

Copyright and Related Rights Law

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WEEK - 05

LECTURE – 21

Two Dimensions of Originality

Welcome back to this course on copyright and related rights law. This week, we are looking at the concept of originality and the various ways in which copyright can subsist in subject matters, which include literary works, dramatic works, musical works, and artistic works. Let us first do a quick exercise on subject matter identification. What we have been able to achieve, hopefully, in the first four weeks of our discussion on subject matter is that when we see a creative expression, we are able to place this expression within a category of subject matter or not? Once we understand this, we will then look at the component of originality as a requirement for the subsistence of copyright. Let us start this exercise. Consider this image.

You can see the books. Is everyone able to place books within the subject matter of literature? What about this? Are you able to place it among artistic works? Some of you may also have been able to not only place this under artistic work, but also classify it as a sculpture within artistic work. What about this? Again, many of you must have figured that this is an artistic work, and still, many of you may have been able to identify that this is a drawing. What about this? I am sure you are all able to identify this as a musical piece.

The graphical notations on this sheet music do not confuse you anymore, as you know that graphical notations, even though they are written or printed in notational form, are included in the definition of a musical work. What about this? You will be able to place this within the subject matter of dramatic works. How? Since this is a dance performance, and considering that the requirements of a dramatic work, such as fixation, are satisfied, this can be characterized as choreography, which is a dramatic work. This quick exercise helps clarify our progress in the weeks that we have had in terms of our ability to classify expressions within literary, dramatic, musical, and artistic works. Many of us are also in a position to sub-classify the expression within a particular category of subject matter.

What we are doing this week is stepping forward from the ability to classify subject matter, to the ability to understand when copyright will subsist in such subject matter. After all, the possibility of an expression becoming a category under the Copyright Act, such as a literary work or an artistic work, is only the first step. The more important step comes in the form of originality. Take a look at this image. You can see that on a notepad, this person has written a short note.

The short note, as you can read, is: 'Every day the sun sets, but the destination always changes. So at last add a new destination to your list.' How is this expression similar to this expression, or is it similar at all? In your mind, you must have been able to make a distinction between the type of subject matter, but you might have also been thinking about the simplicity of these works when compared to their counterparts. In the previous illustrations, for example, when you consider a book of 100, 200, 250, or 300 pages in comparison to an expression on a single page of a few words, is this a simplistic expression in comparison? Similarly, is this a simplistic expression in comparison to this or that? The question we are trying to answer is whether, when we compare expressions, we are able to answer a question. Should copyright subsist in these expressions? Because at the moment we say copyright should subsist or exist.

We are saying that a term of the author's life plus 50, 60, or 70 years, depending on which copyright Act you're looking at. For that period of time, copyright will vest in a certain person. Because copyright has the power to prevent the unauthorized communication of the work and the unauthorized reproduction of the work. It can place a lot of power in the hands of the copyright holder to prevent the dissemination of information. In fact, some would argue that it could also freeze creativity.

Therefore, should the same kind of protection be provided for these works? When the comparison is made with these works. Let us consider. What if copyright were not granted? What are the possible reasons we consider when we say that copyright should not be granted? Are we saying that not a lot of skill is required to write what we have written here? Not a lot of skills are required to do what has been done here. In comparison, a lot of skill is required to do this. What about the efforts? This may not have taken a lot of time and labor.

But this would have taken a lot of time. This too would have taken a lot of labor and a lot of time. What about the application of mind, in terms of whether certain variables should be present within a particular expression or not? Is that aspect of judgment present in these particular expressions compared to these? What you must have considered a basic difference between these expressions and the ones earlier is that they are generally more simplistic. And in supplementing this understanding that it is simplistic, we seem to be justifying it on account of the skill taken to make that particular expression possible and

the effort expended to make it possible. And the application of mind or the judgment is in place to make it happen.

Let us consider the opposite stance. What if we say that copyright should be granted? In this situation, we are saying that irrespective of a particular standard of skill, irrespective of a particular standard of effort, or irrespective of any subjective judgment application that we are considering, For a person to write this particular statement or for somebody to draw this, they are factoring in their own sense of information about their surroundings. And they are placing it on account of their expressions. So there is nothing that denies the application of the category of artistic work to this expression and of literary work to this expression. But when the question is about copyright subsistence, do we in fact think that there should be some kind of test and not all expressions should be copyrighted? On that point, let us return to our initial stance that copyright should not be granted.

What is the problem? Why is it that we cannot grant copyright protection or think of granting copyright protection to all expressions? Irrespective of the skill, the expression, the effort, or the application of mind or judgment? We must understand that the grant of copyright is a state-granted monopoly. Its effect, if not properly addressed, can be chilling. Advocates of freedom of expression target copyright as a possible tool that can be used to restrict the growth of expression. And how is this possible? Where copyright holders use copyright to prevent the dissemination of creativity. Without substantial access to a copyrighted work, it is possible for the argument to be made that copyright can actually be used against the growth of creative expressions.

And therefore, can we say that there is a social benefit in restricting copyright grants to those expressions that are not commonplace expressions? What, then, do we mean by commonplace expressions? Are we saying that there is some kind of level or threshold that needs to be satisfied for an expression to become copyrightable? If a common idea can be expressed very simply, There can be a number of ways in which that common idea can be expressed in similar ways. They are different, but they are more or less similar, representing what is very common. On the question of whether any skill is needed, if the answer is no. If there is any effort that is needed in terms of time and labor, the answer is no. Is there any application of the mind? If the answer is no, then is it not in society's benefit to place some kind of level, the satisfaction of which will carry an expression forward towards the subsistence of copyright? But how do we determine this level? In fact, any kind of application brings to mind the need for something uniform.

It's something that we must be able to apply. Is it possible to have some kind of objective test that can be used across literary works? In other words, what would be the basis for some kind of uniform division of copyrightable literary works from non-copyrightable literary works? Similarly, with respect to artistic works, musical works, or dramatic works, could it also be possible to have a uniform division regarding all expressions

irrespective of the subject matter? Let us go back and do a quick review. In a case that we discussed in our previous sessions, University London Press versus University Tutorial Press, the court indicated a two-layered application. According to the court, a first layer exists wherein an objective assessment needs to be done on whether an expression can be categorized as a type of subject matter. Therefore, we all know now that if an expression is made in words, if it is written, if there are symbols used akin to words or numbers that are used, irrespective of literary quality, it is a literary work.

And the next layer would be to consider whether it is original. Now what is original? The court had explained it. The word "original" does not, in this connection, mean that the work must be the expression of original or inventive thought. Copyright acts are not concerned with the originality of ideas but with the expression of thoughts. And in the case of literary works with the expression of thought in print or writing.

The work must not be copied from another work; it should originate from the author. Based on this two-layered understanding and especially the explanation of what is original, we are splitting this into a two-dimensional study. The first dimension focuses on the independence of creation. You can see here in the last excerpt that it says the work must not be copied from another work. That it should originate from the author.

Consider two works that are seemingly identical, if not identical, then substantially similar. Is it not possible for these two works to be independent? We discussed this point in an earlier session as well, where you may recall we were discussing the possibility of two people who stay geographically in very different locations. And there is a high possibility that these two people have not had any contact or expressed anything that may have originated from them. They might not have been aware of it. Even with the presence of digital media and communication, it's possible that they have not had access to the work.

Even then, it could be possible for two people to come up with a substantially similar expression. Without having any access to each other's work. In which case? The independence of creation is satisfied. Which means what? That a work simply need not be copied from another work in order to be called original.

Or in still other words. As long as we can trace the work back to an author, is that author the point at which that specific expression originated? How do we prove this? By proving non-access. That these two individuals, who are claiming to be authors of two substantially similar works, have not had access to each other, proves that their works have not been copied. And if they have not been copied, then it shows that this work has been independently created and therefore is original. So you can have not just two options. You can have three, four, ten, a hundred, or an infinite number of expressions that are substantially similar.

And as long as they are not copied from one another, they will be considered original. Do you see any problems with this application? Let me rephrase that. What are we trying to achieve here? We have identified that an expression is fitting within a category of subject matter under copyright. For example, we are saying that an expression is a literary work.

This is an objective assessment. The first layer. The second layer is a question of whether copyright can subsist in such literary works. In this second layer, if we are only concerned with the question of whether there is a link between the work and the author, That is, the expression or the work originating from the author and not copied from somewhere else is enough for copyright to subsist in it. What we will be left with is a layer of different works, that are so substantially similar, that you would have to grant them copyright protection despite the fact, that there are an infinite number of possibilities for substantial similarity. What we will look at in the next session, is whether this first dimension can be remedied by any kind of threshold or level, that can be placed in addition to the question of whether there has been copying or not.

And that is a question of creativity. Thank you for joining me. See you all in the next session.