

Copyright and Related Rights Law

Dr. Rohan Cherian Thomas

Faculty of Law

NALSAR University of Law, Hyderabad

WEEK - 05

LECTURE – 23

Existence of Works

Welcome back to this course on copyright and related rights law. This week, we are looking to understand the topic of originality, which is a requirement for the subsistence of copyright in subject matter. In today's discussion, we are going to look at what is meant by a work in existence and whether it is possible for an incomplete expression to be considered a work. Let us start with a provision in the French IP Code. Provision L111.2 states that a work shall be deemed to have been created irrespective of any public disclosure by the mere fact of the realization of the author's concept, even if incomplete.

Let us break this provision down into its individual components. First, we see that this is a deeming provision. Meaning that this provision understands that, if left to itself, incomplete expressions may not be considered works. The second component states, irrespective of any public disclosure, that a work can exist or a work is created without being perceived by the public.

Publication of the work to the public could be through the issuance of physical copies, or it could be by communicating the work to the public, such as through broadcast. But in any case, what if there is no such publication? According to this provision, it is still possible to consider it a work that is created. It then says that all that is required is that it is an expression which is a realization of the author's concept. In other words, it is original. It is independent in its creation.

What we understood as a dimension of originality is. And then finally it says, tying up these components that even if the work is incomplete, if these components are met, then it shall be considered a work. What do we mean by incomplete work? Take a look at this image. Firstly, are you able to identify the subject matter? Are you able to subclassify within the subject matter? You must have been able to state that this is an artistic work and also that this is a sculpture, but you would have also noted that it is possible that this particular sculpture is incomplete. There could be other opinions, but because we are

talking specifically about completeness and incompleteness, Let us consider that this is not a sculpture that is damaged, but rather that it is in the process of being created.

Therefore, it is incomplete. The question we are looking to answer is: Can an incomplete expression be considered a work? Or, in other words, does an incomplete expression lead to the existence of a work? And finally, can an incomplete work be granted copyright? What we understand from the University of London case is that an objectively assessed expression can be considered a subject matter. So, if an expression is in the form of words, then it will be a literary work. If the literary work is original, then it has copyright. But does the completeness or incompleteness of an expression have anything to do with the consideration of whether the work is actually in existence? And does copyright subsist in such an incomplete expression? Let us consider T-Series and others versus Dreamline Reality Movies and others before the Punjab and Haryana High Court in 2024.

It was stated by the court in this case that to claim copyright over something, that something must be an existing work. The person claiming copyright can assert the same only if he or she has already accomplished a work, be it a book or a literary work. Cinematographic or photographic work, musical work, or any other intellectual work by incorporating one's intelligence and creativity. What the Court is referring to is that for copyright to subsist, there must be a work in existence. When does the work exist? The Court seems to be suggesting that the work is in existence when the expression is the outcome of the use of intelligence and creativity by the author.

The seeming mix here that we understand is between a work existing in terms of expression and a work existing in terms of the copyright that subsists in it. But at the foundation, no copyright can be granted unless there is an expression; it starts there. The consideration of intelligence and creativity is a second-level consideration that applies in terms of originality. Further, the Court explains, the mere existence of an idea or the existence of a fact or set of facts, per se, and without the involvement of talent, intelligence, or effort by a person in converting it into a work by any means, cannot be stated to be a work as required under the Copyright Act, for which a person can assert copyright. You can see here that the court is referring to the distinction between idea and expression, wherein the court is saying that underlying facts that are expressed cannot have any copyright in themselves.

We discussed this earlier. Say there is no expression; then there is no scope for any question of copyright subsisting in it. Say there is an expression; then such an expression must satisfy certain qualitative considerations, such as the expenditure of effort, application of talent, intelligence, etc., when considering whether copyright can subsist. Consider this expression: you are loved.

Can we say that you are loved is work? What you would note is that an objective assessment tells us that this expression is, in fact, a work of art. But you would recall that when we discussed a quantum test related to the informative value for which copyright would subsist in the literary work, we discussed an important case decided by the Indian Supreme Court: *Krishika Lulla versus Shyam Vithalrao Devakatta*. In this particular case, the question was whether a title such as *Desi Boys* could be subject to copyright protection in terms of it being a literary work. What we noted was that the court said this particular expression was incomplete on its own. In other words, what the court was explaining was that this particular title, which had a very generic composition, would have to be juxtaposed with other information in order to have some kind of definiteness.

Therefore, you can see that the title of a work has been considered not fit to be the subject of copyright law. A title by itself is in the nature of the name of a work and is not complete without the work. The Supreme Court also noted that there is no instance of a title being held to be the subject of copyright. But this understanding of why an expression that is in the form of a title cannot be considered a work cannot be extended to expressions that are not complete. But it has a distinctive understanding in terms of its informative value or a distinctive understanding in terms of its perception.

Can we say that a single brushstroke of a particular color on canvas is incomplete? Let us then understand completeness as a reference to finishing it off. In other words, we are making a distinction between completeness as a question not of distinctiveness, but rather completeness as a question of finishing the work. If we say this, then we are saying that despite the fact that an expression has achieved a certain amount of distinctiveness, it would have to reach some kind of finish line for copyright to subsist in it. In other words, component parts that could have their own copyright, only when merged together and at the finishing point, would be considered copyrightable. But who decides what the finish line is? Is it the author who decides what the finish line is? Clearly, if the public has no connection to the expression of the work, then it is not the author's intention.

Can we say that when we consider the originality of an expression, we are referring to the originality of the expression as a whole, or can originality exist in parts? In other words, can we consider completeness a question of distinctiveness? This may be slightly confusing. Consider this question. Can a work be fragmented? And can these fragments be considered original or not? In this image, you can see several components that come together to form a whole. In this whole, there might be several components that, by themselves, aren't copyrighted. They might relate to common items.

They might be concerned about public domain items. But it is also possible that certain components can, in fact, have some distinctive considerations to which originality applies. Consider the case of a compilation. When we discussed literary works, we talked about how collections and compilations of information can be considered copyrightable

expressions because of their selection and arrangement. Now, in such cases, would it be right to fragment the work? In the case of a compilation, we understand that individual portions have their own copyright issues.

A compilation could consist of information that is in the public domain, but the selection and arrangement of these public domain elements can be considered copyrightable. But if you were to take fragments from it, they might not be considered copyright. Therefore, in cases such as compilations, we can refer to this particular case from the UK. This is *Ladbroke Football Limited versus William Hill Football Limited*, in which the court stated that one test may be whether the part that he has taken is novel or striking. Or is merely a commonplace arrangement of ordinary words or well-known information.

So, it may sometimes be a convenient shortcut to ask whether the part taken could, by itself, be the subject of copyright. The more correct approach is first to determine whether the plaintiff's work as a whole is original and protected by copyright, and then to inquire whether the part taken by the defendant is substantial. You can see that the court is considering a situation in which there has been unauthorized copying. What the court is suggesting is that, as a first step, we must see whether the copyright as a whole, in terms of expression, exists and then see whether the part that has been taken is a substantial part of that whole. But when we say copyright of the whole expression, are we saying copyright of the finished work? And if we say "finished expression," does that mean unfinished expressions do not have copyright protection? Consider that, unlike compilations, we are considering works that are protectable expressions.

The information that is compiled, which could otherwise be public domain elements, is not public domain elements. They are the outputs of creative effort. What if we consider such fragments? We should also consider whether a work should be published for copyright to subsist. From this, we understand that a work need not be published. What is the meaning of a publication? The ordinary meaning is the preparation and issuance of a book, journal, or piece of music for public sale.

We have seen that the French IP code in its provision states that it is irrespective of any public disclosure. We can see in the Indian Copyright Act, in section 13, which talks about the subsistence of copyright. Such copyright subsists in unpublished works as well. And therefore, there need not be any public perception of the work in order for there to be subsistence of copyright in such an expression. Take a look at this question and think for a moment.

If my incomplete expression is published without my authorization, could it be a violation of my copyright? You might have arrived at this question: if an incomplete expression has copyright protection, at what point does it gain such protection? We can say that a work has two types of existence: one as a subject matter, such as a literary

work. And two, as a copyrighted subject matter, as an original literary work. Are you then able to point out at what point copyright will subsist in your expression? If we look at section 13 of the Indian Copyright Act, it says that copyright can subsist in original literary, dramatic, musical, and artistic works. So in considering at what point copyright subsists in a work, we must look to find at what point originality attaches to such work. Therefore, if the work is finished or unfinished, if your expression can satisfy originality, then it seems that copyright can subsist in such an expression.

But this point of originality is important because, as we have understood, there is a possibility that this is a subjective consideration. Is there more to originality than just the fact that it should not be copied from anyone else? Or, in other words, it should be an independent creation. This subjective understanding brought in by various courts and its application is something that we will look at in the next two sessions. Thank you for joining me. I will see you in the next session.