Copyright and Related Rights Law

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WEEK - 02

LECTURE - 09

Difference between Artistic Works and Industrial Designs

Welcome back to this course on copyright and related rights law. In the previous sessions, we have seen the definitions of artistic work in different copyright acts, specifically the UK Copyright Act and the Indian Copyright Act in terms of the commonalities between them. We have then been able to understand in what manner the separation of artistic quality is applied to certain types of artistic works. We have also understood certain types of artistic works which conventionally seem different, photographs and tattoos. In today's session, we will discuss an important distinction between artistic works and industrial designs. Why is this relevant? As we have seen in the definitions of artistic work, although a work of artistic craftsmanship has been included as a type of artistic work, it has not been explained.

To understand the work of artistic craftsmanship, we had taken the help of an important case, George Hensher versus Restawhile Upholstery - in which we had discussed that two important considerations come into play in a work of artistic craftsmanship: wherein the skill of the craftsman is an important consideration and so is the question of whether there is any artistic appeal. In explaining these considerations, Lord Reid had explained that not only must the artist's intent be considered, but also a substantial segment of the public and their perspective on how they perceive this particular work. But a work of artistic craftsmanship, let us first consider how to break down the term craftsmanship. Craftsmanship is connected to a craft.

What is a craft? A craft is defined as an activity involving skill in making things by hand. And craftsmanship means skill in a particular craft. We had discussed in this sense - crafts such as pottery in which the craftsman showcases his skill in creating a work of artistic craftsmanship. But when we consider articles that we see on a daily basis, items

that we find in our offices, items that we find at our homes, some things that we have purchased. Take a look at this image.

In this image, can you identify the various articles or items that are present in this room? And can you say that these articles are in fact having some kind of an artistic appeal? You can see a curtain. It is not just a piece of fabric with no color on it, with no design on it, meaning that this curtain was chosen for the particular features that it is showing on the fabric. Similarly, you can see a chair. It isn't just any chair meant to satisfy only the object of sitting. It has been designed in a particular way.

So is the case with many of the other items that you can see in this image; where the design was chosen in a particular fashion and because these designs are appealing to consumers . Considering that many consumers will be interested in purchasing the same article with the same design - these designs are made with the object of mass production. What we will also be considering is that Many types of works that we had considered when we discussed the types of artistic works such as graphical works; is that graphical works are capable of being applied to articles. Let us go back to this image. Before the pattern was applied to the curtain, the pattern was part of a graphic art.

Now this graphic art was then applied to the article with the object that it will be multiplied. The object will be multiplied at a mass level to cater to thousands of possible consumers. What is then the difference between a graphic design which is made with the object of applying to curtains for example and something like what you see on your screen - a cartoon character like Popeye. Many of us know that Popeye is a popular children's character who grows strong by eating spinach. He's a sailor man.

Now imagine Popeye; the character of Popeye being applied to articles which are having some utility or some use such as cups. Will the consideration of Popeye as an artistic work deserving of copyright change simply because now it is being applied to an article which is being mass produced. This is the issue that we must consider when we are looking to make a distinction between artistic works and industrial designs. The question of Popeye specifically was considered In this case that comes from the Privy Council, King features syndicate versus O&M Kleeman; in which the court had considered as relevant the object behind the creation of such piece of art. what the court had focused on was that at the point of creation, what was the object of such creation? Was the object to have a standalone piece of art or was the object application to an article and mass production.

If in fact the object was mass production, then it was different from what would otherwise be considered as artistic work such as a painting. Because a painting is not made with the purpose of mass production. As you can see, Lord Wright in explaining this stated, provided there was no intention on the part of the author to use his design as a

model or pattern for industrial multiplication at the time it was created - full rights under the Copyright Act, which were far more extensive and of longer duration than those under the Designs Act, were at his disposal, even should he subsequently change his mind and proceed to industrialize his work. In this case, the character Popeye was created without any intention to industrialize the work at the time at which it was made. This observation brings forth for our consideration some very important questions.

The first question is, at the time the design was made, What was the intention or object of the artist? Imagine running a business of making toys for children. Now these toys, supposing they are cars, toy cars - these toy cars will carry some piece of drawing which would have been made for the purpose of mass production. Now at the time at which that drawing was made, the drawing was not made as a standalone piece of art for the purpose of sale. The drawing was made rather for the purpose of applying it to an article which was going to be mass-produced. Here in itself, you can make a clear distinction between what is considered as a piece of art in itself as against what should be considered as an industrial design.

The second question is what is the difference between rights in copyright and design? What would be the issue if industrial designs were also considered as artistic works? We must understand that copyrightable subject matter satisfies the consideration of originality wherein it originates from the author and is not copied from anyone. The subjective application of originality as I have said is of a complex nature and something that we will discuss in later sessions. But a distinction that clearly arises between the kind of designs that are going to be mass-produced as against standalone art is that designs meant for mass production are of more common nature than pieces of art. For instance, going back to this image, the pattern that you see on the curtain, that pattern would not seem to have an independent existence of itself. Which would then mean that this pattern should not enjoy the full scope of rights that will be possible under copyright.

And finally the question, what is the difference in the term of protection between copyright and design? Because copyright subject matter is considered to be more original and to be less commonplace and having its own independent existence, copyright subject matter is eligible for a far longer duration of protection than designs. Copyright provides a protection for a painting for a duration of the life of the author plus a period of 50 or 60 or 70 years, depending on which country's copyright act you're looking at. Industrial designs, on the other hand, have duration of up to 15 years. Let us consider the legislations on copyright and designs specifically within UK and India. The Copyright Act 1911 of UK does not apply to those designs which are capable of being registered under the Patent and Designs Act 1907.

The design rules provided that where reproduction happened more than 50 times then this is not something for which copyright could protect. What we see is that the Copyright

Act 1911 clearly explains that certain works of art will fall within its domain and still some others will fall within the domain of patent and designs Act. What is it that makes the designs framework closer to the patent framework than copyright? As we had discussed, the patent framework is directed more towards protection of function. copyright is aimed at protecting the expression. because industrial designs are essentially concerning products which are useful in nature it seems to be veering towards the patent framework than copyright.

Now this understanding that certain designs are capable of being registered under the designs framework because of their mass production nature - this was imported into the Indian framework through the Indian Copyright Act 1914. What you see on your screen is an example of mass production. You have a type of graphic design which can be applied to articles and produced industrially. You can also see certain articles which have been shaped in a particular manner. The bowls you see for example, They have been shaped in a manner such as to make it visually appealing.

The present copyright legislation of India in section 15 explains that copyright shall not subsist under the Copyright Act in any design which is registered under the Designs Act; and copyright in any design which is capable of being registered under the Designs Act; but which has not been so registered shall cease as soon as any article to which the design has been applied has been produced more than 50 times by an industrial process. Section 15 continues the application of what we had seen as an addition that was made on account of the UK Copyright Act 1911 - in making a clear distinction between the kind of art that will fall within the domain of copyright and what would fall within the domain of designs. Let us now quickly look at how design is defined under the Designs Act 2000. These are two separate legislation. Copyright law is a separate legislation intended for a specific purpose and the Designs Act is a separate legislation intended for its own purpose.

In this as you can see at the bottom of your screen you can see that artistic work which is contained within the Copyright Act is not included as a design under the Designs Act. Therefore both under the Copyright Act and under the Designs Act there is uniformity in terms of what it is looking to protect. In explaining what a design is then, what this provision says is, design means only the features of shape, configuration, pattern, ornament or composition of lines or colors - applied to any article whether in two-dimensional or three-dimensional or in both forms by any industrial process or means whether manual mechanical or chemical separate or combined which in the finished article appeal to and are judged solely by the eye. So the object itself for the utility of function it offers that is not within the ambit of design protection; as it is very clearly stated but does not include any mode or principle of construction or anything which is in substance a mere mechanical device. It is rather the design itself which could include the shape of the article which must be considered as the subject matter of design.

Take a look at this image. What you see is a portion of a sofa or a chair. But what is striking is the fabric that is used on this furniture. This fabric is referred to as upholstery fabric. Upholstery fabric is also something which you can fit within the ambit of design under section 2(d). We will now take a look at one of the most important cases that have arisen with respect to designs and the subject matter was upholstery fabric.

In Microfibers versus Girdhar, a decision by the Delhi High Court, the court was considering whether the claim that was being made by the plaintiff that their design of upholstery fabric was copied by another entity. The claimant was stating that these designs were actually artistic works under the copyright act. But as we have discussed, the opposite party was stating that a design on upholstery fabric such as this is not design which is original in the nature of artistic works. Rather, this is a design which is capable of being registered under the Designs Act and therefore, because it was not registered, it should not be considered as having copyright under the Copyright Act. The court considered these defenses which were as you can see on the screen.

The textile designs are aesthetic, ornamental and visual in nature with an appeal to eyes only. Textile fabrics are registrable subject matters of design and artistic work is specifically excluded from the definition of design. Also claimants claimed that this was subject to mass production and this was very clear from the exclusion of such mass-produced designs from the ambit of the Copyright Act. Therefore, what the court stated is that there is a clear distinction between: what will be considered as a piece of art under the Copyright Act and what will be considered as a design under the Designs Act. This is how the court explained it.

Artistic work under the Copyright Act shows that the attempt of the plaintiff can only be to bring it within the concept of painting. The comparison with the painting of M. F. Hussain would be otiose as the work in question in the present case is not a piece of art by itself in the form of a painting. There is no doubt that labor has been put and there is some innovativeness applied to put a particular configuration in place.

Such configuration is of the motifs and designs which by themselves would not be original. The originality is being claimed on the basis of the arrangement made. What is the court referring to here? The court is asking the question. The subject matter which is claimed to be an artistic work. Under what type of artistic work would it fall? In stating that this would possibly fall under painting is a clarification really on the distinction we were looking to make between open list systems and closed list systems.

In a closed list system such as the system in India, because there are only specific types of works which are falling under artistic work - the attempt by the court to place it within one of those shows how differently open list subject matter systems operate from closed list subject matters. Nevertheless, in considering the possibility that such a work would

fall within paintings, the court is then making a distinction between what is a painting under the Copyright Act and what is a painting that would fall within the Designs Act. According to the court, when we think about paintings, we are thinking about fine art. A piece of art, for example, that has been made by M. F. Hussain.

This painting by M. F. Hussain would be a standalone work. It would not be dependent on anything else. It need not be dependent on some article of all things. Design that is intended for application to articles that is possibly dependent on the article. So what the court explains is what cannot be lost sight of is the very object with which such arrangements or works had been made.

The object is to put them to industrial use. An industrial process has to be done to apply the work or configuration to the textile. It is not something which has to be framed and put on the wall or would have any utility by itself. The two important aspects are the object with which it is made, which is industrial and its inability to stand by itself as a piece of art. In fact, it has no independent existence of itself.

Why the Microfibers decision is considered to be so pivotal in the field of design law and artistic work law - is that this understanding helps us clearly distinguish between what kind of a design would fall within the copyright act as an artistic work and what would fall within the ambit of the designs act. The object if the object is mass production then this object itself is a signal that the design is capable of being registered under the designs act. If the design is possible to have its own independent existence, wherein simply because it is on a canvas, it can be sold in the market, then the object is not mass production. So when you look at this image, you can see a painter who is using a canvas to make a painting and this painting could possibly be applied to an article. But can it have its own independent existence? I am sure you are able to answer this question now.

So finally, let us look at what is the intent behind these different legislations, the Copyright Act and the Designs Act. How the court explains it is, the Designs Act was brought in place to provide a lesser term of protection, primarily meant for the purpose that This will be aimed at commercial utilization. Copyright on the other hand is meant to be protecting works of art which are not meant for mass production or industrial production; and which is why specifically artistic works have been excluded from the definition of design. Therefore, what the court found was that the specific patterns meant for upholstery fabric in this particular case, they were capable of registration under the Designs Act; and because there was failure to register it, the protection is not available to the plaintiff which would have arisen had it been so registered. To just quickly look at this definition once again, you can see that these design types which are features of shape, configuration, pattern or ornament.

These are to be judged by the eye. It's very clearly stated. The Indian Supreme Court in the case of Cryogas Equipment versus INOX India has synthesized the various decisions of high courts in India pertaining to section 15 clause 2. In doing so, the Supreme Court has formulated a two-pronged approach which will help ascertain whether a design falls within the sphere of the Designs Act 2000 or not. What the Court says is this. First, it needs to be assessed whether the expression is a pure artistic work or is it in fact a design on account of the industrial process that is carried out with respect to such an expression.

We see that our learnings of Microfibers has also led us to this understanding. Once such an identification is made, the Supreme Court says that the test of functional utility must be used. What this test will help achieve is to see what is the dominant purpose of that design. Is the purpose to serve a specific function or is it to provide visual appeal? If it is to provide visual appeal, then it shall fall within the ambit of the design Act. With this, we have understood the distinction between artistic works and designs.

In the next session, we are going to look at how architectural works fall within the sphere of artistic works. Thank you for joining me. See you all in the next session. Thank you.