

Copyright and Related Rights Law

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WEEK - 06

LECTURE – 26

Unoriginal Works

Welcome back to this course on copyright and related rights law. This week, we are looking to understand whether works can have copyright in them without satisfying the consideration of originality. To this effect, we will study two types of works: sound recordings and cinematograph films. This week, we will also be discussing a very important stakeholder in copyright administration: copyright societies. Let us remember what we have done over the past weeks. In the first four weeks, we discussed the subject matter of copyright, literary, dramatic, musical, and artistic works.

By now having completed these four weeks, you are very clear about what the difference is between these works, and how to identify them when an expression is shown or given to you. In the fifth week, we understood the foundational requirement of originality and how it is applied in terms of the subsistence of copyright. Let us then start this session with an exercise in which we will look at images, identify the work, and also consider whether such a work can be original. This first image shows a piano and sheet music.

What type of musical work is it? All of you are discussing musical work. Can a musical work be original, and how will it be original? You are all saying that the composer would not just have to put in some effort, but he would also have to show some amount of creativity in his expression. Similarly, the case is with a book - what type of work is a book? Literary works. In what manner can a literary work be considered original? The author must show that there is a minimal degree of creativity in their expression. What about this? It's a painting; it's an artistic work.

And based on similar considerations, how originality is applied to musical works and literary works would also apply to paintings. What about this? A performance such as this can be based on a script, and as we have understood, this would constitute a dramatic work. What we have understood is that when we consider originality, the Indian Supreme Court is focusing on having such an assessment done on the grounds of skill and judgment. In saying so, the court states that a minimal degree of creativity must be

present, but the caution that we have been considering is that creativity doesn't extend to novelty and non-obviousness, a consideration for the grant of patents for inventions. We have seen in the fifth week, where we discussed originality, that originality must be seen first from the point of its origination.

In other words, has there been independence in creation? You would recall that the independence of creation means simply that a work has not been copied from another work. But in terms of what this independent creation is, we know it to be an expression. In a performance such as this, based on a script, the content of that script, which has been expressed, is a dramatic work. Similarly, the content of a painting that has been expressed is an artistic work. Similarly, the content that has been expressed in a book is literary.

When I say the content that has been expressed, you must consider that the underlying idea is not something that can be copyrighted; nevertheless, the expression itself is a medium. Writing, after all, is a medium of expression, and we had considered that when fixation is a requirement, writing can be one way in which content can be expressed. There are other ways in which content can be expressed and modified. Let us then consider whether sound recordings and cinematographic films are original. Can we consider sound recordings in the same way we consider literary works? Can we consider cinematographic films in the way we consider artistic works? What you see in this image is a typical studio setting.

What, according to you, are the works that are part of a sound recording? Let me clarify that question. We had an earlier discussion in which we stated that a sound recording may not contain any work. It could simply be a recording of some sound, but sound recordings can also incorporate works. And therefore, what works can be part of a sound recording? Musical works can be part of a sound recording. Literary works can be part of the sound recording.

How? When a singer sings, the singing not only provides the tune, which is the musical work, but also the lyrics, which are being sung and which are a literary work. So, a sound recording fixes these works and the manner in which they interact with each other. Let us also consider cinematographic films. What works can be part of a cinematographic film? In the same manner as we discuss sound recordings, a cinematograph film, which is effectively a work of visual recording, need not have any underlying works. But just like a sound recording that can incorporate musical and literary works, a cinematograph film can also incorporate literary, dramatic, musical, and artistic works.

Let us ask ourselves, are these underlying works original, these works which are present in a sound recording or in a cinematograph film? Take a moment to think about this. Underlying works, literary works, musical works, dramatic works, and artistic works; In order for these works to have copyright subsisting in them independently, they must

satisfy originality. Therefore, it would be possible for a sound recording to have multiple original works as part of it. The same is true for cinematograph films. Cinematograph films can have multiple original works as part of the cinematograph film.

Let us recall, how is a fact not original? When did we consider this? When an author expresses his thoughts, the thoughts might be related to an event, a fact, or an idea. But these underlying considerations are not within the domain of copyright at all. In fact, a fact is not original simply because the author is not the originator of that fact. An idea that could be novel and could, in fact, be attributed to the author would also not be copyrighted simply because copyright protects expressions. But it is important for us to understand that whatever expression is claimed by an author, the expression must have a point of origination, and that point of origination is the author.

Please remember that we are talking about expressions. Having understood originality, we know that independence of creation isn't sufficient. Or in other words, that this expression is not copied from another is insufficient. There has to be a minimal level of creativity. But what is the expression in sound recording? Is there an expression in the sound recording? If we understand the sound recording to be a recording of multiple different original works coming together.

Of course, in the form of performances of such works. Can we not say that a sound recording is only a medium of fixation? And if it is just a medium of fixation, isn't it different from creative expression? In other words, can we say that writing is work? A writing that incorporates the literary work. Literary work is certainly a work. But is writing work? Similarly, isn't sound recording a medium of fixation? If we understand sound recordings as mediums and cinematographic films as mediums, then their role is restricted to carrying the expression. Let us also consider the question of whose expression, if at all, the Copyright Act is considering such sound recordings and cinematograph films to be.

If we look at the Indian Copyright Act, we see that under section 2(d), it states that the author, in relation to a cinematograph film or sound recording, is the producer. Who is the producer? In section 2(uu), it states "producer" in relation to a cinematograph film or sound recording. A producer who takes the initiative and responsibility for making the work. In a scenario where a cinematograph film is bringing different original works together, it is facilitating such an arrangement. But it's not the arrangement itself that is in question.

Had the arrangement itself been a question, then we would probably be considering a compilation of scenes or a compilation of protectable expressions or unprotectable expressions that we have clearly understood to be a literary work. Then what exactly is a sound recording and a cinematographic film if not just a medium of expression? Let us

look at Section 13 of the Copyright Act. Under this provision, it is very clearly stated that the works in which copyright will subsist include original literary, dramatic, musical, and artistic works, cinematograph films, and sound recordings. Section 13, which talks about the subsistence of copyrights and what the considerations must be in making that determination, does not apply originally to cinematograph films and sound recordings. This understanding of cinematographic films and sound recordings as carriers of expression and as a mode of fixation - effectively places the copyrightability question on the content and the underlying works with respect to originality and not with respect to cinematograph films and sound recordings.

But this doesn't mean that cinematographic films and sound recordings don't have copyright, as it is very clear from section 13. Both of these are subject matters on which copyright subsists. The only point here is that we do not need to consider originality in order to consider the grant of copyright. Therefore, if a question were to arise as to the subsistence of copyright in a cinematograph film or in a sound recording, then - we do not need to apply the originality test for the sound recording and the cinematograph film by themselves. Let us also consider now that we have understood that there are underlying works that sound recordings can carry and that cinematograph films can carry, and these underlying works are original works.

And if cinematograph films and sound recordings are a form of fixation, then shouldn't that be a copyright of the original authors? We can see in Section 14 that to be the case. You can see in section 14 that it is stated: For the purposes of this act, copyright means the exclusive right, subject to the provisions of this act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof. In the case of literary, dramatic, and musical works, it states that you can create any cinematograph film or sound recording in respect of that work. The provision with respect to artistic works is similar. Therefore, we clearly see that as forms of fixation and carriers of expression, the underlying works, which are literary works, dramatic works, musical works, and artistic works, would have to satisfy originality, but that is not a requirement for cinematograph films and sound recordings.

We also understood that, despite not needing to satisfy originality, these are subject matters of copyright and have their respective provisions that grant them respective copyrights. So, in the same provision in section 14 in which these underlying works are granted copyrights, the cinematograph film and sound recording are also granted copyrights. In other words, the cinematograph film and the sound recording as subject matter are separate from the underlying works that can subsist in such film or such a recording. One question that must have come to your mind is what the role of the director is in the creation of a film. How is it that the director is not considered the author? You can see in section 2(d) that the author in relation to a cinematograph film is the producer.

It doesn't say anything about a director being the author. And this can be confusing because whenever we consider cinematographic films for the kind of expressive effort that a director must put in, it is unclear why the director is not considered an author. And therefore, in the next session, we will see what the justification is for considering the subsistence of copyright in a cinematograph film or a sound recording with the producer and the non-consideration of directors. Thank you for joining me; see you all in the next session.