

# **Copyright and Related Rights Law**

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**WEEK - 02**

**LECTURE - 08**

## **Photography and Tattoos**

Welcome back to this course on copyright and related rights law. This week we are discussing the subject matter of artistic work. Previously, we have discussed the definitions of artistic work in different copyright acts in different countries. What we have seen is a level of commonality in the identification of types of expressions that can fall within the category of artistic work. So a painting for example has been considered commonly to fall within artistic work, same with drawing. There is also a commonality in the rejection of a requirement of artistic quality towards the determination whether an expression can be considered as an artistic work or not.

We saw this explicitly under the UK copyright act and the Indian copyright. What we will be looking at today are two types of expressions, a photograph and a tattoo. Both a photograph and a tattoo seem to be slightly different from the conventional expressions that have been considered as artistic works. A photograph because of a machine that comes in between the author and the expression; and tattoo for a kind of process that is not specifically recognized as a type of artistic work such as an engraving for example.

Take a look at this image and what do you see? In this image you can see a person using a camera. This person is possibly a professional who is using additional equipment to get the best image from his camera. The location of this place perhaps is also chosen by this photographer in taking the photograph. In comparison, when we look at this image, what do we see? Most of us own smartphones now and these smartphones are equipped with cameras. Many of us routinely use this camera to take photographs.

In taking these photographs, are we all photographers? In taking these photographs, are we also artists? or are we authors of an artistic work? Take a moment to think about the considerations that pass through your mind when you routinely take these photographs. Consider this first question. Is there any effort or mental input in taking these

photographs? Is there any kind of consideration apart from the fact that you have identified a subject or a scene which you want to photograph. Apart from that, is there any other consideration that is playing on your mind when taking that photograph? If you aren't thinking about any other consideration, is it because the software on the phone is helping calibrate that scene in such a way that the best shot is captured on that phone? Additionally, would you say that the photo you have taken has some kind of a commercial appeal? Or in other words, if the photo you've taken is put onto the market for people to purchase, do you think anybody would purchase that photograph? The fact that these photos are being taken by you, has this question of commercial appeal of your photograph even come to your mind? Because when you took these photographs, did you in fact take it for personal use? If not personal use, for distribution among people who you are close to such as your friends or family and not something that you wanted to put out in the market at all. All of these considerations are important in the eventual assessment of whether a photograph is an expression which is an artistic work in which copyright should subsist or not.

One of the things that we have understood from our previous discussion on what could be the meaning of artistic in artistic quality is that this is a test of objective assessment. The example we took yesterday, the example we took in the previous session was - if a brush stroke, if a single brush stroke of any color is made on a canvas, then that brush stroke can be considered as an artistic work. That's an objective assessment. On top of this, there needs to be an assessment of whether it is original or not. That's a secondary step.

Similarly, when we ask this question, in using a camera, a standalone camera such as this or a camera which is part of a phone - the simple fact that a photo has been taken means that this is a photograph, a photograph which is an artistic one. But that doesn't satisfy the considerations of copyright subsisting in that photograph. That is a supplementary consideration. In this particular case [Antiquesportfolio.com], the court found it relevant to refer to an extract from a scholarly piece in which the scholars had considered the possibility of originality consideration with respect to photographs.

This is what they said, there may be originality which does not depend on creation of the scene or object to be photographed or anything remarkable about its capture; and which resides in such specialities as angle of shot, light in shade, exposure effects achieved by means of filters and developing techniques. What are the scholars implying? Photograph taken by professionals in such a scenario as this, there is a skill component that comes in place. The skill component is not dependent on setting up a scene particularly as is the case here where this photographer seems to be standing on a raised surface and seems to be pointing at the horizon. In such a photograph what would make the capture an original capture is the attributes of that photograph which is - the effect angle of the shot has brought the light and shade which has been chosen the exposure effects. These are all

considerations which will be considered when originality is being assessed with respect to a photograph.

Originality could also be assessed in a scenario where the scene has to be set by the photographer or the subject has to be prepared. Consider a model who is going to be photographed. The manner in which the model should pose, the kind of preparation that she should take for the purpose of that photograph is something that the photographer can decide. And thirdly, there could also be an originality assessment, where the photograph is taken at a time when the photographer is just at a point at the right time at the right place.

In these situations what these scholars point out is that originality could attach and therefore what they seem to be suggesting - is that while every photograph could entitle the person taking the photograph to be called the photographer, but not every photographer will be an artist. In order to be an artist, there would have to be a copyright which should attach to that photograph and that copyright attachment will come only when this assessment of originality is done. Consider this image. Where would you place this image out of these three possibilities of originality? You can see that point 3 which talks about the photographer being at the right place at the right time seems to be fitting this. In the case of a photograph of a 3D object.

It can be said that the positioning of the object the angle at which it is taken the lighting and the focus and such other matters could all be matters of aesthetic or even commercial judgment. In this particular case, which we are discussing. The subject at issue was a photo of antiques. What the court considered is that the photo appears to have been taken with a view to exhibiting particular qualities including the color, their features and details. It may well be that in those circumstances some degree of skill was involved in the lighting, angling and judging the positioning.

What are we understanding here? that the original understanding of the second step after determining whether it is a subject matter of copyright or not - which is that it should be original, was that it should be originating from the author and should not be copied from anywhere else. But the original considerations what you can see here are going beyond this primary level understanding of original being a question of whether the author has originated it and it not being copied from somewhere else. Consider this image. What we are seeing is a photograph which is taken of a person. It's a black and white photograph.

There seems to be a certain purpose or a design in the mind of the photographer when such photograph was taken. Let's place this in the context of a case from India. This case is Kesari Maratha Trust versus Devidas Tulsaram Bagul. What had happened in this case was that Devidas, the photographer, had taken a photo of a poet Shri Suresh Bhat. Suresh

Bhat had published his poems in a book, the cover of which featured this particular photograph and under this photograph was an attribution to Devidas.

A newspaper by the name of Kesari ran an article on an event in which some poets were awarded for their prolific poems. and in this article this image was reproduced. This case concerned a claim that was brought by the photographer that there was a violation of copyright in this photograph. We will see how the Bombay High Court has considered the presence of copyright in the photograph. But before we do, we must look at what are the counters that have been placed by the defendant.

What the defendant said is that this was a current event. A current event, a news item, And they were not aware or there was no reasonable way in which they could have known that there was copyright in this photograph. Now, what do you think of these arguments? You would have noticed in our discussion on news. You would recall we discussed news in the context of compilations. In that discussion, we had appreciated that the selection and arrangement of articles in a newspaper was a literary work; and it would not affect in any way the separate copyright that can exist in those articles in themselves.

Which means what? While the underlying event itself is not a subject matter, but the expression itself is. So in the garb of it being a news item, It cannot be stated that there is no copyright in the content. Secondly, ignorance of law is not an excuse. which is the reason why we must make ourselves familiar with copyright law because of the many difficulties it poses in its understanding. What the photographer here stated was that he wasn't just any photographer who had taken any photograph.

He said there were some factors which influenced his photograph. Firstly, he said that he had studied the poems of Suresh Bhat. He tried to show highlights intensity of light direction of light and vision. He said that he produced artistic effects in the photograph by showing a peculiar background with focus in particular manner. And he took the photograph such as the entire face is not shown in the photograph.

In claiming compensation, the only thing that the photographer claimed here was one rupee and this was more of a question of the acknowledgement of his copyright. The court in expressing that ignorance of law is not an excuse, stressed on the process that the photographer had followed in taking that photograph. In a sense what the Bombay High Court was saying was that there was something more than just the act of clicking the camera that was undertaken by the photographer; which demonstrated the originality in that photograph and therefore it had no qualms in granting or in accepting the existence of copyright to this photograph. Let's take a look at another case and this one comes from EU. In Painer versus Standard, there was a consideration of the kind of factors that could come in consideration when portrait photographs were considered.

What the court was saying was that with respect to portrait photographs, a photographer can make free and creative choices in several ways. In the preparation phase, the photographer can choose the background the subjects pose and the lighting. He can choose the framing, the angle of view and the atmosphere created. He can also choose from a variety of developing techniques and even computer software. Thus this photograph, seemingly simple as it is, could in fact be the result of several factors that have been considered by the photographer in taking the photographs, which is what will make that photograph original.

Having understood what photographs are and how photographs amount to artistic works which are copyrighted, let us now come to the question of how tattoos can be considered as artistic works. What you see in this image is a tattoo artist making a tattoo on the hand of a subject. But what is a tattoo and how do we understand what it is? The Oxford dictionary meaning of tattoo is to make an indelible design on a part of the body by inserting pigment into punctures in the skin. Now what we had noticed with respect to the different types of artistic works is that these different types showcase a certain process that is followed. Engravings for example follow a certain process.

What is that process? An engraving requires some type of cutting or carving on the surface of a hard object. But seeing the process of what a tattoo entails, can we place a tattoo within the meaning of engraving? Possibly not. What about etching? Etching too involves a certain process. What we had seen in the previous discussion is that engraving can be taken to be a broad umbrella term in which other types of artistic works can be placed such as the case in India. But in other jurisdictions such as UK for example, these are distinct types of artistic works and do not fall within a broad umbrella such as engraving.

What exactly is etching then? This is how the Oxford dictionary explains it. It says that etching is a type of engraving on metal, glass or stone; wherein it is coated with a protective layer, drawing on it with a needle and then covering it with acid to attack the parts the needle has exposed, especially in order to produce prints from it. In trying to place a tattoo within etching as well, we find it to be difficult. And therefore what we can see is that - if we had to include tattoo as a type within artistic works then the open list system would possibly be a better system to include a new subject matter because this is a new process. but in jurisdictions where specific types of works have been recognized and no other, to expansively read a particular subject matter would probably be the only way in which a tattoo could be recognized.

Let us consider some basic requirements and see whether a tattoo meets them. We had understood that a tattoo is following a particular process. The output itself is an output that allows for visual perception. Meaning what? It is on a surface, there is fixation and it is allowing for visual perception. Can the tattoo be original? It can very well be original.

The tattoo artist could have made it independently, meaning that it is not copied from anywhere. It is originating from the tattoo artist. But the general rule of copyright ownership, which means who gets to decide if a person can use a particular work or a subject matter or not. The author of the work is generally considered to be the first owner. We see this principle enshrined explicitly in provisions within copyright acts as well.

For instance, in the Indian Copyright Act, we find this in section 17 of the Act. but this general principle can be bypassed if the work has been made under a contract of service or otherwise an employment contract. But most tattoos are made through a contract for service meaning what? The tattoo artist is an independent contractor and he is not subject to a contract of service or an employment contract. What this means is that as the author of the work, the tattoo artist is the owner of that tattoo. But what differentiates a tattoo from other types of artistic works is you can see here the tattoo is being made on the hand of a subject.

This is very different from other types of artistic works which are being placed on canvas or stone or wood. Now the hand of a person is not something which can be kept at a particular place. In fact, if at all there has to be some kind of control over the communication of this particular tattoo, it would almost have to be considered as some kind of an implied license, especially in the case of celebrities. And therefore what we see is that even though tattoos seem to be falling generally within the ambit of artistic work; in practice and in implementation, the protection of tattoo brings many complex issues which we do not otherwise find in other types of artistic works. In concluding, hopefully we have understood how photographs and tattoos are types of artistic works.

In the next session, we will see a very crucial distinction between artistic works and a very different form of intellectual property called as industrial designs. While there is a commonality, there is a distinction. Thank you for joining me. I will see you again in the next session. Thank you.