platform such as Netflix is the output, but there is a process leading to this output. What if this process and the underlying work that is connected to this process are being considered for the purpose of subject matter? If yes, then perhaps dramatic work can include cinematographic work. On this point, let us also consider the Singapore Copyright Act. It says dramatic work includes a choreographic show or other dumb show if described in writing in the form in which the show is to be presented, and a scenario or script for a cinematograph film - but does not include a cinematograph film, as distinct from the scenario or script for a cinematograph film. If indeed we are looking to protect the work that is tied to the process leading to the output that we are calling a film, then are we in fact protecting the script as a dramatic work and not the output at all? According to the Singapore Copyright Act, that is in fact the case.

The script that satisfies all the considerations of dramatic work will no doubt fall within this subject matter. But a film that is a recording does not by itself satisfy the considerations of dramatic work. In fact, the script and performance can be incorporated into a film, and therefore the Singapore Copyright Act distinguishes between these two elements. Consider this image. You can see a person holding negatives in this image.

As is traditionally the case, the use of such negatives, when run together in a series of photographs, can in fact be done in such a manner as to create visual continuity. Or, in other words, a series of photographs can, in fact, be considered a video. But when we consider that a film is nothing but a series of photographs, what kind of work is a cinematograph film then? We have understood from our discussion on artistic works that a photograph is an artistic work. You will recall that we had discussed that not every

photograph will amount to an artistic work. Any person who is taking a photograph could claim to be a photographer, but not every photographer will have a copyright subsisting in their photograph.

In any case, let us imagine that the photographs forming a visual continuity in the form of what we are referring to as a cinematograph film are original in nature. Then, is this an artistic work? Is cinematographic film an artistic work? Because it is composed of photographs. Is there any other way in which we can consider cinematograph film as something that doesn't fall under dramatic work? Consider these two images. Can we say that images which are in continuity, such as this, can be considered compilations? How is this any different from the previous discussion we were having on cinematograph films being considered a series of photographs and therefore artistic works? In the cases of compilation, we have discussed that a compilation is a literary work and compilations can satisfy originality on account of selection and arrangement. But the compilation is not so much concerned with the copyrightable nature of the content that it compiles.

Can we consider a compilation of scenes like this as a cinematographic film? And if indeed this can be the case, then is the compilation a literary work of dramatic or artistic works? What the Canadian Copyright Act provides in its provision is that a compilation of dramatic works will also be considered a dramatic work. Therefore, it seems that it is a series of photographs that are being selectively arranged, wherein the photographs have a copyright in themselves, or be it any scene that per se doesn't have any copyright in itself but is a compilation, these scenes will be considered for their dramatic components, and the compilation will be considered a dramatic work. Does it seem confusing? Let us first look at an important foundational question: why must we consider cinematograph film as a different subject matter? Let us recall what it is that we have understood as the purpose behind these subject matters and what copyright is looking to protect. What is it for literary work? The informative value. What is it for artistic work? Visual appeal.

Musical works? The harmony is the harmonious tune. What is it for dramatic works? The possibility of performance. What is it for cinematographic films? For cinematograph films, if we consider the purpose to be viewing a recording, then there is a clearly distinct purpose compared to the other subject matters we have discussed. After all, a cinematograph film is a recording. By itself, it cannot be performed.

Its content can be performed, but by itself, it cannot be. It is a form of fixation, just like writing. But who is the author of a cinematographic film? Let us consider the Indian Copyright Act, which states that the author of a cinematograph film is its producer. Who is the producer? Section 2(uu) defines a producer as a person who takes the initiative and responsibility for making the film. The producer is a person who is responsible for bringing together various components that form the film.

How do we understand this illustratively? If a script is required for a particular film, then getting a scriptwriter on board is a responsibility for the producer. If actors are required to perform that particular script for the film, then that's a responsibility of the producer. If particular compositions are required for the film, then it is the responsibility of the producer to arrange them. Therefore, bringing composers, scriptwriters, performers, lyricists, and all other technical considerations, as well as directors and technical assistants for the purpose of making the film is what the producer does. In this activity, what is the creative expression? What is it that the Copyright Act is looking to protect in terms of the producer's creative expression? Consider this case from the UK: *Norowzian versus Arks*.

The question that the court was looking to answer was whether, under the UK Copyright Act, there is any distinction between dramatic work and cinematograph work. In the first proceeding, the court had noted that film is distinct from a dramatic work. As we are also in the process of understanding that where a script is created by a scriptwriter, the producer is getting the scriptwriter on board for the purpose of the film, and the performers who the producer has arranged are performing the expressions provided in the script directed by a director - then the dramatic work is only a component of the film. This means that the film itself is distinct from the dramatic work. But when this matter went to appeal in the higher court, it stated that a film can be considered a dramatic work.

What is the reason for such a reversal? An important point that we must keep in mind is that, unlike the Indian Act, which clearly excludes a cinematograph work from the definition of dramatic work. In the UK Copyright Act, a dramatic work is simply a work that includes dance or mime. Therefore, there is a greater possibility of including other subject matters, such as cinematograph films, if dramatic works are given a subjective and broader understanding. Therefore, in the reasoning of the court, it stated that the dramatic work is fundamentally a work of action, which is capable of performance. A definition that could encompass films is needed.

But in saying that, isn't this confusing? In the *Norowzian versus Arks* case, the court seems to be suggesting that films themselves are the result of action. But is the film itself action? This is an important point that we must keep in mind and understand. We will come to this point in just a bit. But before that, let us come back to this question of why copyright would protect the interest of the producer who does not seem to be creatively expressing anything. If the purpose of copyright is as we have been understanding when we discussed literary works such as books, artistic works such as paintings, and musical works such as compositions— copyright is looking to encourage innovative thoughts in terms of creative expression.

What we can see here is that the protection copyright offers is, as you would recall, a kind of artificial fencing. That is because creative expression is easily copied; copyright

provides a means through which the right holder can prevent this from happening, or as far as possible. In the cases of films that require a huge investment and a great amount of risk on the part of the producer, will it not be justified for copyright to also provide a means for the producer to prevent their unauthorized copying? We then see a distinct purpose of copyright protection for works such as cinematograph films. Therefore, even if an author in a case such as this, with cinematograph films, is the producer who is not creatively expressing anything himself, copyright provides a means to protect this producer against copying. In doing so, the Indian Copyright Act makes a distinction between cinematograph films and dramatic works.

But as *Norowzian versus Arks* and the Court of Appeal express, because the elements that we understood in the previous session when we discussed the *Institute of Inner Studies versus Charlotte Anderson* case - the elements which are the purpose of performance, certainty of performance and an action-oriented performance; are they all satisfied with respect to films? According to the court, it does. What we understand is that, in relation to dramatic works, whether it is the Canadian Act, the Indian Act, or the Singapore Act, there is a clear representation that this has to be fixed. But what it doesn't provide is at what point this fixation must happen? Can fixation happen contemporaneously as the performance is taking place? Or must the fixation happen before a performance can take place? According to the Bombay High Court, in a very important case again, *Fortune Films International versus Dev Anand*, the court explained that fixation must occur prior to the performance taking place. Meaning that the certainty of action and the certainty of performance must be present before the performance takes place. According to the court, the words fixed in writing or otherwise would seem to suggest a point in time prior to the acting or scenic arrangement.

Which requirement must be satisfied before the work can qualify as a dramatic work and secure protection? What do we understand here? A script that is fixed can be performed, but you will see that the performance is recorded in a film. Therefore, if we were to use this rationale and consider cinematograph films as dramatic works— it would not be possible because a cinematograph film is recording a performance, whereas according to the Bombay High Court, fixation must happen before the performance takes place. I hope that with this particular understanding, you are able to distinguish between dramatic works as a subject matter of copyright and cinematograph films as a separate subject matter. Are you now able to distinguish between a script and a movie? Let us see in terms of what we understand. In the *Institute for Inner Studies versus Charlotte Anderson*, we understood that a dramatic work must be based on the purpose of performance.

Not only that, but the sequence of scenes or the sequence of such performances must be connected. So, in a script, it would be connected by a plot. Not only that, the performance must also be a performance of action. A script which seems to be fitting. All of these elements would constitute a dramatic work.

Combined with our understanding that fixation is something that must happen prior to a performance taking place. We can now say that a film is not a dramatic work. Rather, the film is a recording. It's a fixation, a type of fixation - for which the author is the producer, and the purpose of providing copyright protection to the producer is different from the purpose of providing copyright protection to creative expressions and their authors such as painters. We will take a look at some images now and conduct a small exercise.

Please take a look at these images. And try to find which subject matter they fall under. Take a look at this image. Are you now in a position to say that exercise routines, such as yoga, are not dramatic works? In fact, exercise routines are commonplace, and no expression, unless it is creative, can be considered copyrightable; therefore, exercise routines are capable of being used by anybody. What about this image? Are you able to say that cricket, as a sport, is not something that can be considered a dramatic work? There is a great amount of uncertainty in how sports are played and which cannot be fixed prior to the performance taking place; therefore, this is not a dramatic work. What about this? This is a photograph from a cinema hall, and you can see that the audience is wearing glasses that help them with 3D viewing.

What are they viewing? A cinematographic film, which is a recording. A distinct subject matter. What about this? You can see a person who is going to sing. Singing doesn't require any actions. But singing requires the use of musical works and literary works.

Lyrics that are being sung would be literary works, and the tune that accompanies the lyrics would be the musical work. With that, we are able to make a distinction between what could possibly be confusing subject matter considerations. In the next session, we are going to take a look at how TV formats are considered or can be considered dramatic works. With that, we would be completing this week on dramatic works. Thank you for joining me; see you in the next session. Thank you.