Copyright and Related Rights Law

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WEEK - 05

LECTURE – 25

Construction of Originality by Courts - Part 2

Welcome to this course on copyright and related rights law. This week, we are looking to understand the requirement of originality, which is a foundational requirement for determining whether copyright can subsist in a work. In the previous session, we discussed how courts have used the doctrine of sweat of brow in order to make such a determination. Their application seemed to extend copyright protection beyond what copyright protection is supposed to cover. In response to such an extension, which was particularly seen in the case of compilation by the U.S. Supreme Court in Feist v. Rural, an expression would have to satisfy a minimal level of creativity if it were to be granted copyright protection. What, then, is our understanding of the Feist decision? The focus on effort or the focus on labor, toward the determination of the subsistence of copyright would not by itself be enough to determine the subsistence of copyright. There would have to be something additional.

That something additional, according to the U.S. Supreme Court, is a minimal level of creativity. In saying so, the US Supreme Court clearly explained that a minimal level of creativity doesn't encompass a level of inventive thought, or a level of novelty, or non-obviousness that we see in patent law with relation to inventions. What we will look at in this session are two important judgments, both from the apex courts in their country.

The first case that we are going to look at was decided by the Supreme Court of Canada. The case is CCH Canadian v. Law Society of Upper Canada. In this case, the question of originality and how it must be considered was brought to the attention of the court because of the varied nature of its application among the courts in Canada. Where some courts were applying the doctrine of sweat of brow, and applying it in a way that labor and the expenditure of labor would be the sole consideration for the determination of copyright.

Whereas some other courts were of the opinion that something else apart from an expenditure of labor in the form of creativity was required. How does this conflicting opinion match in terms of what we understood in Feist? Keep that in mind as we move forward in our discussion of this particular case. In constructing originality, the Canadian Supreme Court also saw the kind of problems that would arise if labor were the focus of the judge, who was looking to identify whether copyright was subsisting in a given expression, or not. Therefore, in the Canadian Supreme Court's understanding, it would be better if labor as a consideration in any such test were possibly dropped and the focus rather shifted to the use of the terms skill and judgment. Once we focus on these terms, as we understood, the consideration of judgment necessarily brings with it a question of the application of the mind.

Or, in other words, is there any difference in the manner in which such an expression has been made? Has there been any variation? Now, in terms of what this variation should be or what this different nature of expression should be, it needn't satisfy the level of novelty or non-obviousness. Which is what the court is explaining. The exercise of skill and judgment required to produce the work must not be so trivial that it can be characterized as a purely mechanical exercise.

What the court explains is, that if we consider the level of skill and judgment that must be satisfied, it is a low threshold. Isn't this similar to what we were discussing in Feist v. Rural? But unlike Feist v. Rural, where the US Supreme Court was emphasizing a minimal degree of creativity being satisfied, the Canadian Supreme Court felt that the use of the word "creative" can in fact cause confusion. Why is this the case? We understand that creativity is used in terms of inventive capacity to generate something new, and therefore when we say that a person has created something— it is a confusing stance sometimes because we think that we are referring to a new creation, something that hasn't existed, or even if something has existed, there has been an improvement to it of such a nature that it wasn't obvious to others. Thus, according to the court, a reference to skill and judgment was sufficient consideration. As you can see, the Court was saying that creative works, by definition, are original and are protected by copyright, but creativity is not required in order to render a work original.

The original work should be the product of an exercise in skill and judgment, and it is a workable yet fair standard. The sweat-of-the-brow approach to originality is too low a standard. On the other hand, the creative standard of originality is too high. The creative standard implies that something must be novel or non-obvious, concepts more properly associated with patent law than with copyright law. At this stage, we can make a distinction between how the Feist Court—the US Supreme Court—was approaching originality and how the Canadian Supreme Court is approaching originality.

The difference seems to be in the usage or non-usage of the term creative. Creative is being used by the US Supreme Court as an additional requirement, but something that doesn't extend to novelty. Creativity, as a term that should not be used according to the Canadian Supreme Court, can lead to confusion in relation to a high standard, a standard of novelty or non-obviousness. Therefore, we see that although the manner of approach of the US Supreme Court and the Canadian Supreme Court is different, In essence, they seem to be suggesting the same effects. Therefore, when the Canadian Supreme Court says that only skill and judgment must be considered, we can say that if we were to assert that a minimal degree of creativity is required over labor, then a skill and judgment standard is proposing a similar effect.

As you can see, what the Canadian Supreme Court says is, by way of contrast, a standard requiring the exercise of skill and judgment in the production of a work that avoids these difficulties and provides a workable and appropriate standard. To quickly recap, what the Canadian Supreme Court is seeing as difficulties is the application of labour. How is that a difficulty? Focus on labor can lead to the application of the test for the determination of copyright in such a way that copyright can extend to subject matters that are not protected, such as facts. And the second difficulty is that of reference to the word creativity, because creation can be referred to in terms of novelty. I'm sure now that when you consider how the Canadian Supreme Court decision is different from Feist or not different from Feist, you have a clearer understanding of where these courts are taking originality.

With that in mind, let us now discuss a very important case decided by the Supreme Court of India. This is the Eastern Book Company versus D.B. Modak. Eastern Book Company is a company that is involved in the business of printing and publishing. A publication, a famous publication that is run by them, is called Supreme Court Cases. We will refer to it as SCC. How SCC functions is that SCC takes judgments that have been pronounced by the court. Over which the staff of SCC would then make certain modifications, or input additions in such a way that the judgment itself is made more user-friendly. Now there are two things that we must understand very clearly.

One is that judgments, because they are made in the cause of public interest, are free to use. Second, in delivering a judgment and in authoring that judgment, the judge makes many references - to judgments, to provisions, and these are also stated in paragraph form, and there is a connection between the expressive effort carried out by the judge in the judgment. And therefore, where the purpose of the judgment is to enable the user to understand how the law has been applied to a particular fact, it must be clear to the user. The expressive format in a particular judgment is, in any case, meant to be read by a user. What then inputs can do in terms of editing the judgment, and including certain modifications is to go beyond the already existing user-friendly nature, and make it even more user-friendly.

And to do it, it would have to bring in a certain kind of creative effort. Which is where the question revolves around the originality in this particular judgment. The Indian Supreme Court's application of originality and its construction is very helpful in terms of relating it to how originality has evolved in both the US and Canada, and as well as in the UK, and also for us as people who are looking to understand originality - two sets of examples, where one is not creative and the other was held to be creative by the court. The question then revolved around copy-editing and some of the inputs that were made by the staff at SCC, and whether these inputs and such formatting could be considered original or not. Like I said, the purpose here is to make it more user friendly.

Why does a judgment need to be made user-friendly? Because judgments are meant to be read by users, and these users are members of the public. Members of the public are not well-versed in the technicalities of the law. And therefore, if certain inputs can be provided in such a way as to make them more accessible to a wider range of the public, then such an input can in fact go a long way in assisting a user in appreciating a judgment. Another aspect that must be considered is that judgments can be very lengthy depending on the substantive question that the court is looking to answer. The complexity of the reasoning could be such that it stretches to many pages, and therefore any kind of assistance in terms of an arrangement or any modifications or inputs that are made can, in fact, be considered original.

But in terms of whether all of these modifications or inputs are original, the court is referencing how originality has evolved. So, firstly, let us contextualize this based on what modification the quote is pointing to. The first type of modification that the quote is pointing to is the kind of formatting or arrangement that has been done by SCC, which, according to them, fits their style of arrangement. Now, according to the court, such kinds of arrangements, which by themselves don't demonstrate any kind of judgment application or an application of mind, are very trivial in nature and something that can be considered commonplace in terms of effort or the skill required. The court stated that, in terms of skill and judgment, the exercise of skill and judgment required to produce the work is trivial.

It is on account of the labor and the capital invested, and could be characterized as purely a work that has been brought about by putting some amount of labor by the appellants. What do we see here? We see that the court, in using skill in judgment as a criterion for determining originality, has taken inspiration from the Canadian Supreme Court. CCH Canada also refers to skill in judgment and drops labor as a focal point in the determination of copyright subsistence. Which is what the Indian Supreme Court is also stating. If you can see in the first paragraph on this slide, the court is saying that it does not give the flavor of the minimum requirement of creativity.

Isn't the Indian Supreme Court also inspired by the usage of such a requirement by the US Supreme Court? As you can see from what the court is saying, although the standard for establishing a copyright is not that something must be novel or non-obvious, some amount of creativity in the work to claim a copyright is required. Therefore, it does require a minimal degree of creativity. When we consider the use of skill, judgment, and a minimal degree of creativity together. We are seeing that the Indian Supreme Court has considered, in very clear terms and in a very expansive nature, the evolution of originality. The doctrine of sweat of brow and its application by courts, the construction of originality by the US Supreme Court, and the construction by the Canadian Supreme Court, and eventually what the Indian Supreme Court states is that skill and judgment are the tests that must be considered to see if copyright can subsist without a focus on labor, and in considering this test, It must be seen from the perspective of a minimal degree of creativity, in which creativity doesn't extend to novelty or inventive thought.

In its explanation, the court says the arrangement of facts, data, or case law is already included in the judgment of the court. Therefore, the creativity of the SEC would only be the addition of certain facts or materials already published, case law published in another law report, and its own arrangement and presentation of the judgment of the court in its own style to make it more user-friendly. This selection and arrangement can be viewed as typical and, at best, a result of the labor skill and investment of capital, lacking even minimal creativity. It does not, as a whole, display sufficient originality to amount to an original work of the author. To support copyright, there must be some substantive variation and not merely trivial variation.

Now the variation of the type where limited ways or unique ways of expression are available, and an author selects one of them, can be said to be a garden variety. What we are then understanding is that certain types of modification, even though they require effort and perhaps also some skill, But without the consideration of judgment and the consideration of whether there is a minimal level of creativity, it would not be considered an original work. In comparison, let us look at some other elements of expression brought in by the SCC that were considered creative by the Indian Supreme Court. As you can see, the court is suggesting that inputs made in the original text are what these inputs are. One, segregating existing paragraphs in the original text by breaking them into separate paragraphs and adding internal paragraph numbering within a judgment after providing uniform paragraph numbering, and indicating in the judgment the judges who have dissented or concurred by introducing phrases like conquering, partly conquering, partly dissenting, etc.

You can see here that the kind of inputs that the court is considering are creative as opposed to basic arrangements - that there is a certain level of skill and a certain judgment of its application that would be needed to undertake these kinds of activities. For instance, without having read the judgment and without having understood its

individual competence, would it not do a big disservice to the users if paragraphs were split unevenly? Would it not be a disservice to users and, in fact, a great disservice to the court itself if the concurring portion of the judgment and the dissenting portion are, in fact, marked incorrectly? And therefore, according to the court, the use of skill and the manner of its usage can, in fact, satisfy creativity. Therefore, according to the court, how do we determine skill and judgment? The skill here, according to the court, can be understood as the editor who inserts para-numbering must know how legal argumentation and legal discourse are conducted and how a judgment of a court of law must read. And judgment? Often, legal arguments or conclusions are either clubbed into one paragraph in the original judgment, or parts of the same argument are given in separate paragraphs. It requires judgment and the capacity for discernment, to determine whether to carve out a separate paragraph from an existing paragraph in the original judgment, or to combine separate paragraphs in the original judgment of the Court.

I am sure now you are able to clearly understand how certain types of expressions can fit within the requirement of minimal degree of creativity, and certain other types of expressions would not. Therefore, according to the Court, these inputs specifically, which, as you can see, are an exercise of brain work and not just a mechanical process, satisfy the flavor of a minimal amount of creativity. You can see this in terms of the basic arrangements that were made in copy editing. The court had used the expression, "does not give the flavor of the minimal requirement of creativity."

What we then understand if we look at these three judgments: Feist versus Rural of the US Supreme Court, CCH Canadian of the Canadian Supreme Court, and Eastern Book Company versus D.B. Modak of the Indian Supreme Court is that— these judgments have a uniformity among their constructions, and the Indian Supreme Court draws from the evolution of originality, from mere application of the doctrine of sweat of brow to the application of a minimal degree of creativity. Hopefully, now originality as a foundational consideration is very clear to all of us. In the next week, we are going to be discussing some very important subject matters that are not considered satisfying originality for copyright to subsist in them, which are sound recordings and cinematograph films. And we will also be discussing a very important facilitator of copyright applications, copyright societies.

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