

Copyright and Related Rights Law

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WEEK - 06

LECTURE – 28

Composite Works and Ownership Issues

Welcome back to this course on copyright and related rights law. In today's session, we are going to look at composite works and ownership issues. As you know, this week we are focused on discussing unoriginal works, sound recordings, and cinematograph films. Having understood how these are copyrightable subject matters, despite being unoriginal, and having understood the justification for the copyrightability of such subject matters. In today's session, we will see how copyright ownership questions arise wherein a sound recording of a cinematograph film that has underlying works could have other owners of the work. How then do these relations get managed, and if they do not, what kind of solution exists in law? Let us first understand what we mean by a composite work.

As we discussed in the previous session, a sound recording or a cinematograph film can be very simple work. Wherein a sound recording can just be a recording of some sound, it need not be a recording of any particular kind of work. The same is the case with a cinematograph film. For example, if you were to turn on the video camera on your mobile phone and simply head outdoors to capture a scene from nature, then there is no specific work that you are capturing.

But is it a cinematographic film? It is arguable that it is. Because, in terms of meeting an objective assessment, it is a visual recording in which there might be sounds that are also being captured. But where there are different works that have come together to form the sound recording as a whole. In such a scenario, we are stating that the sound recording would be a composite work. What does "composite" mean? It simply means made up of several parts, and the parts we are referring to here are called works.

There are different works that have come together to form the whole that is a sound recording or a cinematograph film. Ask yourself how many works can make up a sound recording. Let us start with a basic kind of work that would be needed in a sound recording, which is musical work. But even with respect to musical works, can we not say that there may be more than one musical work that is being used and therefore more

than one composer who is part of the same sound recording? Similarly, can we also say that where lyrics are part of a sound recording, there might be more than one lyricist involved? Therefore, how do the copyrights of such composers and lyricists overlap with the rights of a sound recording producer? When we consider these underlying works such as musical works and literary works, we must remember that these musical works and sound recordings do not just appear on the sound recording. In order for the music to be recorded, there must be some kind of performance.

All of us understand that very clearly now. A musical composition played on a piano by a pianist can be recorded in a sound recording. Similarly, a singer singing lyrics in a studio can be recorded, thereby recording the lyrics as well as the underlying musical composition. The question of performers and their rights, and how they fit into this equation, is something that we will look at in our future sessions. But for now, let us focus on the element of work that is part of a sound recording or a cinematograph film.

Because this is an arrangement, let us consider it a generic understanding for now. We are not looking at this in a lot of depth regarding what kind of arrangement it is. But when we start asking questions such as this, on whether this is a contract of service or a contract for service. It will have its own application in terms of how ownership will vest in these concerned stakeholders. In a contract of service such as an employment contract, you would understand that in such a relationship the employee is acting within the course of his duty during the time the employer is using the employer's resources.

In a duty that he has been assigned, which is quite different from a contract for service, we are possibly considering an independent contractor who is not bound by any such mandate to fulfill a particular duty, for instance. For instance, if a person were to go to a tattoo artist and pay him to get a tattoo, the tattoo artist is working as an independent contractor. This basic difference between a contract of service and a contract for service informs our discussion to a great extent. As we will see, a basic norm in copyright is that the author or creator of the work is the first owner of the work. But depending on what kind of agreement exists in terms of that particular creation, that could have a direct impact on ownership consideration.

Let us consider a contract for service. As we were understanding in a contract of service because the relationship is based on an outcome dependent on a course of duty. We can say that the producer would be the first owner of such a work, and it wouldn't be the scriptwriter. But what if the script is preexisting? Let us say, for example, that a scriptwriter has written a script, and now he's approaching producers to produce a film based on it. In such a case, because this is not a contract of service, there is going to be a level of negotiation that will come in - In terms of the type of transaction the scriptwriter will engage in with the producer regarding the copyright.

On this point, let us understand how such a transaction can occur. We understood that in order for copyright to be effective, the right holder must authorize the usage of the work. Any person who is looking to utilize the work in a particular manner would have to seek prior authorization from the original author. As we have seen, this is not a contract of service because there is pre-existing work; therefore, the scriptwriter's authorization is necessary. How will this happen? The scriptwriter can choose to simply engage in a license, or the scriptwriter can engage in an assignment.

What is the difference between these? In a license, there is no transfer of ownership from one party to another, whereas in an assignment, ownership does get transferred from one party to another. What we must also note is that both licenses and assignments can be limited by duration and territory. For instance, the license could be restricted to a period of five years, after which there could be a scope for renegotiation of the terms. That could be possible. Depending on what kind of usage is allowed, it could be exclusive usage or non-exclusive usage.

If it's non-exclusive, then the party who has been licensed is not the only person who can use that work in that particular manner. There can be others as well. Consider this question: if underlying works are separate from the recording, can a producer own copyright over all the works through a contract of service? Just now, we considered the point of what happens if a script is pre-existing. You must have realized that when we had this discussion, we had it with the understanding that the scriptwriter is the first owner. But this is completely opposite to a situation of a contract of service wherein the producer will be the first owner.

Therefore, even though we are in a position to differentiate between a work that is part of a composite. In other words, we can clearly make a distinction between the script and the cinematographic film. But because it is a contract of service, are we then saying that the producer has ownership over all the copyright that the scriptwriter enjoys or would have enjoyed if not for a contract of service? On this point, let us take a look at one of the most important cases in copyright law that arose in India, decided in 1977 by the Indian Supreme Court. This is the Indian Performing Rights Society Limited versus Eastern India Motion Pictures. In this particular case, the court was considering this particular concern, which we were trying to answer, and necessarily this was a reflection on section 17 of the Indian Copyright Act.

Which, as we were discussing, states a general norm that the author of the work, the creator of the work, is the first owner. But to this norm, it provides certain exceptions of specific relevance to our discussion, and in this particular case, sections 17(b) and 17(c). Let us take a look at what these provisions say. Section 17, as you can see, talks about the first owner of copyright. It states that, subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein.

(b): subject to the provisions of (a), in the case of a photograph taken or a painting or portrait drawn, or an engraving or a cinematograph film made for valuable consideration at the instance of any person, such person shall in the absence of any agreement to the contrary be the first owner of the copyright therein. In this particular provision, you can see the person who is making the valuable consideration; that person is going to be the first owner. You can look at (c) now. In the case of a work made in the course of the author's employment under a contract of service or apprenticeship to which neither (a) nor (b) applies, the employer shall in the absence of any agreement to the contrary be the first owner of the copyright therein. I'm sure you can make a clear line of distinction between the two based on their reading of (b) and (c).

Where one provision talks about a contract of service, the other provision doesn't talk about a contract of service; rather, it talks about a situation where there is valuable consideration for the making of a particular work. As you can see, it says, in the case of a photograph taken, a painting or portrait drawn, an engraving, or a cinematograph film made for valuable consideration at the instance of any person. So, because a particular work has been made for the instance of a particular person, it is that person who will be the first owner. Now please note, when we talk about the first owner, it means that the entire gamut of rights under section 14, which we will discuss in future sessions, but just to be aware of the different kinds of rights that are available to authors: We can say there are reproduction rights, distribution rights, adaptation rights, translation rights, etc. Now there is no distinction in what kind of rights will vest with the producer, for example, and what will vest with the scriptwriter or what will vest with the composer.

No such distinction is made. It simply states that the producer will be the first owner. Now let us look at how the Supreme Court in this case is trying to answer the question. First, the Supreme Court seeks to explain what cinema is. The court says a cinematograph is a felicitous blend, a beautiful totality, a constellation of stars.

If I may use these lovely images to drive home my point, slurring over the rule against mixed metaphors. Cinema is more than long strips of celluloid, more than miracles in photography, more than song, dance, and dialogue, and indeed more than a dramatic story, an exciting plot, gripping situations, and marvelous acting. But it is that ensemble which is the finished product of an orchestrated performance by each of the several participants, although the components may sometimes, in themselves, be elegant entities. The Supreme Court points out that there is a purpose to the making of cinema wherein the audience is captured within its magic, and this is only possible if we see cinema as a distinct entity, different from the component parts, which in themselves are elegant. On the question of the separation of works, the Supreme Court refers to a very important provision within the Indian Copyright Act, which is section 13(4).

You would remember that section 13 talks about works in which copyright subsists. And 13(4) states that the copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which, or a substantial part of which, the film or, as the case may be, the sound recording is made. What we see is that section 13(4) says that where, say for example, a music piece is made a part of a cinematograph film, then just because it is part of that film, it doesn't mean that it does not have a separate existence. It is a separate work; it can have its own copyright. So, depending on what kind of arrangement exists between the composer and the producer, that will then decide how the copyright can be engaged.

The Supreme Court states, "Beyond exhibiting the film as a cinema show, if the producer plays the song separately to attract an audience or for other reasons, he infringes the composer's copyright." Anywhere, in a restaurant, airplane, radio station, or cinema theater, if music is played, the copyright of the composer or the performing arts society comes into play. These are the boundaries of composite creations of art that are at once individual and collective, viewed from different angles. Let us understand, illustratively, what the court is looking to highlight here. As we have discussed, a sound recording or a cinematograph film is a fixation because it's a recording and a distinct entity from its individual components.

We can say that the recording itself is subject to a copyright that doesn't affect the separate copyright in the underlying works. Meaning what? If a certain portion of the recording itself was taken, then that would be a violation of the copyright of the sound recording producer or the cinematographic producer. And if the music from the sound recording was used by the producer separately, separate from the recording, then that is not a copyright that the sound recording producer has. That's rather a copyright that the music composer has. And, as very rightly pointed out by the Supreme Court, you can see these are the boundaries of composite creations of art, which are at once individual and collective.

Because this is a composite work and because section 13(4) clearly states that the copyright in such a composite work shall not affect the separate copyright; If not for section 17, it would ideally lead to a separate copyright existence for the musical work composer and the sound recording producer, for instance. The Court then elaborates by saying that, from a cosmic perspective, a thing of beauty has no boundary and is humanity's property. But in the materialist plane on which artists thrive, private and exclusive estates in art subsist. Man, the noblest work of the infinite artist, strangely enough, battles for the finite products of his art, and the secular law operating on the temporal level guards material works possessing spiritual values. The enigmatic Mona Lisa is the timeless heritage of mankind, but until liberated by the prescribed passage of time, the private copyright of the human maker says hands off.

The reflection of how copyright must be seen is that society encourages the grant of copyright to fuel more copyright expressions coming into society. The Supreme Court is explaining how copyright creates a monopoly right in the hands of the author and what would otherwise be considered something over which society would want to have free access. The law of copyright ensures that this is within a boundary until the time period for which this boundary can exist has expired. Now consider whether the producer of a cinematographic film can defeat the rights of the composer of music or the lyricist by engaging them. You would have realized that when we discussed sections 17(b) and 17(c) - we had noted that the Copyright Act is clearly providing for two exceptions to the norm that ordinarily the author would be the first owner.

We saw that while 17(c) talks about a contract of service, 17(b) discusses an engagement on the basis of valuable consideration, wherein the valuable consideration and the person making it would be the first owner. The Supreme Court says the key to the solution of this question of whether the producer of a cinematograph film can defeat the rights of the composer of music or lyricist by engaging him is seen in 17(b) and 17(c). Now, this is how the court explains it. According to the first of these provisos, which is proviso (b) - When a cinematograph film producer commissions a composer of music or a lyricist for a reward or valuable consideration for the purpose of making a cinematograph film or composing music or lyric thereof, i.e., the sounds for incorporation or absorption in the soundtrack associated with the film, which has already been indicated are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed, unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other.

The same result follows according to the aforesaid proviso (c) if the composer of music or lyrics is employed under a contract of service or apprenticeship to compose the work. It is therefore crystal clear that the rights of a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in 17(b) and 17(c). Now, what the Supreme Court has elaborated is that under 17(b) and 17(c), what we saw as a separate existence of an underlying work and the composite work, which is the sound recording, can be defeated. So the sound recording producer, on account of engaging a composer for valuable consideration in making a cinematograph film, will be the first owner of the composition.

And according to the Supreme Court, the producer can defeat the rights of the composer of music. Now ask yourself, doesn't such first ownership create an unfair revenue concern for underlying work authors because there is much more to a composition than just its creation in a cinematographic film? Does it not lead to unfair consequences to give first ownership to the producers? It could be contended that perhaps 17(b) and 17(c) are only focused on first ownership to the extent to which the music is recorded onto the sound

recording or a cinematograph film. But that is not the case. We will see in 17(a) how such a distinction between first ownership was supposed to be made and legislatively intended; such a distinction was clearly provided within the provision. Let's look at 17(a); it states that, in the case of a literary, dramatic, or artistic work made by the author in the course of his employment, by the proprietor of a newspaper, magazine or similar periodical, under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work, in so far as the copyright relates, to the publication of the work in any newspaper, magazine or similar periodical or to the reproduction of the work for the purposes of its being so published.

But in all other respects, the author shall be the first owner of the copyright in the work. You can clearly see the distinction in wording between 17(a), 17(b), and 17(c). In 17(b) and 17(c), we see that there is only one first owner, and there is no difference in terms of copyright with respect to that first owner. You can see in 17(a) that there is very clearly the existence of two first owners with respect to the same work. But these first owners are first owners in respect of a specific right.

So, for example, say that a cinematograph film had to be made from a report which was made by an employee under such a contract of employment as envisaged in section 17(a), then permission to make such a cinematograph film will come from the author and not the newspaper. What then we can conclude is that 17(b) and 17(c) do not make any distinction between first ownership therefore all rights which should ideally vest with a musical work for example would vest with the sound recording producer, and this can create unfair revenue concerns for composers and lyricists who are getting their works added on to sound recordings. In the next session, we are going to look at copyright societies. Copyright societies are very important from any point of view with respect to copyright law because the authorization in the real world with respect to works is done to a large extent by copyright societies. In fact, in this case, which we discussed today, the Indian Performing Rights Society is a copyright society.

We will understand in the next two sessions what a Copyright Society is, how it functions, and what some of the important changes that have been brought in through the 2012 amendment to the Indian Copyright Act are. And also whether this particular interpretation brought in by the Supreme Court in 1977 has been modified by the 2012 amendment through some amendment, or is this still the case? Thank you for joining me. See you all in the next session.