The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2023
Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Copyright Law – 'A Harmonious and Synergistic' approach from Economic and Legal Dimensions Perspective

By Samrat Bandopadhyay*[1]

Abstract:

The relationship of **Copyright Law and Economics** are inextricably linked and has to be seen in synergy. The objective of Copyright is three-fold, which is economics at play as it enables incentive to invest, create and to disclose. So, there is incentive to invest, create and disclose when it comes to Copyright. Copyright bestows an economic right. The economic dimension of copyright is at the fulcrum of zeal and enthusiasm for creativity. To analyse this, it is vital to analyse '**Incentive to Invest'** is from short term and long term perspective. The short sighted and parochial view could stymie the incentive of invest which finally would affect the society and commoners stifling the motivation to create, invest and also disclose with repercussion felt on a long term. The '**incentive to create'** has to be seen from the prism of author motivation to Copyright a subjective matter which would provide him/her the ability to get that property alike statutory benefit which runs with Copyright; while at the same time, '**Incentive to disclose'** is vital to understand without disclosure of the copyrightable material, the author cannot claim for the 'Copyright' in the first place. The positives of Copyright could be reaped by the author once he/she offers it to be in the market. The instant paper is an attempt to relook at the some of the techniques evolved from the "Prism of Originality, Varied degree of Threshold and 'Idea-Expression' Paradigm" in the sphere of Copyright Law. The article draws parallel from Comparative Law perspective of erstwhile common law countries of US, Canada, Australia and the UK along with that of India. The article avers the need of the hour to look at

[1] * **Director, Central Government Civil Services Officer, Group A, Government of India, BE(Information Science and Engineering), MBA(Vinod Gupta School of Management, IIT Kharagpur) and presently pursuing LL.B in 3rd year at RGSOIPL, IIT Kharagpur. The author can be reached at email id hi.samrat.2015@gmail.com**

the aforesaid contemporary issue in the light of conscionability and what is ***deems fit in the interest of justice, equity and good conscience***.

Keywords: *Copyright; Prism of Originality; Varied degree of Threshold; 'Idea-Expression' Dichotomy; Non-copying; Comprehensive copying; Substantial Copying; Fragmented Copying; Doctrine of Independent Creation; 'Sweat of the brow' Doctrine; Modicum of Creativity; Spark of Creativity and Innovation; Abstraction and Filtration Test.*

Introduction

Copyright is a framework which confers a property alike statutory right to author to recoup his cost and money, for which he/she has devoted oneself to work. Whereby, the incentive to create is an important objective of motivation to go for Copyright.

A comparison with the Property Rights, just as for tangible property consists of a set of entitlements which is valid against whole world and applies to each and every member of the society. So, the rights can be seen as 'bundle of rights', to exemplify, in the form of R1, R2... Rn. Thus, this includes in its simplistic sense is ownership rights between two individuals. In copyright too, this understanding holds good. This can be exemplified with an instance, a poetry written by owner and author of that piece of work gets the copyright once it is published in a poetry book. **Hence, the essential and vital trinity of Copyright includes**:

1. ***Firstly, It has to be 'Original'.***
2. ***Secondly, It has to be on 'Expression', which is the basic underlying requirement of Copyright.***
3. ***Thirdly, It must be 'Fixed' in tangible mode of operation***.

It is pivotal to understand that Copyright does not protect 'Ideas', as it only protects Copyright of the author.

Concept of Property and its application in Intellectual Property

At the onset, the right conferred on individual could be seen from two vital perspectives:

1. Right conferred to individual who has invented something, where it partake the form of rights related to 'Intangible property rights'
2. Right between individual as against the world at large, ***right in rem***.

An owner right against the whole world, for example on a property ‘P’ includes a bundle of rights, such as right to possession, right of enjoyment of the property, right to ownership, right to sale, right to lease, so on and so forth.

As seen in the case of analysis of ‘Rights’ and ‘Duties’ analysis by Wesley Newcomb Hohfeld. He was an American jurist whose analysis of 'Rights' and 'Duties', is vital as for each individual or member of society there is corresponding duty to obey the right of another individual.

Mr Hohfeld's book 'Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (1919)' is seminal in arising some important quests and questions on varied analysis in the field of 'Jurisprudence'.

In ‘real property’, it is ‘bundle of rights’ as may be in form of ‘never ending series of sticks’.

In sequitur, in this context, lets understand the aforesaid points from the perspective of a poetry in a book. The ‘Poetry’ has certain elements of intellectual property which is ‘intangible property’ (inside a book which is tangible property). The differentiation between a ‘real’ and ‘Intellectual property rights’ conferred has to be analysed from the perspective of those rights which are conferred to the poet on the basis of, say ‘Copyright’, where the subject matter is defined with fixed meanings, as follows:

1. It is statutory right as per law, say creating a right because of Geographical Indications of Goods (Registration and Protection) Act, 1999 or say, Copyright Act 1957, read with the amendment as amended by the Copyright Amendment Act 2012, which is governing the subject of copyright law in India.
2. It is a set of ‘finite rights’, for example, just as GI Act or Copyright Act.

It is very vital to see that such **‘Rights’ in case of Intellectual Property is in tandem with Hohfeldian matrix.**

In this context, alluding to the Locke’s theory of property becomes vital. As such in Lockean theory of property following points gains traction:

1. There has to be a **labour**.
2. That the aforesaid labour, must be used to bring something **held in common**.
3. **‘Enough good must be left’ in ‘common’**

The questions which prompts one to supplicate to ask is, Whether the Locke's theory of property applicable to 'Intellectual Property', the answer **may not be so** simplistic ***prima facie.***

An important aspect which emerges is that 'non-waste condition' is not applied in case of Copyright. Whatever is taken is consumed, in this endeavour and hence, assuming that the **Intellectual property rights bestow 'finite' rights**, the main understanding as emerging from the analysis coming from John Locke, is can there be a similar scenario to apply it to common domain of unexplored ideas, which a budding or aspiring author could explore just as property held in common? This may not apply to 'Intellectual property as

1. Though there may ***be labour***
2. **An *'unexplored domain of ideas'***, as such anyone can venture and bring out a new idea. But, in Copyright, the cardinal principle that it applies to 'expression of ideas' and not to 'general ideas'.

The common underlying philosophy of Lockean theory of property cannot be applied to Intellectual property, for instance in 'Patents' inter alia 'Copyrights'. However, the perspective in '**Intellectual Property' is that the value/essence/basis purpose of the intangible property efficacy can be achieved by 'giving' its utility to others**, as such holding such rights bestowed by Intellectual property leads to defeat the basis purpose as posited by the advantages of having an intellectual property as per theories in that context.

Another perspective is that of ***'Monetary' vis-a-vis 'emotional justification'.*** **This 'emotional justification' far out-weighs the value attached to 'monetary' parameters,** as such the Lockean theory does not take care of emotional values.

As per '**Hegelian theory',** which works if the **creator attaches emotional value to the creation of his/her**, whereby, ***creator feels oneness with the creation***. This would not apply in cases where emotion or emotive component is low, as such in that context 'Hegelian theory' would not apply. **The philosophy of G. W. F. Hegel**, which is commonly called **'Hegelian theory'** has to be seen from the perspective of place.

To exemplify, the **Continental countries such as France, Italy** where the continental laws attaches value to the emotional system. The aforesaid justification has to be seen in synergy and in harmonious fashion as an attempt to synergize the common and civil laws. In **US and the UK, the common laws takes precedence**. As such in American countries, the common law principle might support the Lockean theory as the emotional value of the owner may not

be or rather not the prime objective to satisfy the meet of the enunciated purpose and rational purposive goals as per law of the land.

Trinity of Copyright

The Trinity of Copyright viz. Original, Expression and Fixed in tangible mode of operation has to be seen from the perspective of incentive to invest, create and to disclose.

The definition and interpretation of scope and extent of Original is varied in Common Law Countries. In that endeavour, it is vital to look at it from Lockean perspective (labour theory of property as propounded by John Locke) and the theory applicable in the continental countries where the author's intellectual creation is provided a primacy.

Original includes two vital component, namely, non-copying and varied degree of contribution.

In that perspective, it is different from the concept of 'Novelty' as seen in The Patent Act, 1970. Novelty pertains to 'no one has done it before'. Whereas, in copyright**, 'Original'** means, it has **emanated from the author** and it is not copied. So, it could be concluded that if a subject matter in question for copyright is there, which has qualifies the requisites of varied degree of contribution depending on the Common Law country in question, it does not matter whether it the merit of famed and renowned author or not, has aesthetic beauty or not it would be a perfect subject matter of Copyright providing protection to the author regarding storyline, sequence and plot mentioned in the literary text.

Section 52 of **The Indian Copyright Act 1957** embodies the 'Fair use' Doctrine of Copyright, which states, "Certain acts not to be infringement of copyright.— (1) The following acts shall not constitute an infringement of copyright, namely,—

(a) a fair dealing with any work, not being a computer programme, for the purposes of—

(i) private or personal use, including research;

(ii) criticism or review, whether of that work or of any other work;

(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public..."

The **Idea and expression dichotomy** is a vital one to analyse considering that it very difficult to demarcate the exact line to differentiate what qualifies as 'Idea' and 'Expression'.

Elements not protected by Copyright include:

1. Ideas
2. Public domain material
3. Functionality
4. Industrial Standard
5. Scène à faire
6. Merger
7. Facts

End product or Output of any author is an amalgamation of 'ideas and expressions', which implies that the subject matter in discussion or consideration has some copyright and some non-copyrightable portion. A vital question comes, Is it possible to identify or decipher or decode that Copyrightable portion from any non-Copyrightable material, if at all it exists. To exemplify, say a filtering method is evolved where the subject matter of copyright is subject to a 'filter'. It is *sine qua non* that to identify that point of filtering (removal of particularities in the process of filtering) where Copyright do not subsist. It is pertinent to mention that the author goes from 'Idea' to 'Expression', while a lawyer goes from reverse direction (that is, from Expression to the Idea) while discussing and deciphering the copyright issues pertinent to the subject matter of copyright.

A method of filtering should be done in such a way that, on successive iteration of filtering, appoint would be arrived when certain particularities cannot be removed causing the line or point which demarcates the 'end of expression domain' and 'the beginning of idea domain'.

In this context, as seen from catena of cases, the 'Abstraction test' and as propounded by Judge Learned Hans, "Upon any work, increasing number of generalities would fit equally well". As method is being applied, Is it possible to extract that 'pure' or 'golden' nectar (point of demarcation between the ideas and expression) to identify the 'creative expression, from the prism of legal parlance the filter to get that 'protected element' from the unprotected elements, so that the contention of the defendant that infringement of copyright has happened could be sustained in the eyes of law.

In ***Donoghue v Allied Newspapers Ltd*[2],** it was held that **Copyright cannot** be extended to '**only ideas'**. The Copyright would go to the person who has 'clothed' the idea in some form of expression. In India, the stance has been the same when it was delved in ***R.G. Anand v Delux Films*[3]**, as such there is no copyright which subsists on ideas, themes and plots of any literary work or films for that matter.

In this context, it is vital that even computer program with a source code in High Level languages is a subject matter which could become a candidate for discussion in this context. For example, a software program has been developed via flowchart and algorithm. Then depending on the level of abstraction and modulation in that program, the program is sub-divided into sub-program. It is important to understand that while copyright is being considered, it has to be 'original', which means that non-copying is a 'Objective' test. So, this has to seen while the sub-programs are again developed with flowchart and high level language. When the sub-programs are ready, it is amalgamated and the program is compiled by a compiler to have a machine readable format which is purely binary in 1's and 0's. So, the process of Source Code to Object Code to Binary version of 1's and 0's and its subsequent distribution is done. The vital aspect is that the level of difficulty to decipher the portion which is 'Idea' and "expression' is very difficult and leading to this dichotomy of 'ideas and expressions' which is not a easy task but a cumbersome one.

In the United Kingdom (UK), the emphasis has been on Skill, Labour and Judgment for the consideration of what is Copyright material. The '***Sweat in the brow'*** principle has been provided that primacy in this context.

Original meaning has to be construed from two context:

1. Non-copying (so Doctrine of Independent Creation has to be authored)
2. Threshold of varying degree

All what the author has to establish that it is not copied and it is an independent creation which satisfies the 'Independent Creation theory of Copyright' so that any attempt to have an infringement case filed against the defendant is not sustainable in the Court of law. In this

[2] Donoghue v Allied Newspapers Ltd, 1937 3 ALL ER 503
[3] R.G. Anand v Delux Films AIR 1978 SC 1613

context it is vital to mention that Copyright involves balancing the point of private individual right and the right of the public at large.

This enables one to conclude, that once the period of subsisting of Copyright is over (that the period of lifetime of author plus the 60 years from the death of the author), it becomes a public domain work and hence, for example, anyone is free to develop a Copyrightable work from that domain of work which is in public sphere. So, 'John Keats'(died in 23 Feb 1821) work is in public domain can be utilised by anyone.

The 'Reasonable access to poet work' or 'Theory of Subconscious copying' is another domain where the 'Doctrine of Evidence' require the person who so complain to prove that there has be 'substantial copying' and hence a case of violation of Infringement of 'Copyright' is made out.

The subject matter of the establishing the substantial efforts on the ground of 'Sweat of the Brow' such as Skill, Labour and Capital came up before the Indian Court in, ***Eastern Book Company v D.B Modak***[4] as such some 'quality or character' has to be in the form of differentiating parameter in copy edited work vis-a-vis the original literary work.

Extent and Scope of Threshold of Varying Degree

In UK, if it is just Skill, Labour and Judgment which has to pass the test of 'Originality', which involves Non-copying and Threshold of varying degree. The US Standard is very high, where the "modicum of Creativity" along with 'selection' and 'arrangement' become a vital parameter for qualifying the test of threshold. While in Canada, it has been settled that Canadian Court opine that US standard is too high while the UK Standard is too low. Indian Court have followed the Canadian 'middle' path and hence, it is different approach viz-a-viz the US and the Standards of Threshold of varying degree for Copyright. The modicum of creativity involves, selection and choice of arrangement, where intellect is involved which results in originality.

In US, the parameter and the "Doctrine of Modicum of creativity" sent shock waves in the database industry as mere selection and arrangement without creativity and intellect, was the difficult choice for being a candidate of 'Originality' which lead to another statute being

[4] Eastern Book Company v D.B Modak 2008 (36) PTC 1 (SC)

enacted for non-original databases **in US** protection as the debate on *Sui Generis System for Protecting Databases* was garnering traction.

While in UK, the EU database directive complied with **Section 3A of the UK Copyright Act**. Pertinently, the directive 96/9/EC of the European Parliament and of the Council of 1996 was on the legal protection of databases.

In the UK, Section 3A of Copyright, Designs and Patents Act 1988 states, "Databases (1)In this Part "database" means a collection of independent works, data or other materials which—(a)are arranged in a systematic or methodical way, and (b)are individually accessible by electronic or other means. (2)For the purposes of this Part a literary work consisting of a **database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation**..."

CCH Canadian Ltd v Law Society of Upper Canada[5], has been a leading case **in Canada** where the issue surfaced on infringement of Copyright for copying of research material. On the basis of fair dealing and passing the test of threshold of varying degree of originality, Hon'ble Supreme Court of Canada held that it squarely fell in the canvas of fair dealing.

Various cases, which dwelt into the aforesaid issues of copyright include:

1. In **the UK**, an issue which came up in ***University of London Press v University Tutorial***[6]**,** Whether Mathematics Question Paper was subject matter of Copyright or not? It was held that, 'it was copyrightable'.
2. *In* ***Feist Publications, Inc., v. Rural Telephone Service Co***[7]*.,* the matter before the Supreme Court of **United States** was, Whether Feist copying of telephone list was infringement of copyright considering that *Rural Telephone Service Co.* did not permit license to such information to *Feist*? It was vital to understand the
3. In **Canada**, the appeal-level case of ***Tele-Direct (Publications) Inc. v. American Business Information Inc***.[8] arrived at a similar conclusion as that in case of *Feist*'s. The Canadian Supreme Court interpretation of standard of originality involves application of skill which is non-trivial and which cannot be on mechanical basis.

[5] CCH Canadian Ltd v Law Society of Upper Canada, (2004) 1 SCR 339
[6] University of London Press v University Tutorial [1916] 2 Ch 601
[7] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)
[8] Tele-Direct (Publications) Inc. v. American Business Information Inc. (1997) 76 C.P.R. (3d) 296 (F.C.A.)

4. The *sui generis rights of database* has been the subject matter of contention in many Common Law Countries including **Australia**, Federal Court decision ***Desktop Marketing Systems v Telstra***[9] followed the UK approach in *Walter v Lane 1900 AC 539* and ruled that copyright law did, in fact, follow the "sweat of the brow" doctrine
5. **In India** following Canadian approach, ***Eastern Book Company & Ors vs D.B. Modak & Anr***[10]***,*** any derivative work in the form of copy-edited version of Hon'ble Supreme Court judgment is subject to test of modicum of creativity along with principle of sweat of the brow. Hence, respondents were not permitted to sell the CDROMS with text of judgment embellished with footnotes, headnotes and comments/summary so that the original rights of authors in terms of exclusive rights of original work of author is not infringed from Copyright point of view. The balanced approach followed between the high standard of US and low standard of threshold with skill, labour and judgment in UK, is vital where some 'spark of creativity' is a prerequisite.

Functionality and Industrial Standard are subject matter which does come in the domain of copyrightable material as such. In such cases, Court also looks at the '***Comprehensive Similarity' or 'Substantial similarity which assessing the impact of 'copying' include that of structure, plot, sequence, ploy.***

For example, though the intrinsic behaviour or Programme of the Computer is not protected by Copyright but the analysis has to on the '***Scope of Interoperability protection'.***

Industry standard defines the contours by detailed parameters which is open for all, however the case ***Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)*** to extent non-literal part of software are subject to copyright was the subject matter and here the **'Abstraction and Filtration Test'** becomes pertinent. Software is developed through multiple stages such as Flow Chart, Design, High level Language(Source Code), Compiler, Machine Level Language (Object Code), where though the "idea" is not copyrightable, nonetheless, the culminating point of **'Object code'** is the subject matter which can **be protected by Copyright**.

[9] Desktop Marketing Systems v Telstra 2001 FCA 612
[10] Eastern Book Company & Ors vs D.B. Modak & Anr (Civil Appeal No. 6472 of 2004)

Just as plug, an interoperable component, where the application programme, if it was subject to ‘Copyright’ then there would be virtual monopoly, dictated by environment, dictated by industry, as such therefore 1’s and 0’s are **not protected by Industry Standard**.

In Nichols v. Universal Pictures Corp.[11]***,*** **Judge Learned Hand**, came up with vital observation on 'Copyright' in area of dramatics. The core issue which was adjudicated by US Court of Appeal for second circuit was on the matter of 'non-literary matter' which was copied, calling into question the feasibility of copyright infringement or not? Judge Learned Hand opined that point of '***abstraction***' where it cannot be further generalised is 'subjective' part of finding the point of idea and expression dichotomy.

Scène à faire and Merger, is another vital area, where the subject matter does not merit copyright.

Idea can have manifestation in multiple expressions, says E_1, E_2, E_3 and E_n. For example the genre of say a movie on “political style” or “say movie on Benares with sages” has to show some scenes which are integral to that genre and for which there cannot be any Copyright. Similarly, the ‘disk shape of a UFO (Unidentified Flying Object’ or ‘tilak’ of a Rajput era is a Idea which represents that genre and hence, it is not ‘Copyright’ subject matter. However, if the same color, or same lyric is being used ‘as it is’ then, the matter comes in the domain of ‘Copyright’.

Merger is an instance where Idea is Expression, where background Idea and resulting expression cannot be separately viewed and hence, the Copyright cannot work for it. For example, the backward and forward arrow or ‘Home’ symbol in computer browser is examples where Copyright cannot apply.

Joint Authorship

A priori contract between the Joint authors is a vital element in that endeavour where the ‘Joint authorship work’ has be delineated with clarity. In ***Erickson v. Trinity Theatre, Inc.***[12]***,*** the issues confronted by the Court was whether to apply **Prof. Goldstein** or **Prof Nimmer** view, when it comes to Copyright of combination or amalgamated work vis-a-vis individual work that is, ‘Independent otherwise Copyrightable work’. The **Court held that Prof. Goldstein**

[11] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930)
[12] Erickson v. Trinity Theatre, Inc. 13 F.3d 1061 (1994)

interpretation is correct as such in US, with the individual work of the authors is seen from the perspective of 'Copyright' and the merits for each component, when arriving at a conclusion.

In ***Najma Heptulla v M/s Orient Longman Ltd.***[13], the issue again was on whether it was a work of 'Joint Authorship where the former first education minister of India Maulana Azad has provided the ideas, thoughts and material for the literary work for the book '***India Wins Freedom'*** to Prof. Humayun Kabir, where Prof Kabir did not object in the lifetime of Maulana Azad.

In India, 'work of joint authorship' is defined in Section 2(z) of Copyright Act 1957. So it becomes imperative as advice to clients from Counsel:

1. Plug in all the possibilities of litigation with respect to Royalty payment where the contribution of the joint authorship becomes the subject matter of debate.
2. 'A priori joint authorship agreement' become imperative in case where later becomes a difficult terrain to navigate

Conclusion

To conclude, the economic dimension comes into play when Copyright is seen in the light of economic principles sustain the point that objective of Copyright is three-fold, viz. Incentive to invest, create and disclosure which is at the core of any Copyright subject matter. It is vital to aver with conclusiveness that the disincentive of non-copyright would have a 'trickle down' effect on downstream or secondary market along with jeopardising the primary market. With the evolution of the information driven industry, various stakeholders in the value chain of growth include information reporters, content aggregators, cross-information publicity channels, Content producers and publishers, OTT (Over the top or streaming channel partners) adversely getting affected. The 'bandwagon effect' and the 'trickle down effect' would be seen across the supply chain of information industry. It would set in motion a chain reaction in the content producing sectors along with issues of unemployment. This issue has the potential to spread faster with word of mouth and in information technology savvy internet driven market. The multiplier effect along with consequent accelerative effect at play could potential set in motion a 'depression' in the economy. So, looking from the Prism of Originality, Varied degree of Threshold and 'Idea-Expression' Paradigm is at fulcrum of sustainability and

[13] Najma Heptulla v M/s Orient Longman Ltd. AIR 1989 Del 63

maintainability of pertinent issue with respect to subject matter copyright. Nonetheless, it is important to see that it has a bearing in continuum of social development and cultural process and no one can start from scratch as the future generation has to rely on the findings and sit on the 'shoulders of the predecessors' when it comes to any piece of work, whether of poetry writing or AI (Artificial Intelligence) work, which forms integral portion where Copyright exists.

***