Copyright and Related Rights Law

Dr. Rohan Cherian Thomas

Faculty of Law

NALSAR University of Law, Hyderabad

WEEK - 05

LECTURE – 24

Construction of Originality by Courts - Part 1

Welcome back to this course on copyright and related rights law. This week, we are discussing a foundational requirement for the subsistence of copyright: originality. In the previous sessions, we have looked at certain important considerations that must be kept in mind before we examine the construction of originality by the courts themselves. We have understood that a conventional understanding of originality focuses on the mere consideration that there must not be any copies. But is there anything more that we must consider, and what is the threshold of that consideration? This discussion on originality and its construction by the courts is split into two parts.

In the first part today, we will look at mostly cases that are focused on a conventional understanding of originality, ending this particular session with one of the most important cases in the evolution of originality in copyright law - a case decided by the U. S. Supreme Court in Feist v. Rural. In the next session, we will carry forward that discussion and see how the Feist decision has influenced the construction of originality in other courts in different parts of the world, including India.

Having said that, the Indian Supreme Court decision in Eastern Books versus D.B. Modak is a seminal case that we will be focusing on. In fact, the exposition by the Supreme Court of the evolution of originality is something from which I have taken extracts and will be attempting to explain in a simple fashion. Let us first keep in mind that we were trying to understand on what threshold consideration copyright would subsist in a work.

Therefore, if it is a literary expression or an artistic expression, is it the effort expended in creating that expression? Is that the sole consideration for the granting of copyright? You can see in this image that this person has possibly made an effort for some activity. He is perspiring because of this activity. The doctrine of the sweat of the brow is connected to the expenditure of effort. It has biblical roots. In effect, this means that if a person has

expended effort in doing something, in laboring for it, then the value of that particular labor is for him to exploit.

This particular application of sweat of the brow has certain issues. If effort were the sole consideration for the grant of copyright, then independence of creation and the consideration that a work has not been copied from another work would be enough to satisfy the grant of copyright. Because of an effort, no matter how minimal, that would be expected by a person in creating what he has created. Therefore, the sheer number of expressions that would be eligible for copyright would be very, very many. But that itself isn't very problematic.

Rather, what seems to be more problematic is whether the effort expended can in some way lead to the protection of the content itself. Something that we have understood cannot be extended as copyright subject matter. We will look at how the doctrine of the sweat of the brow has been applied in some cases. Towards that front, as I explained, the seminal case on this point of originality in India is Eastern Book Company v. D. B. Modak. In this case, there have been references to some of the most important judgments in various parts of the world. And these judgments tell us a story of how originality has evolved. I will be taking specific extracts from the judgment itself regarding how these important cases have been explained. And I will attempt to explain them simply.

The first case that we will look at is C. Cunniah versus Balraj. In this particular case, the question revolved around a drawing. The drawing itself—when it was copied by the defendant—rather revolved around the originality of the subject that was drawn. As you can see here, the subject of the drawing was Lord Balasubramanya, and according to the defendant, he said that this subject was a common subject and that no copyright could be acquired by anyone on the subject.

Let us do a quick recap of what we discussed in the previous sessions. You would recall that in making a distinction between idea and expression, we discussed that copyright extends its protection only to expressions. It does not cover the idea on which an expression has been made. In fact, there could be an infinite number of expressions on the same idea. The defendant stated that his or her picture was an independent production.

In terms of independent creation, what the defendant is saying is that the sole consideration of copyright is that there must be independence of creation, which means that there has been no copying. But at the same time, the defendant is also saying that because the subject is so common, there is no protectable expression. The court held that in order to obtain copyright protection for literary, dramatic, musical, and artistic works, the subject dealt with need not be original, nor need the ideas expressed be something

novel. What is required is the expenditure of original skill or labor in execution and not the originality of optimism. What are we seeing here? What the Court is stating is that the subject itself, which is being targeted as a common subject; The subject itself is not originating from the author; therefore, the subject cannot be claimed by the author at all.

It is the expression that is being claimed by the author. That is the point of origin. And therefore, in the previous sessions when we made a distinction between copyright and patent; We had clearly distinguished. The essential considerations of originality and novelty. For an invention, the idea must be a new idea.

But the idea itself can be expressed in a number of ways, and that expression is what copyright concerns itself with. The next portion of this holding focuses on the requirement for copyright to subsist. According to the court, what is required is that there be an expenditure of skill or labor. So according to the court, it isn't necessary that some quantum of effort must be met. Remember, we were trying to understand whether there is some level of effort that needs to be expended in order for a work to be original or some level of skill that must be achieved.

You would remember that we had considered a problem there, which was: If a person is skilled, then perhaps the effort it takes for him to create something is less. But does that mean that this person should not be granted copyright simply because there is less expenditure of effort? So, as the Court explains, to be original, it could be a question of skill or labor. Or, in other words, skill or effort. And if that has been proved, then there is originality, and copyright can subsist. You would see in this image a representation of an idea, and throughout our discussion on originality, you must keep in mind that copyright does not extend to the originality of ideas.

An original idea can be expressed in a number of original ways, and it is the originality of expression that we must concern ourselves with. The attributes that must be considered for the purpose of determining originality in this particular case are skill or labour. Let us look at another case. This is Agarwal Publishing House versus the Board of High School and Intermediate Education and another. The challenge posed in this particular case was against an amendment made by the board in its regulations.

According to this, copyright of question papers set at all examinations conducted by the board would vest in the board, and it forbids the publication of such question papers without the board's permission. The question that came before the court was whether the question papers were original literary works. It was held that original literary works are not confined to works of literature as commonly understood. After our learning in the subject matter of literary works, I am sure this is not something we need to understand anymore. It then reads, it would include all works expressed in writing whether they have any literary merits or not.

This is clear from the definition of a literary work, which states that a literary work includes tables and compilations. The word original used in Section 13, does not imply any originality of ideas but merely means that the work in question should not be copied from some other work. But it should originate in the author being the product of his labor and skill. What we see here is that there is a slight change in the manner in which the application of these attributes is made by the court. Instead of saying labor or skill, it says labor and skills.

So this would indicate that not just any effort would be able to pass the question of originality and the subsistence of copyright; rather, there would have to be some demonstration of a skill component. Consider the case of a photograph. As we have discussed, a skill component arises, for example, in the setting up of the scene that is to be photographed. Therefore, there is minimal expenditure of effort and a demonstration of skill. At the same time, there is a clear caution that any such question of originality must keep in mind that this is independent and not copied.

Let us look at yet another case on this point. This is Rai Toys Industries and others versus Munir Printing Press. The plaintiff in this case had published a Tambola ticket book containing 1,500 different tickets. What is tambola? For those who don't know, it is a game in which tickets with different numbers are bought from a spinning container, and small prizes are won when the numbers on the tickets are the same as the numbers on the prizes. That is what Tambola effectively is.

The opposite party had brought out another ticket book, which the plaintiffs claimed to have written in the same year and registered as copyright. The ticket book brought out by the defendants was alleged to contain 600 different tickets, and the same had been copied identically from the books of the plaintiff. What was the question before the court? Whether the ticket books in the form of tables constitute literary works and whether copyright has been violated. Now it was held by the High Court that the preparation of tickets, and placing them on tables required a good deal of skill and labor, and would thus satisfy the test of being original literary work. It was recognized that the arrangement of numbers is an individual work of a person who prepares it.

It reflects his individuality and long hours of labor. It is not information that could be picked up by all and sundry. You see what the doctrine of brow application effectively does. In the sense of effort, and even with the combination of skill, it can go beyond the boundary of copyright in including content that is a part of that expression. As you can see, the court provides this indication when it says, "the information itself could not be picked up by all." But is information in itself copyrightable? Therefore, what is the doctrine of the sweat of brow doing? Its application seems to be extending copyright protection to those items which it was not meant to protect. Therefore, should a different line of tests be applied? Should the doctrine of sweat of the brow be modified or done

away with to bring in perhaps a new test? What if this test is based on creativity? This is the background of Feist Publications versus rural telephone service. A very important case in the evolution of originality in copyright law is presented. Let us look at some brief facts before we arrive at the court's holding. Rural Telephone Service Company published a typical telephone directory consisting of white pages and yellow pages.

The white pages list the names of rural subscribers, together with their towns and telephone numbers, in alphabetical order. The Yellow Pages list businesses, business subscribers alphabetically by category, and feature classified advertisements of various sizes. To obtain White Pages listings for its area-wide directory, Feist Publications approached different telephone companies operating in Northwest Kansas; and offered to pay for the right to use their white page listings. Rural Telephone refused. Unable to license Rural's white page listings, Feist used them without Rural's consent.

Rural sued them for copyright infringement. Taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door to door or conduct a telephone survey to discover the same information themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. From this factual situation itself, I'm sure that most of you must be in a position to say that the claim made by Rural was going beyond the domain of expression.

What Rural was claiming was a copyright over the information itself. They were connecting the effort that was taken in collecting this information and in protecting the information itself, which, as Feist argues, is not within the scope of copyright protection. What the US Supreme Court is saying must be looked at very carefully. The court is saying that the most essential aspect of copyright is originality. To qualify for copyright protection, a work must be original to its author.

Original, as the term is used in copyright, means only that the work was independently created by the author as opposed to copied from other works and that it possesses at least some minimal degree of creativity. You can see here that a new consideration, or an added consideration beyond the mere application of the doctrine of sweat of brow, has been brought in by the US Supreme Court. And this consideration is a consideration of creativity. According to the court, what is the threshold of creativity? It is a minimal degree of creativity. According to the Court, the threshold of creativity is so low that even a slight amount will suffice.

Therefore, the vast majority of works will meet this grade quite easily, as they would possess some creative spark. Originality, according to the court, does not signify novelty. A work may be original even though it closely resembles other works, so long as the

similarity is fortuitous and not the result of copying. The Court further held that no one can claim originality regarding the facts. This is because facts do not owe their origins to an act of authorship.

The distinction is between creation and discovery. The first person to find and report a particular fact has not created the fact. He or she has merely discovered their existence. Factual compilations, on the other hand, may possess the requisite originality. What we have been seeing in the previous sessions is that the Supreme Court of the US has very clearly stated, that the underlying event or the underlying fact on which the expression is based cannot be tied to the author in terms of its origination.

Therefore, it is not something copyright can protect. In fact, if such facts had to be protected at all, it would not be within the domain of copyright. But if it is related, for example, to some kind of functionality, then another domain of intellectual property could protect it, which is patents. In terms of compilations, we have understood that the selection, arrangement, and manner of such selection and arrangement can lead to a construct of originality. The Court explains that the compilation author typically chooses which facts to include and in what order to place them.

And how to arrange the collected data so that it may be used effectively by readers. These choices regarding selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim copyright in this written expression. The primary objective, according to the court, of copyright is not to reward the labor of authors but to promote the progress of science and useful arts.

In saying so, the U.S. Supreme Court is referring to the constitutional mandate of the U.S., wherein the mandate promotes the progress of science and useful arts. To this end, copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work. Only the compiler's selection arrangement may be protected.

However, raw facts may be copied at will. The Court rejected the doctrine of sweat of the brow, as this doctrine had numerous flaws. The most glaring issue is that it extended copyright protection in a compilation, beyond the selection and arrangement of the compiler's original contributions to the facts themselves. A subsequent compiler was not entitled to take one word of information previously published but rather had to independently work out the matter for himself, to arrive at the same result in the same common sources of information. The Sweat of Brow thereby eschewed the most fundamental axiom of copyright law: that no one may copyright facts or ideas. The Sweat of the Brow Doctrine flouted basic copyright principles and created a monopoly in the

public domain without the necessary justification of protecting and encouraging the creation of writings by authors.

Therefore, it must be very clear to all of us now that, in terms of what the US Supreme Court says is original - extends to expressions only, and such a consideration is not just based on an assessment of effort expended and the skill that has been required for it, but rather on a minimal degree of creativity. With that, we will take this discussion forward in the next meeting, wherein we will take a look at how certain other courts have considered originality and its application. Thank you for joining me. I will see you in the next session.