Copyright and Related Rights Law

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WEEK - 12

LECTURE – 56

Infringement Part II

Welcome back to this course on copyright and related rights law. In the previous session, we discussed section 51 and its components. We had seen what it is that the Indian Copyright Act considers to be infringement of copyright in a work. In today's discussion, we are going to see whether Section 51 is to be applied the way it is or if there is some kind of analysis that is conducted by courts when an infringement action comes before them. Consider the question of whether copyright infringement is only literal infringement, or in other words, only verbatim copying amounting to infringement. Now when we looked at what it is that copyright is attaching to? We understand that copyright doesn't apply to an idea.

Copyright applies to the expression. Is it not then that the infringement of an expression should be the replication of that expression and just that? Because if anything else, we are looking to bring in a subjective analysis in this infringement consideration. In other words, it is no longer a literal copy. There are non-literal elements that must be considered for infringement to occur. Let us recall an earlier discussion that we had about fair use. Recall session 51. These are the two sets of lyrics that we discussed. See these lyrics. One set reads, "Pretty woman, stop a while, pretty woman, talk a while, pretty woman, give your smile to me."

And the other set reads, "Bald-headed woman, girl, your hair won't grow; bald-headed woman, you got a teeny-weeny afro." Now, in terms of a replication, there isn't any. There is no literal copying. But in terms of whether there was infringement or the possibility of infringement, to which a defense of fair use was being applied. There was no debate.

In Campbell versus Acuff-Rose, it was a given fact that if not for the exception of fair use, this was infringement. Now ask yourself, is there a literal infringement here? You will all say that there is no literal infringement. There is no verbatim copy. The

expressions are different. But if indeed expressions are different, then how would adaptations enjoy their copyright protection? Let us recall Session 45, in which we discussed adaptations.

We had seen that section 2, clause (a), which defines adaptations in the Indian Copyright Act, states that adaptation means, in relation to a dramatic work, the conversion of the work into a non-dramatic work. Would the expression not change if the subject matter were changed? Thus, to limit copyright to only literal copying and such protection would be to, in a way, say that adaptations which are not literal copying do not enjoy copyright protection. On that note, we are going to consider one of the most important cases that has arisen under copyright law in India. This particular case is R.G. Anand versus Deluxe Films, decided by the Supreme Court of India. Because we will be looking at this case in a lot of detail, we will be focusing on facts. These facts will help us better appreciate the pronouncement of the Indian Supreme Court.

R.G. Anand, the dramatist, had written a play called Hum Hindustani in 1953. It was enacted for the first time in the following year, 1954. Such was the popularity that this play received that R.G. Anand considered making a film based on it.

The same year later, R.G. Anand was approached by the defendant, who claimed that he had received the synopsis of the play from a common friend. The defendant seemed to be motivated to make a film based on the play written by RG Anand. For this purpose, a request was made to RG Anand to supply a copy of the play to the defendant.

RG Anand, in turn, had said that the play was going to be enacted and that the defendant should come and watch the play and then decide for themselves whether there was a potential for the conversion of this play into a film. It was the next year, in 1955, that the defendant met R.G. Anand in Delhi. It is the contention of RG Anand that in this meeting between the defendant and the dramatist RG Anand, he read out the play and explored the possibility of the play being converted into a film.

At this time, no commitment was made by the defendant, who simply said that they would inform RG Anand of their decision once they returned to Bombay. It was later in the same year, 1955, that the defendant announced the production of a film called New Delhi. One of the artists who had worked on the play, Mr. Thapa, who was incidentally present in Bombay at that time, had seen this production and informed R.G. Anand that the film was, in fact, based on the play Hum Hindustani. Upon this information, R.G. Anand brought to the producer's notice his serious concern that the film was an adaptation of the play. But the defendant rejected this consideration by stating that the story treatment, dramatic construction, and characters were all quite different and bore not the remotest connection or resemblance to the play written by RG Anand. The picture was eventually released in Delhi in 1956, and at that time, the newspapers commented

that the picture bore a resemblance to the play. RG Anand himself went and watched this picture and was of the opinion that it was based on his play.

In fact, according to R.G. Anand, it was entirely based on the said play, and he was convinced that this picture was dishonestly imitated and therefore resulted in a violation of the copyright he had in the play. The defendants denied that there was a connection between the film and the play. And they stated that there could be no copyright in the subject of provincialism, which could be used or adopted by anybody in their own way. What is provincialism? Provincialism means concern for one's own area or region at the expense of national or supranational unity. Provincialism is the subject that underlies both the play and the film.

This thematic consideration is something that the defendants are contesting as being different. It's a different expression. There could be similarities, but there are also dissimilarities. In fact, this contention can be reasoned by saying that the dissimilarities are much greater than the similarities. In fact, the similarities are such that they are very common in nature.

Do these questions of similarity and dissimilarity within an expression have any role to play in the determination of whether an expression is an infringement of another? This is what the court is looking to answer in this particular case. The court is first saying that the play is a dramatic work. It is then stated in a simple answer to the question we were looking to answer, which was whether copyright infringement is restricted to literal copying or not. The court has provided an answer that no, it is not restricted. But the Supreme Court engaged in an exercise of expanding this simple answer so that its complex facets can be understood better.

Let us then look at two extracts in particular that I have taken for the purpose of explaining the Supreme Court's exercise from this particular judgment. One extract that the Court refers to is a book on copyright by Copinger in which the learned author had stated: Various definitions of copy have been suggested, but it is submitted that the true view of the matter is that where the court is satisfied that a defendant has, In producing the alleged infringement, substantial use was made of those features of the plaintiff's work in which copyright subsists; an infringement will be held to have been committed. If he has made such use, he has unlawfully exercised the sole right that is conferred upon the plaintiff. What does this mean?

Does this mean that when we consider an expression, we must divide the features of that expression into two categories? One features that are copyrightable and features that are non-copyrightable. If indeed that is how we are supposed to categorize an expression, then what this extract suggests is that from the features we have found within the set that

is copyrightable in an expression, If substantial use has been made by a user, then such use would be considered infringing.

What you would understand from this is that the more features you can add in this category of protectable elements, the much higher the chance of copyright infringement. The other extract that is considered by the Indian Supreme Court is by the author Horace Ball, who states in an action for the alleged infringement of the copyright of a play by a motion picture, wherein it appeared that both authors had used life in a boys' reform school as a background. But the only similarity between the two productions consisted of a few incidents and points in dialogue such as one would expect to find in stories set against the same background. There was no infringement of copyright. Can we not connect the first extract to this? In this particular extract, there is a discussion of a specific case.

Can we not say that the features that are present in an expression, if they are commonplace, cannot be considered as features on which copyright can subsist? Then the use of those features by another individual would not amount to infringement. The Supreme Court, in considering several cases and authorities, provides a summary of certain propositions. Let us look at these one by one. The first proposition is that there can be no copyright in an idea, subject matter, themes, plots, or historical or legendary facts, and violation of the copyright in such cases is confined to the form. Manner, arrangement, and expression of the idea by the author of the copyrighted work.

This is one of the basic tenets that we discussed in our earlier classes on copyright law. Consider the example of a news item. The item that the news presents is commonplace. It's a fact, and facts cannot be copyrighted. What this proposition then says is that the expression, particularly that specific form, is what will be considered for the purpose of copyright infringement.

The second proposition is that where the same idea is developed in a different manner, it is manifest that, since the sources are common, similarities are bound to occur. In such a case, the courts should determine whether the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there, it would amount to a violation of the copyright. In other words, in order to be actionable, the copy must be substantial and material, which at once leads to the conclusion that the defendant is guilty of an act of piracy. Let us consider that two authors have worked on the same idea but have emerged with different expressions.

Even though the expressions, on the face of it, seem different because of the language that is employed. The sequence of that expression and the features that connect those expressions together, Where there is an imitation of the original expression, it could be

said that even though there is no verbatim copying, When we read two expressions, it may emerge that one is considered to be a copy of the other. Bear in mind that two individuals who have independently done this without having access to each other's work; these two independent creations would be original. But we are considering a situation such as the one in this case where two people have worked on an idea, stating that they have made different expressions, but they have had access to the original work.

Let us consider the third proposition. This says one of the surest and safest tests to determine whether or not there has been a violation of copyright. To see the reader, spectator, or viewer after having read or seen both works is clearly to be of the opinion that the subsequent work appears to be a copy of the original. Does it not happen to us as well as to ordinary readers? When we have read a piece of work followed by another piece of work, and even though they are literally different, we are able to say that the second work is an imitation of the first. This is what the court is saying. The court is suggesting that the proposition emerges from the authorities to which the court has referred, namely case laws and commentaries.

They are suggesting that it is possible for such an impression to be left on the minds of readers or the mind of the spectator or the viewer that there has been copying. The fourth proposition is where the theme is the same but is presented and treated differently, so that the subsequent work becomes a completely new work. No question of violation of copyright arises. Let us understand that there can be dissimilarities of such a nature that the expression serves a new meaning. We can connect this understanding to something that we discussed earlier under fair use.

The transformative nature of a particular expression is significant. Even if a work, along with a consideration of another work, is as this proposition states on the same theme, They could be on completely different pedestals in terms of the meaning they are providing to the reader. The fifth proposition is that, however, apart from the similarities appearing in the two works, there are also material and broad dissimilarities which negate the intention to copy. The original and the coincidences that appear in the two works are clearly incidental.

No infringement of the copyright exists. The sixth proposition is that, as a violation of copyright amounts to an act of piracy, it must be proved by clear and cogent evidence after applying the various tests laid down by case law. An act of piracy is a serious legal consideration in which it is regarded as an offense. Every act of copyright infringement that is done knowingly is an offense, and therefore any such act of infringement must be proved with cogent evidence. And seven, however, where the question is of the violation of the copyright of a stage play by a film producer or a director, the task of the plaintiff becomes more difficult to prove piracy. It is manifest that, unlike a stage play, a film has

a much broader perspective, a wider field, and a bigger background where the defendants can introduce a variety of incidents.

Give a color and complexion different from the manner in which the copyrighted work has expressed the idea. Proposition 7 then, in effect, synthesizes the earlier propositions by applying them to a specific circumstance where there is the possibility of an infringement wherein a play has been converted to a film. Because the film is on a broader canvas, it can present a very different purpose and meaning from what could be similar features. How, then, do this understanding and these propositions play themselves out in terms of the particular facts of this case? We will then take up the latter part of R.G. Anand's discussion in the next session. Thank you for joining me. See you all in the next session. Thank you.