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101

CASE STUDIES FOR STUDENTS

CreativeFirst is a forum to highlight the vital role played by the media and entertainment industry in India to foster creativity, innovation and culture, which in turn stimulates investment, jobs and economic growth. CreativeFirst provides quality commentary, research and additional resources on the value of copyright and the promotion and protection of the creative industries. For more information, please write to Lohita Sujith at info@creativefirst.film or visit https://creativefirst.film

IPTSE Academy is an initiative by IPETHICON - an Educational Academy focusing on Intellectual Property (IP). IPETHICON is an Indian registered and awarded startup that works in the field of IP education. Launched in July 2018, IPTSE or Intellectual Property Talent Search Examination is the first & one-of- its-kind annual 'IP Olympiad' for Intellectual Property Rights in India that tests the knowledge of an individual on patents, designs, copyright, designs, geographical indications and trade secret. The various editions of IPTSE have been supported by several organizations that believe in knowledge based economy such as ERICSSON, Creative First, FICCI, AICTE, Ministry of Information and Communication Technology, Ministry of Science & Technology, Ministry of MSME, i-hub Gujarat, Punjab State Council of Science and Technology, Manak Inspire Initiative of Department of Science & Technology, National Research Development Corporation etc. For more information, please email ipethicon@ipethicon.com / sourabh.sachdeva@iptse.com or visit https://www.ipethicon.com / https://iptse.com

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5th April, 2022

MESSAGE

The Handbook on copyright law authored by team IPTSE Academy and Creative First is a ready reckoner on various aspects of copyright.

The important feature of this Handbook is that it explains the fundamental principles of copyright law in a very simple manner.

After laying the foundation of the law along with case laws, it expands on how principles of copyright law are to be interpreted, applied and understood in the digital era. The treatment given to the manner in which copyrighted works are utilised on the internet, in the form of memes, uploading of YouTube videos, etc. is well presented. The synthesis of case laws from around the world with some examples makes it easy to understand for a reader. Complex issues such as character licensing and non-fungible tokens (NFTs) are also explained with ease.

Principles of fair use which form the bulwark of copyright law in the context of use on the internet including social networking platforms have been introduced with practical examples. The terminologies are well explained. The Handbook also deals with challenges that copyright law faces with creation of new works in large quantum by the use of algorithm, software and block chain technology. On these aspects, a comparative analysis has been made of the position in India and the authors have given an opinion as to how law could in fact develops in this field.

Online copyright infringement has posed great challenges to copyright owners. The introduction of ***the Copyright Alternative in Small-Claims Enforcement (CASE) Act 2020*** *to the readers gives a new perspective on how small claims relating to copyright infringement involving individual authors and artists or individual Defendants can be dealt with in an alternate system designed for them exclusively. Such a small claims Court mechanism could help quick and efficient resolution of copyright disputes. The manner in which authors' rights and performers' rights are going to be challenged in the digital environment, has been explained keeping in mind the sensitivities of the authors, performers as also the users.*

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The message from the Handbook is that copyright law has to adapt with the challenges that technology poses, in order to have true meaning and achieve the necessary results for all stakeholders concerned.

I commend the team which has authored this Handbook as also FICCI for publishing the Handbook. The Handbook deserves to be circulated in a digital form on the website of FICCI, IPTSE Academy, Creative First and other copyright related websites. It is a work which will be of a great use to the intellectual property community.

Prathibs..

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स्वच्छ भारत
एक कदम स्वच्छता की ओर

सत्यमेव जयते

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FOREWORD

Advances in the technologies have transformed the way creative works in form of literary texts, artistic works, music, and videos are created and disseminated over various platforms. The emergence of dynamic ways of production of creative content, and its distribution across traditional and contemporary channels have played a critical role in the shaping and interpretation of copyright law and policy. Copyright law is the pillar that protects, safeguards and encourages creativity and provide opportunities to capitalize on such creativity. The Indian Copyright Legislation has been compliant with international standards and strives to keep abreast with the several developments in this dynamic environment.

This Handbook on Copyrights unravels the complex nuances of copyright law in a simple and understandable manner.

Whilst appreciating that Copyright continues to be a dynamic industry and the corpus of protected works keeps expanding to accommodate new and improved ways of content generation it substantially presents the contents of copyright protection. Beginning from fundamental subject matter such as literary, dramatic, artistic, musical, sound recordings and cinematograph film works, it progresses to discuss more complex matters like memes, videos and user-generated content on YouTube and other social media, artificial intelligence, blockchain, non-fungible tokens (NFT's) in a precise and incisive manner through clear explanations of law and brief analysis of Indian and international judicial precedents.

The public welfare purpose that copyright intends to serve has also been effectively captured by discussing the limitations and exceptions on the exclusive rights, the duration of copyright protection in different works, and various forms of licensing of copyrights for ensuring continued access to works.

This handbook shall be an effective resource material for students as well as various other stakeholders in understanding the key provisions under the Copyright law and the judicial interpretation.

I would like to acknowledge and extend my heartfelt appreciation to the IPTSE Academy, Creative First and the Federation of Indian Chambers of Commerce and Industry (FICCI) and their team of Industry Experts, Advocates, Writers and Research Scholars for their assiduous efforts in the development of this Handbook on Copyright Law.

I believe this Handbook on Copyright Law will be of great assistance and shall serve its purpose of creating IP awareness by acquainting readers with different aspects relating to the Copyright Law and its transverse application in different sectors.

(Karan Thapar)

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Date.....

FOREWORD

Upending several paradigms of developmental phases, India is well on its course to a digital first economy now. Aiding this monumental journey is the nimble Indian startup ecosystem which has emerged as an inevitable 'economy boosting machine' creating jobs, disrupting legacy systems and ushering in new technological evolution.

The exponential increase in the ability to multiply and disseminate information by digital means has led to numerous conflicts. The fast and furious worlds of internet, social networking, humungous databases, clouds and other emerging technologies have led to the expansion in the scope of copyright protection and other IPRs in the digital age.

Naturally, this poses a formidable challenge to the current Intellectual Property landscape in India and generates a growing need to understand and discuss issues surrounding the realm of copyright.

While the amount of scholarship addressing such contentious technology issues is far from adequate, the e-Handbook on Copyright couldn't have come out at a more opportune time.

My sincere gratitude goes out to the team at the Intellectual Property Talent Search Examination Academy (IPTSE) and Creative First for bringing out this timely compendium on Copyright and applicable laws. Using concrete examples the Handbook offers a comprehensive exploration of the key issues, challenges and implications arising out of Copyright laws and corresponding judicial responses in India.

Written from the perspective of the 'end-user' the Handbook provides an overview of the cross-sectoral impact of Copyright Law and its ramifications for various sectors such as the Media, Entertainment, Publishing, Academia, Fashion etc.

There is not an iota of doubt in my mind that the content of this publication will appeal to researchers, policymakers, practitioners, lawmakers along with the lay readers trying to understand the frontiers and changing horizons of Copyrights in India.

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सत्यमेव जयते

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FOREWORD

Copyright law is a potent catalyst for protection of an author's/owner's creative expression in their original Literary, Dramatic, Musical and Artistic works, including Cinematographic Films and Sound Recordings. The Indian Copyright Act also extends protection to the 'Neighbouring rights' which are, the 'Performer rights' and 'Broadcast reproduction rights'.

Copyright has cross-sector implications, for instance, copyright laws have its shoots spread through publishing houses, Fashion Industry, IT Sector, News, Media and Entertainment sector and Academic sector, etc. However, the surge in innovation and digitalization has increased the number of cases related to online piracy of copyright in works like books, artistic work, movies, songs, etc., which are infringed by cyber smart offenders. Thus better administration and protection of Copyrights in the Digital era is the need of the hour.

The initiative for this handbook was taken up by the 'Intellectual Property Talent Search Examination' (IPTSE) Academy & Creative First. The contribution, time and combined efforts of competent Industry Experts, Advocates and Research Scholars have made this Copyright Handbook a success.

This Copyright Handbook will take the reader through the intricacies of the basic concepts and topics in the Copyright law, such as the implication of copyrights in books, adaptations, fictional characters, academic research, news media, photographs and the fashion industry. The readers will also have a deeper insight into the aspects relating to 'Copyrights in Digital era' by exploring the concept behind 'Notice and Takedowns' 'Non Fungible Token', 'Rembrandt Painting' and the legal implications relating to 'Artificial Intelligence', 'Machine Learning' and 'Augmented Reality'. The exceptions relating to Copyrights and the laws with respect to 'Performer rights' under the copyright regime, have also been discussed in the chapters of the handbook.

I am extremely delighted to pen down my thoughts upon the Handbook and would like to congratulate 'IPTSE Academy' and the contributors for their significant efforts and sound implementation in successfully creating this excellent piece of work, which I believe would help students and professionals in better understanding of the theoretical and practical aspects relating to Copyrights.

I am utterly confident that this Copyright Handbook developed by Creative First and IPTSE Academy with support of FICCI will serve the purpose for which it is meant for.

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FOREWORD

With great pleasure, I acknowledge the remarkably resourceful and well-designed handbook on sectoral case studies related to Copyright authored by the team at 'Intellectual Property Talent Search Examination' Academy (IPTSE) & Creative First. This handbook covers the cross-sector implications of Copyright Law and delineates its significance in various domains, including the News, Media, and Entertainment Industry, the Publishing industry, Academic sector, Fashion Industry, etc. The handbook is not merely a compendium of information on the copyright laws, but it also provides relevant case studies and highlights vital concepts discussed after each chapter for better understanding.

Since the advent of the internet era, the jurisprudence of copyright has further evolved and has become digitally inclusive. Therefore, it is essential to educate the budding content creators, right owners, and the audience about the nuances of copyright law, its myriad interpretations in different walks of life, and the associated economic and moral rights. This informative handbook is an excellent introduction to the Copyright laws in India, such as 'copyright protection of authors' rights and performers' rights, especially in the digital environment.

Once again, I congratulate the IPTSE Academy, Creative First and other contributors involved in compiling this comprehensive handbook on Copyright, designed to acquaint patrons from multiple industries with the relevance of this intellectual property and the corresponding legislations.

I wish the Book and the authors great success in their endeavours.

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CHAPTER 1

COPYRIGHTS IN BOOKS, SCRIPTS, SCREENPLAYS, ADAPTATIONS & TRANSLATIONS

Books in digital, printed or written form are literary works, protected as a subject matter of copyright. A book containing original literary works such as a story in the form of novel/novella or short story, poems, research articles and original script or screenplay will be a subject matter of copyright. Novels such as 'The Shiva Trilogy', 'Harry Potter' series, 'The Divergent' series, 'Palace of Illusions' and 'To Kill a Mockingbird' are examples of books protected as original literary copyrighted works. Meanwhile a piece of recitation, acting or scenic arrangement and choreographic work fixed in the form of writing or otherwise are protected as dramatic work under the copyright law[1]. The copyrightable material in a screenplay or script resides in the literary or dramatic expression of an idea[2] . For Instance, 'Harry Potter & The Cursed Child', an original story authored by J.K. Rowling along with Jack Throne and John Tiffany is a copyrighted work. Similarly, 'Fantastic Beasts and Where to Find Them', authored by J.K. Rowling is an original screenplay protected as a copyrighted literary work.

An idea or concept of a story or plot is not a subject matter of copyright. The articulation or expression of a concept, plot or storyline into a concrete and tangible form enables copyright protection in such original literary or dramatic work.

AUTHORSHIP AND OWNERSHIP OF COPYRIGHTS IN BOOKS, SCRIPTS & SCREENPLAYS

The writer or creator of an original literary, dramatic or artistic work like a book, chapter, story, script, cartoon, etc is the author of such work.[3] In case of a cinematograph film, the author refers to the producer[4]. Section 14 of the Copyright Act, gives an author/owner exclusive rights to do or authorize doing of certain acts such as-

(i) The right to reproduce the work in material form
(ii) storing the work in electronic or any other medium
(iii) issuing copies of the work to the public
(iv) performing or communicating the work to the public
(v) to make any cinematograph film or sound recording in respect of the work
(vi) to make any translation and adaptation of the work

Section 17 of the Copyright Act, 1957, lays down provisions related to Ownership of Copyright. Author is the first owner of copyright in original literary, dramatic and artistic work such as books, screenplays and scripts and strip cartoons. However, except in the case of an agreement to the contrary, the proprietor of a newspaper or magazine will be the owner of a work created in the course of employment or apprenticeship under a contract of service for the purpose of reproduction and publication of such newspaper or magazine. The author however shall have the right to be identified as the first owner in all other respects other than publication or reproduction of such work. Similarly, Section 17(c) states that, ownership of copyright in work done by an author in the course of employment under a contract of service, will rest with the employer in absence of an agreement to

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[1] *Section 2(h) of the Copyright Act, 1957*
[2] *Scripts. Access from- https://www.copyright.gov/register/pa-scripts.html*
[3] *Section 2(d)(l) of the Copyright Act, 1957*
[4] *Section 2(d)(v) of the Copyright Act, 1957*

the contrary. However the applicability under Section 17(c) ceases post termination of the employment contract between a publication house and author. However, ownership of copyright in a certain work might vest with the author in case of a 'contract for service', when the employee / independent contractor decides the manner of accomplishing or proceeding with the work. For instance, The Supreme Court of India in the case of ***Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited***[5] analysed the tests to differentiate between contract of service and contract for service, stating that, 'under a **contract *of* service,** a man **is** employed as part of the business, whereas under a **contract *for* service,** his work, though done for the business, is not integrated into it, but only accessory to it.'. To simplify, in a contract of service, an employee/company gets into a contract with the employee, where the employee engages and performs services as part of his employment with the company on an everyday basis. Whereas, in case of a contract for service, a third party is engaged with a company/employee as an independent contractor for completion of a certain project or for a numbered or limited time period[6], where the independent contractor usually decides the course of the project.

In the case of ***V.T. Thomas and Ors. v. Malayala Manorama Co. Ltd.***[7] the court analysed the dispute related to the ownership of copyright in the characters of Boban and Molly, which was published by Kala Kaumudi, post the termination of employment contract between the previous publisher, Malayala Manorama and the author V.T. Thomas. The court in this case ruled out that, "V.T. Thomas was the author and owner of the characters Boban and Molly and, not a mere shorthand writer, but the one who clothed the idea into form and fixed the picture onto paper, thus had the right to present his creation through any other medium. Furthermore, the content and form of the cartoon series based upon Boban and Molly were created by the author prior to his employment with the publication house Malayala Manorama and the restriction with respect to ownership of copyright as under Section 17(c) ceased to exist post the termination of employment with Malayala Manorama. An author of an original copyrighted work has special rights to claim authorship of the work and is also free to restrain or claim damages, in case a mutilation, modification or distortion of the original work is prejudicial to the author's honour or reputation, irrespective of an assignment either wholly or partially of the said copyright.[8]

The ***3 Idiots Controversy*** stressed upon special rights of an author to claim moral right to be identified as an author of his original work, even after a complete or partial assignment of rights. Chetan Bhagat the author of 'Five Point Someone' claimed that the credit exhibited by Vinod Chopra Films at the end of the movie '3-Idiots' was fleeting and crammed in a single line, thus not meeting the spirit in giving due credit adequately to the author. The case was settled out of court between the parties.

An **author's special rights** like the right to paternity and the right to integrity is known as **'Moral Rights' of an author**[9]**-**

1. Right to paternity- An author has the right to claim authorship and be attributed for his work. This right is called the right to paternity.
2. Right to integrity- An author has the right to claim integrity with respect to his/her work, by way of restraining or claiming damages in case of any distortion, mutilation, modification to his/her work, which would be prejudicial to the author's honour or reputation.[10]

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[5] *CIVIL APPEAL NO. 2235 OF 2020 (ARISING OUT OF SLP (CIVIL) NO.1170 OF 2019)*
[6] *Difference between a contract of service and contract for services. Access from- https://blog.ipleaders.in/difference-contract-service-contract-services/*
[7] *AIR 1989 Ker 49*

According to Section 56 of the Copyright Act, every owner of copyright in their separate rights is entitled to claim remedies and enforce such right by way of a suit or proceeding, without making the owner of any other right a party to such suit, action or proceeding.

For Example- J.K. Rowling owns copyright in the Harry Potter novels, while Bloomsbury has the publishing rights of Harry Potter books as licensed by Rowling. Warner Bros. Entertainment owns trademarks in Harry Potter names, characters and copyright in the Harry Potter movies, a derivative work of the Harry Potter Novel.

COPYRIGHT PROTECTION IN STORIES, SCRIPTS AND SCREENPLAYS

An idea can lead to the development of different storylines, each capable of respective and separate copyright protection if expressed with the touch of creativity and intellectual input.

The resemblance and the degree of similarities between two copyrighted works shall be material and substantial in order to constitute a copyright infringement in a particular literary work such as a script or screenplay.

WHAT IS COPYRIGHT INFRINGEMENT? - The unauthorized use of someone's copyrighted work is an infringement of copyright. According to section 51 of the Copyright Act, the evasion of the exclusive rights of the owner by way of communicating the work, making copies of the work, storing and selling the work or offering the work for sale without the consent or license of the copyright owner would amount to copyright Infringement, which shall be punishable with an imprisonment which may exceed to Rupees three years and a maximum fine of Rupees Two Lakhs. Furthermore, a case of copyright infringement can also be settled in a civil court by way of an injunction against the accused[11] Section 51 also clarifies that, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film without acquiring a license from the copyright owner, shall make the cinematographic work an 'infringing copy'.

The Supreme Court of India, in the landmark case of ***R.G. Anand v. Delux Films & Anr.***[12] observed that, 'two scripts/stories written on the same subject are bound to have few similarities, as the central idea behind the plot are similar in nature. Nevertheless, adoption of the arrangement, manner, situation and scenes with embellishment, minor amendments or super additions, where defendant's work seems to be a copy of material and substantial part or a transparent or disguised rephrasing of the original work, would amount to a copyright infringement by way of plagiarism or piracy. However, infusion of new life into the idea of a copyrighted work by way of its reproduction in a different form, tone and tenor would not amount to copyright infringement'.

The guiding principles established in the case of ***R.G. Anand v. Delux Films***, for determining copyright infringement on the basis of substantial similarities are as follows-

1. No copyright exists in an idea, subject matter, themes, plots or historical or legendary facts and events. Determination of copyright violation in such cases is based upon the arrangement, manner, and expression of the idea
2. Similarities are bound to occur, when a similar idea is presented and developed differently. In order to determine the degree of similarity, and identify copyright infringement in such circumstances, the

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[8]*Section 57 of the Copyright Act, 1957*

[9]*India: Moral Rights Under Copyright Law. Access from - https://www.mondaq.com/India/copyright/537094/moral-rights-under-copyright-law*

[10]*Section 57 of the Copyright Act, 1957. - Author's Special Rights*

court shall observe whether the defendant's work is nothing but a literal imitation of the copyrighted work with trivial or minor variations, if so then it would amount to copyright infringement.

3. When the reader, spectator or the viewer after having read or seen both the works gets an unmistakable impression that the subsequent work appears to be a copy of the original.
4. No question of copyright violation arises, in case a work is presented and treated differently, such that it becomes completely novel, regardless of the theme being the same as the other work.
5. Regardless of the similarities in two different works, in case broad dissimilarities are evident in another work, which negates the intention of copying of the original and the coincidences appearing in the two works are clearly incidental, then no infringement of the copyright comes into existence.
6. The violation of copyright amounting to an act of piracy must be proved with clear and cogent evidence.
7. In case, the question is of violation of copyright of a stage play by a film producer or a director, and, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, then the violation of copyright may be said to be proved.``

The principles established in the case of ***RG Anand v. Delux films*** has been cited, followed and re-affirmed by different courts in India through various cases such as the ***Twentieth Century Fox Film v. Zee Telefilms,*** where the Bombay High Court concluded that defendants' serial "Time Bomb" was not similar to or a copy of plaintiff's serial "24" as the storyline, treatment and expression of the serial "Time bomb" was different from plaintiff's serial "24". The Bombay High Court in its judgment also cited the Karnataka High Court's judgment in the case of ***NRI Film v. Twentieth Century Fox***[13] where it was held that, "no copyright exists in **'Scènes à faire'**, such as the concept, idea and portrayal of sequences like the dazzling effects of the nuclear missiles, disruption of communication and traffic jams, commonly used in science fiction. Such common grasp and 'Scènes à faire' had no novelty or uniqueness either in the idea or in expression."

'Scènes à faire' is a French term which literally translates to, 'Scene to do', which implies an element or plot in a book, movie or play, standard for a particular genre, which is bound to be used. Under the copyright law, elements constituting to 'Scène à faire' is not granted copyright protection[14].

For Instance, in the tiff between a famous script writer **Mansoob Haider and Yash Raj Films**[15]**,** the Bombay High Court held that,"the very idea, storyline, premise and plotline of Yash Raj Films 'Dhoom 3' was different from the script named 'Once' authored by Mansoob Haider. The coincidence of certain elements in both the works such as the vanishing act trick, identifying birth mark and the concept of a magician with two sons, were not unique elements. Thus such coincidences in certain incidents and situations constituting 'Scène à faire' such as 'A robbery with a chase sequence following' will not amount to copyright infringement". The court further held that the plaintiff, Mansoob Haider' failed the test established in R.G. Anand case and hence no copyright infringement case will sustain against Yash Raj Films in the movie, 'Dhoom 3'.

Even though a single idea is capable of producing multiple copyrightable stories, a script writer can protect his idea or concept through non-disclosure agreements. For instance, in the case of ***Zee Telefilms v. Sundial Communications***[16] the detailed concept note along with basic character sketches

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[11] *Online Movie Piracy: Combating 'Rogue' and 'Hydra-Headed Rogue' Websites. Access from-https://www.globalpatentfiling.com/blog/online-movie-piracy-combating-%E2%80%98rogue%E2%80%99-and-%E2%80%98hydra-headed-rogue%E2%80%99-websites#_edn6*

[12] *1978 (4) SCC 118*

and plot on a script called 'Krish Kanhaiya' was communicated by Sundial communications in confidence with Zee Telefilms. To Sundial's surprise, ZeeTV aired a show 'Kanhaiya' which had substantial similarity with the idea shared by Sundial, without communicating or giving due credits. The Bombay High Court opined that, 'the reading Sundial's script and concept note would conclude that Zee's Kanhaiya was based on Sundial's Krish Kanahiya and hence upheld grant of injunction by the single bench judge of the court, holding that allowing the commercial exploitation of Sundial's confidential information by Zee would harm Sundial's business prospect and goodwill'.[17]

Facts pertaining to a well-known story, concept or a real life event or person is not subject matter of copyright. In the **copyright infringement case filed by Mr. Rakesh Bharti against Fox Star in their movie *Chhapaak*[18],** the court denied the grant of a perpetual injunction restraining Fox Star from releasing, exhibiting and exploiting intellectual property in their film titled "Chhapaak" without giving an appropriate credit to the plaintiff, Mr. Rakesh Bharti in the titles and publicity of the said film as a story and screenplay writer of the film on the ground that, *'the idea or concept behind the movie was a common information already in the public domain'.* However, the court granted the plaintiffs the liberty to press contentions on the similarities between the film and the script/screenplay, post the film release.[19]

In another case[20] writer Sameer Wadekar claimed that the to be released Netflix original web series, 'Betaal' was an infringement of his copyrighted screenplay 'Vetaal' registered with the Screen writer's Association. Mr. Wadekar contended that he came across 13 similarities in the 146 seconds trailer of the web series 'Betaal' on Youtube. When interrogated by the court as to how did Netflix come across his copyrighted screenplay, the plaintiff, Mr. Wadekar proclaimed that he had communicated his script with many filmmakers, including a film maker/director Wilson Louis, who had few contacts in Netflix and elsewhere and was determined to adapt the screenplay 'Vetaal' into a cinematographic film. The court did not find this assertion conclusive enough to believe that the story 'Vetaal' written by plaintiff, was copied by Netflix for its web series, 'Betaal'. Furthermore, the court pointed out that `Betaal' originated from the well-known character `Vetalam' relevant in Hindu Mythology, who had supernatural powers with great prowess. Citing the above grounds, the Bombay High Court refused to grant an injunction against Netflix Original series, 'Betaal' as contended by the plaintiff.

COPYRIGHTS IN ADAPTATIONS AND TRANSLATIONS

It is pertinent to note that, only original adaptations, translations and abridgments are capable of copyright protection, where sufficient skill, labour and judgment has been employed by the author of such work. Submission of written consent or license from the owner of the original work shall be made for the purpose of registration of an adaptation, abridgment or translation.[21] Thus, it is essential to acquire a license or assignment from the copyright owner in order to make any adaptation or translation of the original copyrighted work.

Adaptations- According to Section 2(a) of the Copyright Act, 1957, an 'adaptation' involves re-arrangement or alteration of the original work. It also involves the conversion of a dramatic work into a non-dramatic and literary or artistic work into a dramatic work by way of performance in public or otherwise. The conversion of a literary work into a cinematograph film is also considered to be an adaptation. For example- The movie 'Fault in our Stars' is an adaptation of the book by the same name authored by John Green.

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[13] *ILR 2004 Kar 4530*

[14] *Scènes à faire. Access from- https://en.wikipedia.org/wiki/Sc%C3%A8nes_%C3%A0_faire*

[15] *Mansoob Haider vs. Yash Raj Films. 2014 (59) PTC 292*

[16] *2003 (5) BomCR 404*

Any abridgement of the literary or dramatic work or any version of such work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical also comes under the ambit of 'Adaptation'. With regard to a musical work, any arrangement or transcription of the work will amount to an adaptation. Remixes in today's time is the best suited example of adaptation with regard to musical works, which involves alteration of original musical composition by adding and/or changing the composition's arrangement.[22]

According to Section 14(vi) of the Copyright Act, the owner of the copyright has the right to make any adaptation of the original literary, dramatic or musical work. An adaptation made without a license granted by the owner of the copyright or the Registrar of Copyrights under the Copyright Act or in contravention of the terms and conditions of the license would amount to copyright infringement, as clarified in section 51 of the Copyright Act.

Translations- Section 14(v) of the Copyright Act specifies that the copyright owner has the right to make translations of any literary, dramatic or musical works. Thus a translation of an original work shall be made after acquiring license from the copyright owner in the original work.

An application can be made to the Commercial Court for a licence to produce and publish a 'translation' of a literary or dramatic work in any language, only after a period of seven years after the first publication of the original work. The Commercial court, after an enquiry, is authorized to grant a non-exclusive license to produce and publish a translation of the work in a particular language, subject to the condition that the applicant shall pay to the owner of the copyright in the work royalties in respect of copies of the translation of the work sold to the public. However, a licence shall only be granted under certain circumstances-

1. If a translation of the work in a particular language has not been published by the owner of the copyright in the work or any person authorised by him, within seven years, three years or one year, after the first publication of the work, or,
2. In case a published translation has been out of print.[23]

The owner of the copyright may also assign or license the right to translate their original work on the basis of a copyright licensing or assignment agreement for translation in a certain language.

In Twentieth Century Fox v. SME entertainment [24], Fox's plea against copyright infringement by SME entertainment's movie adaptation named 'Knock out' against the script and screenplay of the Fox movie 'Phone Booth' was accepted by the Bombay High Court. The Court granted an injunction on the grounds that an impression of an average viewing would unmistakably conclude that 'Knock Out' is a copy of 'Phone Booth'. In appeal however, the Division Bench of Bombay High Court stayed the injunction granted by the Single Bench Judge of Bombay High Court, allowing the film to be released subject to a compensation of INR 15 million[25]

In ***R.M. Subbiah & Anr. v. N. Sankaran Nair[26],***the plaintiff claimed copyright in the story titled 'Mandanotsavam' and sought an injunction restraining the defendant from producing or continuing to produce the Telugu movie titled 'Amar Prem' which was allegedly based on the story 'Mandanotsavam'.

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[17]Indian Film Industry January 2017. Tackling Litigations. Nishith Desai Associates. Access from-Indian_Film_Industry.pdf (nishithdesai.com)

[18]Rakesh Bharti v. Fox star Studio. SUIT (L) NO. 1395 OF 2019

[19]Bombay High Court clears release of 'Chhapaak'. Hindustan Times. Access from-https://www.hindustantimes.com/brand-post/bombay-high-court-clears-release-of-chhapaak/story-MmXmnMA4MG08JilYpqVweL.html

[20]Sameer Wadekar & Anr v. Netflix Entertainment. LD-VC-70 OF 2020

Instead of granting an injunction, the court passed an order against the defendants to furnish a bank guarantee to the tune of Rupees 50,000/-. It was observed that non release of the Telugu version of the story after being picturised and complete, would neither benefit the defendants nor the plaintiffs.

CASE STUDY

ISSUE: Mr Arav wrote a popular play 'Hum Hai Indians'. Mr. Kabir emailed Mr. Arav, expressing his willingness to adapt Mr Arav's play into a Cinematograph Film. Mr. Kabir met Mr. Arav, and discussed the entire script of the play. However, Mr. Arav the author of the script in the Play did not make any commitments, but later found that Mr. Kabir had released a movie titled 'Dilli'. Mr. Arav after watching the movie 'Dilli', was of the opinion that it is based on the story of his play 'Hum Hai Indians'. Mr. Arav filed a suit against Mr. Kabir, for permanent injunction and damages for copyright infringement. Both the District Court and the High Court ruled against Mr. Arav on a finding of the facts. The matter then went to the Supreme Court of India, where it established a landmark decision on the 'Idea-Expression' dichotomy, laying down tests to determine substantial similarities in two different works.

1. Identify the landmark judgment and explain whether Mr. Kabir infringed the work of Mr. Arav on the basis of the principles/tests established for the purpose of identification of substantial similarities in a copyright infringement case.
2. Mention other cases that followed the approach established in that particular landmark Supreme Court Judgment.

SOLUTION: The facts in the above issue resembles the case of ***RG Anand v. Deluxe Films.*** R.G. Anand contended that the copyright in his play 'Hum Hindustani' was infringed by Delux Films in their movie titled 'New Delhi'. The Supreme Court of India in this case laid down certain tests to identify the existence of substantial similarities in a copyright infringement case.

The guiding principles for determining copyright infringement on the basis of substantial similarities are as follows-

1. 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 and arrangement and expression of the idea by the author of the copyright work.
2. Where the same idea is being developed in a different manner, it is obvious that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not 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 violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.
3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be

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[21] *Literary works. PRACTICE AND PROCEDURE MANUAL 2018. Access from- LITERARY_MANUAL.pdf (copyright.gov.in)*

[22] *MUSICAL WORK. access from- https://copyright.gov.in/Documents/Public_Notice_inviting_reviews_and_comments_of_stakeholders_on_draft_guidelines/Musical_Work.pdf*

a copy of the original.

4. 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.
5. Where 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 appearing in the two works are clearly incidental no infringement of the copyright comes into existence.
6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence.
7. Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is obvious that unlike a stage play, a film has a much broader prospective, a wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.` `

After analysing and applying the tests enunciated for determination of substantive similarities in the two works, the court observed that, "the film 'New Delhi' was not a material or substantive copy of the play 'Hum Hindustani', even though the central theme or idea in the two works were similar in nature, as a mere idea or theme is not copyrighted. Furthermore, any average person after watching both the works will not get the unmistakable impression that the two films were similar or 'New Delhi' was a copy of 'Hum Hindustani'."

Basing our analysis on the ***RG Anand v. Delux Films*** case we can conclude that in the issue in the case study above, Mr. Kabir did not infringe upon the copyright of Mr. Arav's dramatic work 'Hum Hai Indians' by making the film 'Dilli'.

Other cases such as **Mansoob Haider vs. Yash Raj Films Pvt. Ltd. & Others**[27] and **Twentieth Century Fox Film v. Zee Telefilms** reaffirmed the principles established in the case of ***RG Anand v. Delux Films.***

KEY CONCEPTS:

1. **Copyright Infringement-** Copyright infringement refers to the unauthorized use of someone's copyrighted work.
2. **Scènes à faire-** It is a French term which literally translates to, 'Scene to do', which implies an element or plot in a book, movie or play, standard for a particular genre, which is bound to be used . Under the copyright law, elements constituting to 'Scène à faire' is not granted copyright protection
3. **Independent Contractor-** An independent contractor is a self-employed person or entity contracted to perform work for—or provide services to—another entity as a nonemployee.
4. **Moral Rights-** Moral Rights are special rights of an author to claim authorship and attribution for his/her work. Under the author's special rights the author is also free to restrain or claim damages in case there is any distortion, mutilation, modification to his/her work, which would be prejudicial to the author's honour or reputation.

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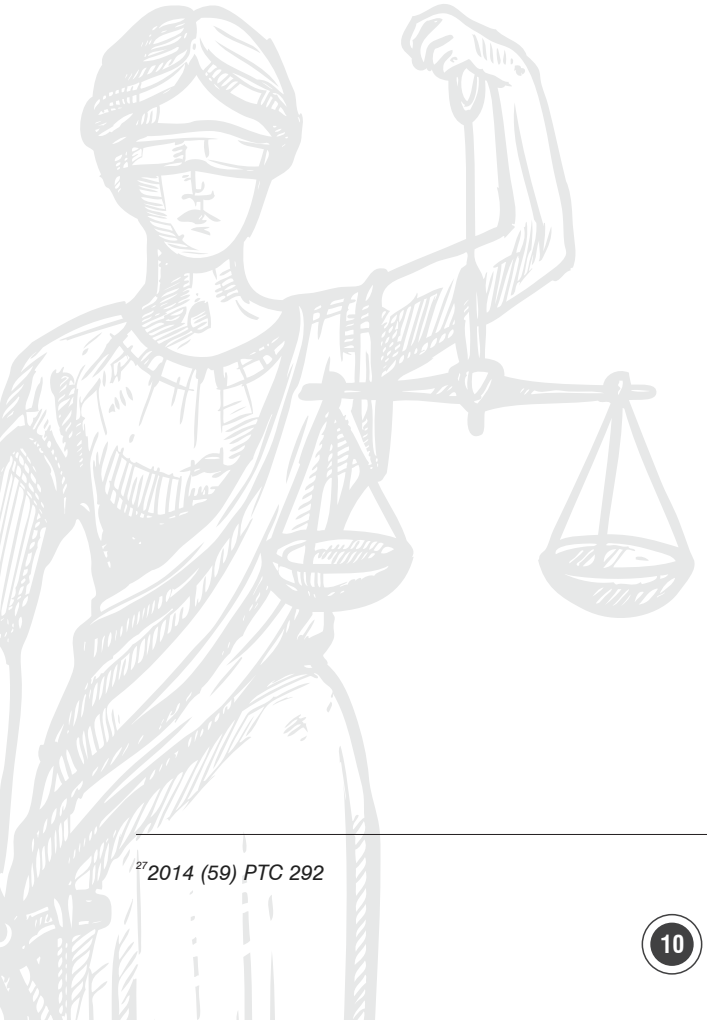
[23] *Section 32 of the Copyright Act, 1957*
[24] *20th Century Fox v. SME Entertainment Pvt. Ltd.*
[25] *Id at 10*
[26] *AIR 1979 Madras 56*

5. **Injunction-** An injunction is a judicial order which obliges a person to do a certain act or refrains them from doing a specified act.
6. **Accused-** A person against whom certain charges are claimed by another party is an accused of a crime/offence.
7. **Author- "author" means,**—
   (I) in relation to literary or dramatic work, the author of the work;
   (ii) in relation to a musical work, the composer;
   (iii) in relation to an artistic work other than a photograph, the artist;
   (iv) in relation to a photograph, the person taking the photograph;
   (v) in relation to a cinematograph film or sound recording, the producer; and
   (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created



[27] *2014 (59) PTC 292*

CHAPTER 2

CHARACTER LICENSING

Creative works, primarily literary and motion pictures, based on fictional plots, are built upon several peculiar elements that help the creator leave a strong impression on the audience's minds. Fictional characters enhance storytelling and allow the audience to perceive the character in the way the creator intended. They are essentially descriptive portrayals of a particular character occurring in a literary or cinematic work. Intellectual property rights help protect and monetize such works. Copyright is one such right that offers legal protection to fictional characters. It subsists with its creator, except when an individual creates a character in the course of employment, thereby vesting the copyright with the employer.

When the fictional character and its unique identity become popular among the masses, they are at risk of being illegally used/reproduced without the permission of their copyright owner through piracy or counterfeiting, which constitutes copyright infringement. Piracy refers to unauthorized duplication of copyrighted material; counterfeiting generally involves imitating authentic goods with ill intent to pass fake goods as originals.

A legally correct solution to make use of the fame and likeability of a character is licensing, which refers to authorizing a party/person to temporarily access, utilize and monetize another's intellectual property rights. These licensing agreements are mostly between manufacturers/ licensees and owners of copyright/ globally recognized character brands, also known as licensors, where the licensor is entitled to a royalty for every licensed item sold. This helps the licensor target a new market and similarly benefits the licensee(s) to increase sales of a product due to the popularity and broader acceptability of the established character. Furthermore, such licensing arrangements help brands use popular characters to attract audiences towards their products through instant recognition, enhancing their face value.

Let's imagine a character- e.g., a talking mouse. What visual comes to your mind when you think of it? We all might picture varied versions of talking mice in different shapes and sizes. When a character type has no defined attributes, it is referred to as a 'stock character.' Such generic characters represent specific stereotypes and do not deserve exclusive protection. Characters like robots or strong men with supernatural powers are examples of stock figures. They do not meet the standard of creativity until the creator adds further layers of expression to them. Now consider the famous Disney character Mickey Mouse. We instantly associate the name with the same talking mouse that we have all seen on screen. Such a character, that is recognised by the masses, deserves exclusive protection in the form of a copyright, because of its unique identity.

FICTIONAL CHARACTERS AND LEGAL PERSPECTIVE (COPYRIGHT LAW)

Copyright law does not protect ideas but expressions of those ideas. Going back to the above example, we can say that the talking mouse character is an idea, while Mickey Mouse is an expression of that idea. However, drawing that fine line between ideas and expressions most often is challenging, as different jurisdictions have varied sets of differentiation standards. Further, there is an added layer of complexity when it comes to fictional characters as characters evolve and change over time. For instance, from the initial brute monster, the Hulk has now transformed into an emotionally intricate character, while superheroes like Batman and Spiderman have changed so many costumes since their first appearances.

Under Copyright law, a fictional character has three significant elements:

1. The name of the character;
2. Its visual or physical attributes; and
3. Its personality traits.

If these three components collectively form a distinct image in the audience's minds, it may be copyrightable.

If a fictional character is distinctively recognized by the public at large and not just by the work, it was featured in, and it is entitled to be protected under copyright owned by the creator of the comic, movie, or series. In India, as per Section 13 of the Copyright Act, 1957, copyright subsists in any original literary, artistic, musical, and dramatic works, sound recordings, and cinematography films. The Act does not explicitly extend protection to fictional characters, and hence, the legislation regarding this subject matter has been developed by the judiciary through case precedents.

In, ***Raja Pocket Books v. Radha Pocket Books,***[28] the Delhi High Court in 1997 held that plaintiff's copyright in his comic character "Nagraj" had been illegally used by the defendant under the name of "Nagesh," which along with a similar name, had similar visual and characteristic attributes as well, thereby causing infringement. Subsequently, in the 2016 case, ***Arbaaz Khan v. Northstar Entertainment,*** [29] the Bombay High Court recognized Chulbul Pandey's character to be unique and its portrayal and writing in an underlying work efficient of protection, however, Arbaz Khan Production's plea against copyright infringement of the character 'Chulbul Pandey' by Northstar Entertainment's character 'Sardar Gabbar Singh' was rejected by the court, by stating that, "the character 'Chulbul Pandey' had miles to travel to get the shaken-not-stirred gold standard. However it is acceptable that the character was unique and the portrayal and the writing up of that character, in an underlying work is efficient of protection. However, at the same time it would be an exaggeration to call it an utterly developed and uniquely depicted character, because it is 'merely a character', which stands totally outside the domain of protection." Furthermore, the court noted that, Gabbar Singh's portrayal in the Telugu remake of Dabang, was totally unique and was remade for a completely different audience, conceived differently yet built upon a similar story-line developed by the first Dabang film.

A similar precedent[30] in the United States examined the infringement of J.D. Salinger's widely acclaimed fictional character 'Holden Caulfield' from his published work "Catcher in the Rye," by Fredrik Colting, who authored "60 Years Later: Coming Through the Rye," a sequel to Salinger's book. Colting explicitly used Salinger's character in his book along with its eccentricities and character traits as defined in the original work, without Salinger's permission. The Court acknowledged the character's individual identity and how it had created a lasting impression on the readers over so many years and hence was subject to copyright.

Another US Court scrutinized the eligibility of "bat-mobile[31]" from the popular Batman comics for a copyright grant. It opined that the bat-mobile did have a special element and a different identity with respect to the comics. Most jurisdictions follow this standard, also referred to as the '**character delineation test[32],**' which is a touchstone to ascertain whether a character is copyrightable or not. This test determines whether a particular character is sufficiently developed and distinctively delineated from the copyrighted work it is featured in[33].

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[28] *1997 (40) DRJ 791.*
[29] *Arbaaz Khan v. Northstar Entertainment Pvt. Ltd., (Suit (L) No. 301 of 2016).*
[30] *Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009).*

This was followed by another test known as the **'Story being told'**, first applied in ***Warner Brothers Pictures v. Columbia Broadcasting Systems,***[34] where the Court held that a character needs to be well-described so as to constitute 'the story being told' and should not be a mere 'chess man' in the story or an irrelevant character. The story should revolve around that character for it to be eligible for copyright protection. This test is also known as the *Sam Spade Test, where the character needs to be central to the story to be copyrightable.*

However, The United States Court of Appeals in ***Walt Disney Productions v. Air Pirates***[35] noted that the 'Story Being Told' test established in the Warner Bros. case wasn't applicable on 'graphical representation' of 'fictional characters' like Disney's 'Mickey Mouse' and other strip cartoons, as graphical characters in comics were distinguishable from that of literary characters. It was further noted that the visual elements in the graphic characters in comics had unique elements of expression and facial gestures, with both physical and conceptual qualities attached to them, which afforded them easier copyright protection by distinctive delineation compared to the literary characters. While comparing Mickey Mouse to Air Pirate's mouse that had an entirely different name and personality traits, the circuit judge opined that visual similarities in the case of comic book characters were sufficient to constitute infringement, and the character need not meet the 'story being told.'

In 1989, the decision in *Anderson v. Stallone*[36] impacted the rampant copying of characters in the form of fan fiction, where the appellant wrote a story based on the famous character 'Rocky' from the Rocky movie series, thereby resulting in defendants (makers of the movie series) alleging infringement. The Court favoring the defendants, relied upon the aforementioned copyrightability standards and held that as the movie series laid down the character's physical as well as emotional traits in detail, the character was extensively delineated and also constituted to the 'story being told' as the Character Rocky Balboa along with other characters in the Rocky movies like Creed, Adrian, Paulie Apollo, and Clubber Lang were immensely developed and were central to the movies, hence deserved copyright protection. Thus, while determining the copyrightability of the characters in Rocky movies, the court applied both the test of the 'story being told' and 'delineated distinction.' In another case[37], the defendants featured a suave hero chasing a villain, visually alike to the James Bond character, in their car advertisement, without a license from the makers of the movie series James Bond. The Court recognized this use as an infringement of the copyright subsisting in the popular character.

In 2020, the estate of Sir Arthur Conan Doyle sued Netflix over its film Enola Holmes on the pretext that the movie's depiction of the character Sherlock Holmes having emotions and respect for women violated Doyle's copyright. Even though the original copyright of Sherlock Holmes, as a character, is in the public domain and not protected by any intellectual property right, there are still some character traits of Holmes, which Doyle introduced in his later copyrighted works. Doyle's estate argued that the public domain character is "aloof and unemotional" in contrast to the character traits like emotional capability in dispute. Such traits are still covered by his copyright. However, the US Court, dismissing the frivolous contentions of the plaintiff, opined that emotions like empathy and respect towards women are too general and are universal concepts and thus are not copyrightable. Copyright protection for

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[31] *DC Comics v. Towle, [802 F.3d 1012, 1021–22 (9th Cir. 2015)].*
[32] *Nichols v. Universal Pictures, 45 F 2d 119 (2d Cir 1930).*
[33] *Copyrightability of Characters, Sourav Kanti De Biswas, Journal of Intellectual Property Rights, Vol 9, March 2004, pp148-156.*
[34] *Warner Bros Pictures Inc v Columbia Broadcasting Sys Inc 216 F 2d 945, 104 US P Q 103 (9th Cir. 1954).*
[35] *581 F.2d 751 (9th Cir. 1978).*
[36] *Timothy Burton Anderson v. Sylvester Stallone & ors,11 USP Q 2d 1161 (C.D. Calif. 1989).*

fictional characters is still a grey area in the legal sense, as proving delineation of characters beyond doubt is a very subjective standard. Further, a fictional character is still not a defined character under the Indian Copyright Act, 1957, thereby leaving the purview of its copyrightability wide open, to be determined by the judiciary.

CHARACTER LICENSING IS BUSINESS

Now, consider an eight-year-old Indian kid in a supermarket. How likely is it for him to pick a pencil box with Chhota Bheem's face on it over a simple pencil box? With over 40+ million viewership of POGO's flagship show in India alone, the answer to this question is - "very likely." Starting out as a television show in 2008, Chhota Bheem, an animated series about a small boy with super strength fighting evil with his friends in the fictional town of Dholakpur, has burgeoned into a widely popular brand. The Indian animation company behind this character, Green Gold Animation, has since ventured into diversified revenue streams including licensing and merchandising activity of the Chhota Bheem character across branded stores, and digital media. From school bags, lunch boxes, water bottles, toys, comics to apparel and food products, presently there are more than 4000 products[38] in the Indian market featuring the character Chhota Bheem in addition to 60 product licenses and 40 promotional licenses, which are licenses to use licensor's intellectual property to create branded products or promote a product, respectively. Huge brands such as ITC, Johnson and Johnson, Knorr, Parle, Godrej, Cello, Pepsodent, Unilever, Del Monte, and McDonald's have launched/ relaunched products/ variants on the back of Chhota Bheem's success. The creators of the character have also broadened their global reach by collaborating with Netflix to launch a show, "Mighty Little Bheem," which has garnered a viewership of over 27 million internationally within a year. Moreover, today, Chhota Bheem is valued at more than INR 300 crores, and 40 percent of its total revenue is generated from licensing and merchandising. This is exemplary of how character licensing/ copyright can be monetized in addition to adding value to allied products/ businesses.

Because of the noticeable prominence and likeability of fictional characters, a global market has emerged for character licensing, which uses the DNA of a character and combines it with a contemporary trend to sell more of its own products. However, a major challenge for the licensing industry in the form of piracy and counterfeiting still exists. There have been numerous instances of unauthorized use of fictional characters by riding on their fame in order to generate illegal profits. A relevant case[39] involved a manufacturer selling products at a lower price, which contained representations of famous Disney characters, including Winnie the Pooh and Hannah Montana, without any license. The Delhi High Court issued an injunction against the manufacturer and held them liable for infringement as the rightful owner of the merchandising rights was Disney Enterprises Inc. India's rich and diverse cultural history has potential to cultivate homegrown stories and characters like Chhota Bheem, attracting fanbase from all over the world through various mediums.

CASE STUDY 1

ISSUE: A new TV series soon to be released on Netflix features the character "Flying Man" which has superhuman abilities. The character was born on a planet called "Flux 11" but shifted to Earth with his parents on a mission to protect Earth inhabitants from anti-heroes. He wears a black suit and can fly. He never hides his powers and leads a life in the public eye. The makers of "Superman" got to know about this just a month before the release and filed an infringement suit against the makers of the show, alleging that Flyingman is an imitation of Superman, as it is also a superhero and hence is infringing on

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[37] *Metro-Goldwyn-Mayer, Inc. v. Am.Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995).*
[38] *Available at: https://www.greengold.tv/green-gold-licensing.php*

Superman's copyright.

Given the above facts, determine Flyingman is infringing upon Superman or not?

SOLUTION: Copyright does not protect general ideas or generic traits of a character. Specific detailing and sufficient delineation of the character reflecting its distinctive identity can only bring it under the purview of copyright protection. Therefore, the concept of a man with superpowers alone is not copyrightable. Suppose the character Flyingman had similar physical and emotional characteristics to Superman like he wore the same iconic red and blue costume or lived a dual life trying to protect his actual identity from the public. In that case, the infringement claim could have been won. However, due to no strong resemblance to Superman, except the super human abilities, Flyingman does not infringe upon Superman's copyright.

CASE STUDY 2

ISSUE: Mr. X, the original creator of the famous fictional character "Swingman," first introduced it in his book "Swingman and the Jungle" in 1912. This character is an ape-man living in the jungle and has the ability to talk to animals. It can also swing from trees like a monkey and has a well-built body, with signature long hair, and wears leopard-print loincloth. In 1923, he founded a company under the name of XYZ Inc. and transferred all his rights in the book to the company, including the copyright of the book. Soon after, in 1931, XYZ licensed the media giant, ABC, to use the Swingman character in one of their movie productions, along with rights to produce remakes of that movie with the same title and basic plot. In 1932, ABC made its first Swingman film and subsequently a remake in 1959. However, in 1977, Mr. X's heirs served XYZ with a notice, terminating the original copyright grant. ABC did not become aware of this termination until 1980, when a second Swingman remake, "Swingman in the City," was under production.

Consequently, Mr. X filed a copyright infringement suit against ABC, claiming that due to termination of the 1923 original copyright grant Agreement, the 1931 license had been "rendered null and void." ABC disputed the claim, arguing that their film was based on ABC's original story and not on the copyrighted works of Mr. X. The film merely used the character from the book and hence did not infringe Mr. X's copyright.

Given the above facts, how will you determine whether Swingman is a copyrightable character or not?

SOLUTION: To determine the copyrightability of the character, Swingman, in Mr. X's book, try to break down the character into its various attributes. The character is an ape-man inhabiting a jungle and is closely in tune with his environment. Moreover, he has the ability to communicate with animals and at the same time experiences human emotions. He is athletic, innocent, youthful, gentle, and strong. He wears a specific leopard print clothing and has long hair. This kind of analysis indicates Swingman's distinct identity and individuality required for a fictional character's delineation and to meet copyrightability criteria. A similar issue was discussed in *Burroughs v. Metro-Goldwyn-Mayer, Inc.*[40], where MGM had utilized Burroughs's popular character "Tarzan" in their films after the termination of their copyright license. Due to Tarzan's distinct and developed identity, MGM was not permitted to use the character in their movies without a renewed license. Therefore, after the invalidation of the license agreement with XYZ, ABC would no longer be able to make a movie with Swingman as one of its characters, let alone as the main character, unless it received a new license from XYZ for the character.

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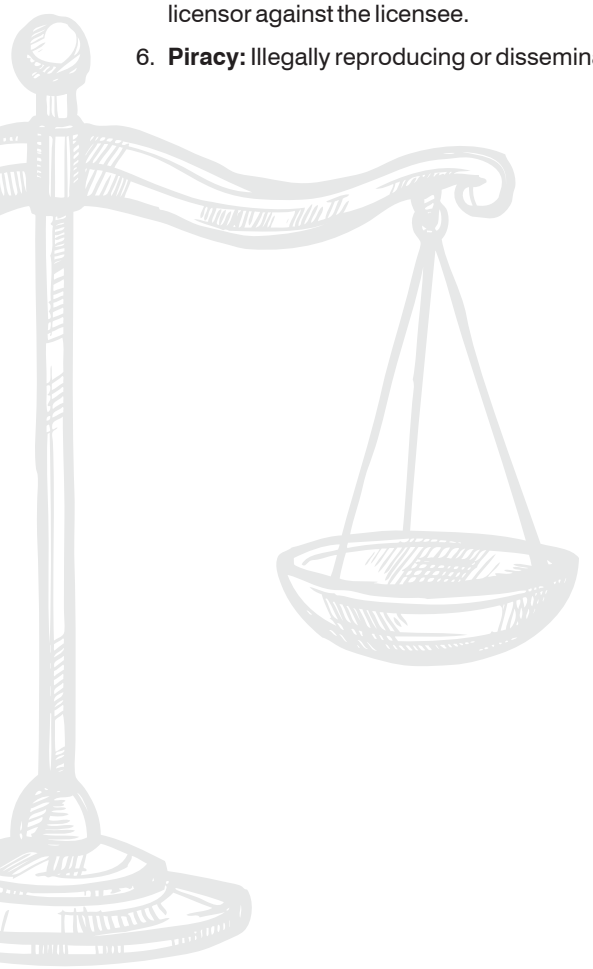
[39] *Disney Enterprises & Anr. v. Santosh Kumar & Anr., CS(OS) 3032/2011.*
[40] *683 F.2d 610 (2d Cir. 1982).*

KEY CONCEPTS

1. **Character Licensing:** When an owner of the copyright subsisting in a fictional character may grant a license either himself or through his agent to another party in order to gain commercial benefits.
2. **Copyright Infringement:** The use or production of copyright-protected content without the authorization of the copyright holder.
3. **Counterfeiting:** Production of counterfeit goods that are exact replicas of the original goods, with the intent of taking unfair advantage of the actual product's popularity and reputation.
4. **Fictional Character:** A literary or visual portrayal of a character with specific personality traits and detailed characterization described by the creator, essential to the story it is featured in.
5. **Licensing:** Granting a license or authorizing a party to use or reproduce the copyrighted content for a specified period, in exchange for a fee, without any claim of unauthorized use being brought by the licensor against the licensee.
6. **Piracy:** Illegally reproducing or disseminating copyrighted content.



CHAPTER 3

COPYRIGHT IN ACADEMIC RESEARCH, WRITING & PUBLICATION

What is the first thing you do when you decide to write an academic topic for a school, university or corporate project? You collect data from various sources, study, evaluate, interpret and reach conclusions. To put it simply, you analyse, study and search repeatedly, to confirm a given information or existing knowledge. In short, you 'Research'.

Research is the discovery or generation of new information, concepts, facts, methodologies, understanding or conclusions by way of systematic in-depth analysis of an existing knowledge or a pre-existing research.

'Academic Research and Writing' is a non-fiction research/writing done for scholarly or academic purpose. The distinguishing factors for academic writing lie in its content, tone, purpose and audience[41].

Through this lesson we will go through different genres of academic writing such as-

I) Research Papers/Articles/Essays

ii) Dissertation and Thesis

iii) Chapter in an Edited Book

iv) Scholarly/Academic Book

Academic writings or research publications are based upon pre-existing academic works, which might be subject matter of copyright. In such cases it becomes necessary to acknowledge the source of inspiration. Academic writings are protected as 'original literary work[42]' under the Copyright Act, 1957. The prefix 'original' does not imply a novel or inventive thought. Originality in terms of a literary work denotes originality in the expression of ideas and not in an inventive or novel idea or thought. An original literary work can enjoy copyright protection, when it originates from the author and the author has put in sufficient labour, skill, capital and judgment in producing the work in writing or in print[43]. The literary input need not necessarily be an expression of an inventive or novel idea or thought, instead it should originate from the author and shall not be a copy of another work[44]. The idea and material used in a literary work can be inspired from several known or existing sources, but if the presentation, plan, arrangement, combination and expression of such material or idea is different, then such literary work will be subject matter of copyright.

For Instance, in the case of ***MacMillan v. K&J Cooper***[45] it was observed that, 'it is not necessary for a material in a work to be entirely new or unused. Copyright will subsist in a work, if the plan, arrangement and combination of materials have not been used before for the same purpose or any other purpose'.

The originality in work relates to the expression of thought. The concept behind 'Originality' in literary work mostly depends upon the knowledge, skill, labour and the capacity to digest and utilise the raw materials taken by other sources in such a way that the finished product imparts quality and character which those materials/sources did not possess and which differentiate the product from such sources/ materials.[46]

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[41] *Copyright Issues in Legal Research and Writing Lisa P. Lukose. Journal of Intellectual Property Rights Vol 21, September-November 2016, pp 275-282*

To put it simply, a literary work can be regarded as 'Original', when the author imparts adequate knowledge, skill and labour in their work and utilises the references and sources taken from other materials such that the finished product, i.e., the resulting literary work differs from the materials referred to and imbibes a quality and character which the references did not possess.

COPYRIGHT IN RESEARCH PAPERS, THESIS & DISSERTATIONS

Before exploring the implication of copyrights upon academic papers like Thesis, Dissertations and Research papers, we need to understand the similarities and differences between them.

The one thing common between Research papers, Thesis and Dissertations is that all of these come under the category of academic writing, which involves extensive research, analysis and reaching conclusions. All the three academic writings should be free of plagiarism and should be an original literary work of the author. A thesis and a dissertation are both considered to be academic writings presenting the author's research and findings, submitted in view of candidature for a professional qualification or an academic degree[47]. Even though there are few common points between such writings, they do differ from one another in certain aspects.

A research paper is an elaborate article or essay which explores a topic and critically analyses an issue or problem by way of referring to relevant information from sources such as websites, published articles, books and interviews, etc.[48] A research paper differs from a dissertation/thesis in a way that a research paper is usually shorter in length than a dissertation/ thesis. Furthermore, a dissertation or thesis is written in the fulfillment of an academic degree or qualification. Whereas a research paper could be written for the purpose of publication in a journal, website or an edited book or for the purpose of a paper presentation in a seminar/conference or for a college assignment/project.

The meaning of thesis and dissertation differ from country to country. For instance, the words Thesis and Dissertation are used synonymously in few countries like Australia, while countries like UK, Ireland and India regard "Dissertation" as part of a requirement for completion of a bachelor's or master's degree, while "Thesis" is normally applied for the fulfillment of a doctorate degree, while in other countries like USA, the opposite is true.[49] In India, generally the PhD scholars are required to submit a thesis for the purpose of acquiring a PhD, while M.Phil, Masters or Bachelors students need to submit a dissertation in partial fulfillment of their course.

Copyright subsists in an original literary work, where sufficient skills, judgment, labour and intellect is put in use by the author. Academic writings such as thesis, dissertations and research papers come under the purview of literary work and will be granted copyright protection if it is an original work of the author, where the author has put in sufficient efforts, skills and intellect in procuring such literary works. The issue in the case of ***Fateh Singh Mehta vs O.P. Singhal***[50] was whether copyright subsisted in a dissertation submitted in partial fulfilment of the requirement of a degree and whether the thesis submitted by Mr. Fateh Singh Mehta was infringing the copyright in dissertation submitted by Mr. O.P Singhal, in partial fulfillment of his Masters Degree in Mechanical Engineering. The Rajasthan High Court observed that literary work included tables and compilations and that Thesis/Dissertation prima facie is a literary work. The court while dealing with the issue of copyright infringement in Mr. Singhal's

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[42] *Section 13(1)(a) of the Copyright Act, 1957*
[43] *Dr. B.L. Wadehra, Laws Relating to Intellectual Property Rights (Universal. Lexis Nexis, Fifth Edition, Reprint 2018), 274.*
[44] *University of London Press v University Tutorial Press. [1916] 2 Ch 601*
[45] *AIR 1924 PC 75*
[46] *Fateh Singh Mehta vs O.P. Singhal & Ors. AIR 1990 Raj 8*
[47] *Thesis. Access from- https://en.wikipedia.org/wiki/Thesis*

work by Mr. Mehta, observed that, 'A thesis/dissertation entitled, 'An Experimental Investigation of Swirling Flow of Cylindrical Chambers' was submitted by the tedious efforts of Mr. Om Prakash Singhal, in partial fulfilment of his masters degree in mechanical engineering. Mr. Singhal acknowledged his faculty guide, Mr. Fateh Singh Mehta for his guidance and encouragement. However, Shri Fateh Singh Mehta in his aspiration to obtain a degree of Doctor of Philosophy in Mechanical Engineering, freely copied from the work of his previous ward Shri Om Prakash Singhal. A teacher cannot be allowed to copy the work of his student and obtain a degree of Doctor of Philosophy and earn future promotions on that basis.' Thus the Rajasthan High court's decision in Fateh Singh v. Singhal case established that, Copyright subsists in thesis and dissertations and neither a third person nor a faculty of the institution where such work was submitted in order to obtain a degree, can pirate such work for any purpose. Such piracy would amount to copyright infringement.

The Draft Model Guidelines on Implementation of IPR Policy for Academic Institutions of India, was published by the Cell for IPR Promotion & Management (CIPAM) in September 2019.The guidelines with respect to ownership of copyrights in academic work has laid down that, 'The ownership rights in scholarly and academic works generated utilising resources of the academic institution, including books, articles, student projects/dissertations/ theses, lecture notes, audio or visual aids for giving lectures shall ordinarily be vested with the author(s)'.

Even though these guidelines haven't been made into a bill as of yet, the intention behind formulating the guidelines is to create a standard IP policy throughout India for academic/ research institutions.[51]

The relevant provisions like Section 2(o) read with Section 13(1)(a) and Section 14(a) of the Copyright Act, the precedent established in the case of ***Fateh Singh Mehta v. O.P. Singhal*** and the **Draft Model Guidelines on Implementation of IPR Policy for Academic Institutions of India,** proves that, copyright subsists in a dissertation/thesis and research papers, and even a student can claim copyright in his academic projects like research papers, dissertation or thesis, which qualifies the prerequisites for being an 'Original literary work'.

COPYRIGHT IN ACADEMIC BOOKS AND 'CHAPTERS' IN EDITED BOOKS

Writing a non-fiction book on academic topics like, law, biology, mathematics, arithmetic, English grammar, social studies, etc, requires information and facts, which are already available in the public domain. Ideas, facts, general knowledge and news are not subject to copyright protection. However, creative articulation of such facts, information, knowledge or ideas into a concrete written or printed form using skills, intellect and labour will be eligible for copyright protection as literary work. Nonetheless, it should be noted that a literary work should not be plagiarized, i.e., the work should not be a copy of another's work. **For Example,** a book on 'Indian History' contains information and facts on topics related to India's historical events, which is not a subject matter of copyright. However, the presentation and articulation of such facts and information on the historical events, will be subject to copyright protection. The author of the book invested time, labour, skills, intellect and creativity in researching, analysing, interpreting and writing the book. Thus the book will be a subject matter of copyright.

According to Section 13(1)(a) of the Copyright Act, copyright shall subsist in 'Original Literary work'. In

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[48]Sierra College Handout. Access from- https://www.sierracollege.edu/_files/resources/student-services/academic-support/writing-center/documents/ResearchPaper.pdf

[49]Difference between thesis and dissertation. Access from- https://www.projectguru.in/difference-between-a-thesis-and-dissertation/

[50]AIR 1990 Raj 8

case of literary work related to academics, the owner of copyright has the exclusive right to reproduce the work in any material form, store such work in any medium by electronic means, issue copies of the work to the public, perform or communicate the work to the public and can make any translation and adaptation of the work.[52] When such exclusive rights of the owner are utilized by someone else without obtaining a valid license or consent from the rightful copyright owner, then such an act will amount to copyright infringement according to section 51 of the Act. However, there are certain acts established under Section 52 of the Act, which do not amount to copyright infringement.

For instance, the act of photocopying for the purpose of preparing and distributing course packs, would not amount to copyright infringement as such an act falls under the purview of exceptions to copyright infringement as under Section 52(1)(i) of the Copyright Act, 1957, which states that "the reproduction of any work – by a teacher or a pupil in the course of instruction", would not constitute infringement.

This precedent was established in the landmark judgment by The Delhi High Court in the famous **Delhi Photocopy case *(University of Oxford and Others v. Rameshwari Photocopy Services and University of Delhi).*** In this case, Oxford University, Cambridge University and Taylor & Francis Group filed a suit against University of Delhi and Rameshwari photocopy shop, alleging copyright infringement in their copyrighted publications by way of preparation of course materials used as textbooks through photocopying. It was contended that Section 52(1)(i) was not applicable since reproduction by Rameshwari Photocopy Services, with the assistance of University of Delhi could not be classified as reproduction by a teacher or a pupil in the course of instruction and that the section only covered reproduction 'in the course of instruction' and not 'in the course of preparation for instruction'.

Whereas, The University of Delhi pleaded that Section 52(1)(i) of the Copyright Act, 1957 permitted students and educational institutions to copy portions from any work for research and educational purpose wherein reproduction for educational purpose permitted unlimited photocopying as no limitation on the quantum of reproduction under Section 52(1)(i) has been provided under the Copyright Act. It was also pleaded that Rameshwari Photocopy Services was licensed by the University of Delhi to operate a photocopy shop within its premises in order to facilitate photocopying by students for educational and research purposes.

The court ruled in favour of University of Delhi, holding that, reproducing books and distributing copies for educational purposes comes within the ambit of *exceptions to infringement of copyright,* as under Section 52(1)(i) of the Copyright Act, and therefore does not amount to copyright infringement. The court also noted that, 'imparting and receiving of instruction would not be limited to personal interface between teacher and students, but 'in the course of instruction' would include, imparting instruction, setting syllabus, prescribing textbooks, readings, holding tests and clarifying doubts of students. Thus, the term, *in the course of instruction* will apply to *'reproduction by teachers pre and post lectures'.*

An edited book contains chapters authored by multiple authors. In case of book chapters authored by different authors in an edited book, the ownership of copyright would typically rest with the publisher or the editor of the work. The copyright in respective literary works is transferred to the publisher or the editor by way of an assignment agreement. However, in the case of an academic book, the copyright typically rests with the author, while the publisher is licensed publishing rights. The ownership and publication rights hugely depend upon the publishing agreement executed between the **author and the publisher**/**editor** in case of an academic book, research paper or articles, whereas in case of an edited book the ownership and publication rights will depend upon an agreement between the

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[51]*Copyright in academic work created by students. Access from- https://www.zeusip.com/copyright-in-academic-works-created-by-students.html*

publisher and editor.

Nonetheless, even though all the rights in a work are assigned or transferred to other person/publisher, the author still would have the right to receive royalties, be acknowledged as the author of such work and can claim damages for any distortion, mutilation, other alterations of his work, or any other action in relation to said work, which would be prejudicial to his honor or reputation.[53]

BRIEF DESCRIPTION OF WHAT BERNE CONVENTION IS ?

Article 6bis(1) of the Berne Convention states that, "*Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.*"

OWNERSHIP AND PUBLICATION RIGHTS IN ACADEMIC WRITING

According to Section 3 of the Copyright Act, 1957, 'publication means making a work available to the public by issue of copies or by communicating the work to the public.'

Academic publishing means the publication of academic work to make it available for a wider audience. Most academic literary work is published in books or in journals as articles/essays or as chapters in edited books. There are subject specific and interdisciplinary journals, such as scientific and legal journals for publication of dissertations, thesis and research papers.

WHAT IS TERM OF COPYRIGHT IN LITERARY WORKS?

Copyright shall subsist in any published literary work all throughout the lifetime of the author, until sixty years from the beginning of the calendar year next following the year in which the author dies. In the case of a work of joint authorship, the copyright shall subsist for lifetime of the author in a work until sixty years post the death of the author who dies last.[54] Term of copyright in published anonymous and pseudonymous literary works shall be sixty years from the beginning of the calendar year next following the year in which the work is first published. In case the identity of the author in an anonymous or pseudonymous work is disclosed before the expiry of the said period, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the author dies.[55] A work published, post the death of an author is known as a posthumous work. Subsistence of copyright in a literary work published, post the death of the author will be sixty years from the from the beginning of the calendar year next following the year of first publication [56].

WHAT ARE COPYRIGHT OWNERSHIP AND PUBLICATION RIGHTS IN ACADEMIC WORKS?

The ownership of copyright in an academic literary work shall be with the author of such work[57], unless an agreement to the contrary exists or the work has been done in the course of the author's employment under a contract of service or apprenticeship[58].

The copyright ownership and publication rights in an academic work relies majorly on publishing agreements between the author and the publisher. The terms in a publishing agreement vary between parties and hugely depend upon the genre of academic writing published in the form of a book, journal article, blog/website article, or a chapter in an edited book. For instance, in case of publishing a research paper/article in a journal or an edited book with multiple authors, authors usually assign copyright and publication rights in their work to the publishers. While, on the other hand, in the case of publishing a book, the author retains the copyright and enters into an exclusive or non-exclusive agreement for publication and sale with the publisher. However, in case there is no publishing

[52]*Section 14(a)*

agreement between the author and publisher, the author will be the owner of copyright and the publisher will only have the right to publish the work for the issue or purpose it is submitted for and would not be able to re-publish without the permission of the author. They would not be able to re-publish the article in an annual collection of popular articles without the permission of the author.[59]

Before diving more into the concept behind publication agreements, let's understand the concept behind copyright assignment and licensing.

Assignment- WHAT IS ASSIGNMENT? Section 18 of the Copyright Act, refers to assignment of copyright. The owner of the copyright in a work has the right to assign copyright to another person. The person assigning certain rights in copyrights will be the **'assignor'** and the person to whom the copyrights is getting assigned will be the **'assignee'.** The assignee will become the owner of specific rights so assigned to him/her by the assignor. A person authorized by the assignor to act on behalf of him/her is an **'authorized agent'.**

Necessary requirements for an assignment are as follows:

I. An assignment should be in writing and shall be signed by the assignor or by his duly authorised agent.

ii. The assignment agreement should include the rights assigned, duration and territorial extent of such assignment.

iii. The amount of royalty and any other consideration payable to the author or his legal heirs shall be included in such assignment of copyright in any work

iv. The assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.

v. The period of validity of assignment shall be mentioned and if not mentioned the period is considered to be 5 years from the date of assignment.

vi. The territorial extent of assignment of the rights if not specified shall be presumed to extend within India.

Licensing -

WHAT IS LICENSING? Licensing refers to the act by which the owner of copyright in a work grants interest in copyright to another person, where the ownership of copyrights in such work remains with the owner/licensor, unlike assignment of copyright, wherein the ownership of copyright in such work, either partially or wholly is transferred to the assignee by the assignor.

Section 30 of the Copyright Act explains that, 'The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing by him or by his duly authorised agent.'

A valid license agreement should also include the rights assigned, duration and territorial extent of such license, amount of royalty or other consideration payable and period of validity of such license. The license shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.

A compulsory license can also be attained in case of a literary work, if the work has been withheld from

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[53]*Section 57 of the Copyright Act, 1957*
[54]*Section 22 of the Copyright Act, 1957*
[55]*Section 23 of the Copyright Act, 1957*

the public. In case an owner of copyright in a work, refuses to republish and by reason of such refusal the work is withheld from the public, then any person can reach out to the 'Commercial court[60]' and such court after hearing the owner of the copyright and upon being satisfied that grounds for such refusal is not justified can direct the Registrar of Copyrights to grant a licence to republish the work, subject to payment of a compensation to the owner of the copyright.[61]

Now, Let's try and understand different publishing agreements used in the publication of a book, as follows-

1. **Copyright Transfer Agreement**

   Copyright Transfer agreement, typically means assignment of copyrights in a certain work either completely or partially to another person by the owner of copyright in a certain work. A copyright transfer agreement for book publishing assigns or otherwise transfers all rights, title, interest, and copyright ownership for publication of a literary work to the publisher. Thus an author needs to seek permission from the publisher in case the author wants to distribute copies or re-publish his work on his website etc.

   Therefore, it is necessary to negotiate the copyright transfer agreement carefully in order to retain certain rights in your own work. The amount of royalties payable to the author by publishers should also be executed between the parties in a copyright transfer agreement. A publisher upon negotiation between parties may grant the author certain rights such as-

   i. Right to re-publish the published work on their own website

   ii. Depositing an open access version of the work into an institutional repository

   iii. Right to distribute a limited number of copies

   iv. Right to reuse parts of the published work in the author's future work, etc.

   After a copyright transfer, the publisher may publish the paper either as 'subscription publication' or as an 'open access publication'.

   Subscription mode of publication- Publication which require a subscription by way of payments to access is a Subscription Publication.

   Open access mode of publication- An open access publication allows free access to the published materials. Such publications are generally funded by way of 'article publishing charges' which require authors, institutions or funding bodies to pay in order to publish content.[62] Open access publications widely use 'Creative Common' License as agreements or clauses in publishing agreements.

   A sample of a Copyright Transfer agreement of 'The Indian Journal of Medical Research' has been attached for your reference in 'Appendix-1'

2. **Creative Commons Publishing agreement**

   In case of an open access publishing, where the distribution and access to the academic publication is free, authors generally retain copyright in their work, and the publishers attach a reuse license to the work so as to allow open sharing, adaptation and reuse[63] Nevertheless, at times, publisher

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[56] *Section 24 of the Copyright Act, 1957*
[57] *Section 17 of the Copyright Act, 1957*
[58] *Section 17(c) of the Copyright Act, 1957*
[59] *Understanding publishing agreements. Access from- https://copyright.unimelb.edu.au/information/copyright-and-research/understanding-publishing-agreements*

retain copyright in open access articles by way of Copyright Transfer agreement executed between the author and publisher.

Genuineness of an Open Access publication is generally determined by the use of **Creative Commons** licenses[64]. **A Creative Commons (CC) license** is copyright license which enables free distribution and access of a copyrighted "work" thus giving the public the right to freely use, share or build upon the author's original work, on the condition that the author is acknowledged for his work[65].

3. **Exclusive Publishing License agreement**

An exclusive license is restrictive in nature as it binds the author with the publisher in producing a certain publication, wherein no other third party can publish the author's work except the authorized licensee. In case of academic publication, if an author licenses a publishing house to publish a book, then the publication rights or such book cannot be vested with another publication house.

4. **Non-Exclusive Publishing License agreement**

A 'Non-Exclusive Agreement' with a person entitles them to certain rights in a copyrighted work. However, such rights does not restrict the copyright owner to engage with other persons with respect to the exploitation of the same rights.

For Instance, a Non-Exclusive License grants the copyright owner the right to license the work to other publishers, once the article has been published by the 'First publisher'. However, post the first publication, the author is obliged to acknowledge the first publication credits given to the publisher.

CASE STUDY

ISSUE: Vishant Malik by his studious efforts prepared a dissertation entitled "Cloning & Expression of Lpxl Gene from Pseudomonas aeruginosa" and on the basis of that dissertation along with passing in other subjects, he obtained a degree of Master of Science in Biochemistry. In gratitude like a true mentee, he conveyed his heartfelt thanks to his Guide and Supervisor Karan Mehta, who was employed as a teacher in the Department of Biochemistry for the guidance, encouragement and also his permission to use the findings on gene expression for Karan Mehta's PhD degree. However, Mr. Karan Mehta freely copied from the "work" of his previous ward Mr. Vishant Malik in order to fulfil his aspirations and claimed that Copyright will not subsist in his student, Mr. Vishant Malik's work, since the work was a dissertation submitted in partial fulfillment of Msc Degree. With the help of the relevant judgment, decide whether copyright subsists in a Dissertation/Thesis and if Mr. Karan Mehta's act of copying parts of his student's dissertation would amount to copyright infringement.

SOLUTION- The above issue is similar to the case of Fateh Singh Mehta v. O.P. Singhal. Thus, according to the precedent established in the case, a thesis/dissertation submitted by Mr. Vishant Malik will be considered as a literary work, which is a subject matter of copyright.

The court in the case of Fateh Singh v. O.P Singhal held that, 'Prima facie the teacher's act of copying his student's work is not less than copying in an examination hall and a teacher cannot be allowed to copy the work of his student and obtain a degree of PhD and earn future promotions on that basis, which would amount to copyright infringement'.

From the above observation, it is clear that, the act of copying done by Mr. Karan Mehta, infringed copyright in the work of Mr. Vishant Malik as his dissertation titled, "Cloning & Expression of Lpxl Gene from Pseudomonas aeruginosa" was a literary work, protected under the Copyright Act, 1957.

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[60] *"Appellate Board" replaced by "Commercial Court" in accordance with the TRIBUNALS REFORMS (RATIONALISATION AND CONDITIONS OF SERVICE) ORDINANCE, 2021*

[61] *Section 31 of the Copyright Act, 1957*

APPENDIX-1

Copyright Transfer Agreement Form
This document must be signed by all authors and submitted with the manuscript.

COPYRIGHT TRANSFER AGREEMENT[66]

The Indian Journal of Medical Research (IJMR) is published monthly by the Indian Council of Medical Research, V. Ramalingaswami Bhawan, Ansari Nagar, New Delhi-110029 (India). The IJMR and Authors hereby agree as follows: In consideration of IJMR reviewing and editing the following described work for first publication on an exclusive basis: Title of manuscript:

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Authors' Names (in sequence) Author's Signature

1._____ _____

2._____ _____

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[62]*https://www.elsevier.com/about/policies/pricing*
[63]*Copyright policies of academic publishers. Access from- https://en.wikipedia.org/wiki/Copyright_policies_of_academic_publishers*
[64]*Guide to Getting Published in Journals https://ifis.libguides.com/journal-publishing-guide/open-access-models*
[65]*Creative Common License. Access from- https://en.wikipedia.org/wiki/Creative_Commons_license*
[66]*Copyright Transfer Agreement Form. Access from: https://www.pdffiller.com/jsfiller-desk10/?projectId=624eb5037518c53d991a6dce&lp=true#c53dc3f4d35d42b0aa5a400b75fb1d8a*

KEY CONCEPTS:

1. **Publication-** publication means making a work available to the public by issue of copies or by communicating the work to the public
2. **Licensing-** Licensing refers to the act by which the owner of copyright in a work grants interest in copyright to another person, where the ownership of copyrights in such work remains with the owner/licensor.
3. **Assignment-** Assignment of copyright, is wherein the ownership of copyright in a work, either partially or wholly is transferred to the assignee by the assignor.
4. **Author's Special Rights-** Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation. Such rights to claim authorship is known as 'Author's special rights.
5. **Creative common license-** A Creative Commons (CC) license is one of several public copyright licenses that enable the free distribution of an otherwise copyrighted "work".[67]

CHAPTER 4

COPYRIGHT IN NEWS MEDIA AND PHOTOGRAPHS

Copyright is an Intellectual Property which protects the creations and expressions of mind related to original Literary, Dramatic, Musical and Artistic works. Copyrights protect Cinematographic Films and Sound Recordings.

News/Press Media is a mass media, which aims to deliver news to the public at large. Forms of News Media Includes -[68]

1. Print Media - Newspapers, News-Letters and News Magazines
2. Broadcast News- Television and Radio
3. Internet News Media- Online Newspapers, News Blogs, Online News Streaming and Live News Streaming

Applicability of Copyright in News Media

Justice Rajagopala Ayyangar, in the case of ***Blackwood & Sons Ltd and Ors. vs. A.N. Parusuraman and Ors.***[69] stated, *'What is protected is not original "thought" or "information" but the "expression of thought" or "information" in some concrete form'.* Copyright resides in the 'Expression of fact' and not in the 'Fact' itself. As facts are discovered and not created, it cannot be copyrighted and resides in the 'Public Domain'.

News is regarded as a fact. Thus, copyright does not subsist in the news itself, but in the way it is expressed or reported[70]. The U.S. Court of Appeals in the case of ***Wainwright Securities Inc. v. Wall St. Transcript Corp.***[71] held that, 'There is no copyright in news. However, copyright does subsist in the manner of its expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments.'[72]

For Example- A news article on a current event can be protected as a literary work. However, the news related to the current event would not be a subject matter of copyright protection.

Copyright subsists in the articulation or expression of a news/current affairs/events into a form. News articles in Newspapers, News-Letters, magazines and online news blogs are protected as 'Literary work' under the Copyright Act, 1957. While, the news broadcasted over television and online platform like 'Youtube', can be protected as a cinematographic work. Whereas, radio broadcasting and online podcasting of news gets copyright protection under the purview of 'sound recording' under the Copyright Act, 1957.[73]

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[67] *Creative Common. access from: https://en.wikipedia.org/wiki/Creative_Commons_license*
[68] *News Media. Access from- https://en.wikipedia.org/wiki/News_media*
[69] *AIR 1959 Mad 410*
[70] *A HAND BOOK OF COPYRIGHT LAW. Department For Promotion of Industry and Internal Trade Ministry of Commerce and Industry. Access from- https://copyright.gov.in/Documents/handbook.html*
[71] *558 F.2d 91 (U.S. Court of Appeals, 2d Cir. 1977)*
[72] *WIPO-PRINCIPLES OF COPYRIGHT CASES AND MATERIALS. Access from- https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf*
[73] *Role of Copyright Law in the Media Industry. Access From- https://enhelion.com/blogs/2020/12/14/role-of-copyright-law-in-the-media-industry-2/#:~:text=Copyright%2C%20as%20well%20known%20is,chromatography%20films%20and%20sound%20recordings.*

Ownership of Copyright in News Media-

Section 17 of the Copyright Act, 1957 recognizes the 'author' as the first owner of copyright. The question which we will discuss in this section is, who owns the copyright in a news article or photograph published in any form of news media, the author (journalist/photographer) or the proprietor ?

Since a photograph comes under the purview of artistic work[74] and News articles/content under the ambit of 'Literary work', the concept of ownership in copyrights as given under section 17(a) of the Copyright Act, 1957 will be applicable on a journalist and photographer. An author, in this case a journalist and photographer, will always be the first owner, unless the work is created in the course of employment under a contract of service or apprenticeship for publication in newspaper or magazine, etc, in absence of an agreement to the contrary.

ILLUSTRATION- Jurni, a publication house, hired photographers under a contract of service, for publication and reproduction of photographs in its Newsletter. Jurni will be the first owner of the photographs so produced by the photographers with respect to the publication or reproduction in its newsletter, unless a contract to the contrary exists.

According to Section 17(a) of the Copyright Act, 1957, in the absence of an agreement to the contrary, when the author creates a literary, artistic or dramatic work under a contract of service or apprenticeship, in the course of his employment by the proprietor of a newspaper, magazine or similar periodical, for the purpose of publication; the said proprietor shall be the first owner of copyright in the respective work, in so far as the copyright relates to the publication or reproduction of the work in newspaper/magazine. However, in all other respects the author shall be the first owner of the copyright in the work. Furthermore, according to Section 57 of the Act, independent of the author's/photographer's copyright and even after the assignment either wholly or partially of the said copyright, the author/photographer of a work shall have the right to claim authorship of the work; and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such acts is prejudicial to his honour or reputation.

Fair Dealing in Reporting News-

Reporting of current events and affairs is regarded as 'Fair dealing/fair use', which does not constitute a 'copyright infringement' under Section 52(1)(a)(iii) of the Copyright Act, 1957.

According to Section 52(1)(m) of the Act[75], unless the author of a news article has reserved a right in its reproduction, any reproduction of an article on current economic, political, religious or social topics in a newspaper, magazine or periodical, is not regarded as a copyright infringement and comes under the ambit of 'Fair Dealing'.

In the case of **'Super Cassettes Industries and Yash Raj Films vs Mr Chintamani Rao & Ors.'**[76] The Plaintiffs 'Super Cassettes' and 'Yash Raj Films' alleged that, the defendant 'The India TV', a news channel, had broadcasted without authorisation, the plaintiff's copyrighted sound recordings and telecasted audio visual songs from various cinematograph films, for their weekly programmes "India Beats" which was purely an entertainment programme. According to the defendant 'India TV', the use of the copyrighted works by them was under the ambit of fair use, fair dealing and fair comment for the purpose of review and criticism and for reporting current events as under Section 52(1)(a)(ii)and 52(1)(a)(iii)[77]. According to Section 52(1)(a)(ii) and 52(1)(a)(iii) of the Copyright Act, a fair dealing with

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[74]*Section 2(c)(i) of the Copyright Act, 1957*

any work, for the purpose of criticism or review and reporting of current events and current affairs, is not an infringement of copyright.

The exception of 'Fair dealing/fair use', as claimed by the defendant, was rejected by the Delhi High Court on the account that there was hardly any intellectual input in making of the programme by the defendants. Neither the sound recordings, the clips of cinematographic films or the literary or musical works as performed, were under review or criticism as laid down under the exception. Instead the programme contributed to the commercial exploitation of the copyright works of Super Cassettes and Yashraj Films. The defendant, India TV was restrained from either engaging or authorizing, the public performance / communication to the public, reproduction, recording, distributing, broadcasting or otherwise publishing or in any other way exploiting any cinematograph films or sound recordings of the Plaintiffs.

Rights of Paparazzi vis-a-vis Rights of Celebrities -

Paparazzi are freelance/ independent photographers who take random or candid pictures of celebrities/high profile people, generally while they go about their daily routine, and sell the pictures to media houses/newspapers/magazines[78] or exploit it commercially in any other manner.

A photograph is considered to be an artistic work[79] protectable under the copyrights regime in India[80], wherein the person taking the photograph is the author[81].

The Copyright Act, 1957 protects the labour and original skill which is involved in taking the photograph. For instance, setting the angle and selecting the moment to capture the picture requires labour and skills and thus is protectable under the act.[82]

A photographer is the author of the photograph taken by him/her[83] and is considered to be the first owner of its work, except when the photograph is taken for the valuable consideration at the instance of any person or when the photograph is taken in the course of employment under a contract of service or apprenticeship for the purpose of publication or reproduction in a newspaper or magazine, and when an agreement to the contrary doesn't exist.[84]

Paparazzi will be first owner of the photograph taken by him, unless the image is sold off or the ownership in the copyright of the image is assigned to a media house by the paparazzi.

The ownership of copyright in a photograph taken of a celebrity in a public place, for the editorial purposes, would vest with the news media company or photographer and not with the celebrity. For instance, In the case of ***Splash News & Picture Agency, LLC v. Onika Tanya Maraj, C.D. Cal., No. 2:20-cv-00551,*** filed on 19/01/2020, Niki Minaj was sued over posting her own picture taken at public places on her instagram account. It was pleaded by Splash in the case that it owned the copyrights to seven photos taken of Minaj at public appearances and the defendants' unauthorized use by posting it to her instagram without authorised permission by the owner harmed the existing and future market for the original Photographs.[85] Even though the case, Splash v. Onika, is still pending in the US court, these cases helps us understand that celebrities get sued by photographers or media companies for posting their own pictures on their social media handles, since the basic copyright rule suggests that copyright in photographs taken in public places for editorial purposes typically vests with the news media company or photographer, unless an agreement to the contrary exists or when the photograph is taken

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[75] *Copyright Act, 1957*

[76] *I.A. No. 13741/2006 in CS(OS) 2282/2006. Judgment delivered on 11.11.2011*

[77] *The 2012 amendment, amended Section 52(1)(a) and 52(1)(b) of the Copyright Act, 1957. The clause on, 'reporting of current event and affairs', prior to the 2012 amendment was included under Section 52(1)(b), which post amendment has been included under Section 52(1)(a)(iii) of the act.*

on the instance of the celebrity themselves.

However, a fair use/fair dealing defense can also be claimed by the celebrities on instances where they pose for the photograph.

For instance, in the case of ***Xclusive-Lee Inc., v. Jelena Noura "GIGI" HADID***[86]***,*** the US court dismissed Xclusive's copyright infringement claim against Gigi for posting her picture on social media, citing that the plaintiff, Xcluisve-Lee Inc. did not obtain registration of a copyright in the photograph taken of Hadid, before filing the lawsuit. In this case, Xclusive claimed that Hadid, by posting the picture taken of her by Xclsuive's photographer without consent, violated copyrights in the photograph. While Hadid countered by stating that, her use of the image constituted fair use since she posed for the picture and smiled for the camera, thus contributing to the creative and copyrightable elements in the photo. Since the US court in this case, dismissed Xclusive's complaint against 'Gigi Hadid' on the basis of lack of registration alone, it did not address Hadid's 'fair-use' defence.

Note- It shall be noted that, even though the US mandates pre-registration as a criteria for filing a copyright infringement case, no such limitation exists under the Indian law. In the case of ***Sanjay Soya Pvt Ltd v Narayani Trading Company,*** the Bombay High Court noted that, Copyright registration is not mandatory under the Copyright Act, 1957, for seeking an injunction against infringement.

Nevertheless, the ownership of copyrights in photographs of celebrities, in many instances, might collide with the privacy, publicity and performer's rights of such celebrities.

The landmark judgment of the Supreme court of India in the case of ***K.S. Puttaswamy & Anr. V. UOI and ors.*** established that, *'Right to Privacy is a fundamental right guaranteed under Article 21 (Right to Life and Personal Liberty), Article 19(Right to Freedom) and Article 14(Right to Equality) of the Constitution of India'.* The basic human rights guaranteed to the citizens of India enshrined in the Constitution of India, is known as the *Fundamental Rights.* Among the coram of judges, Justice Sanjay Kishan Kaul in the case, recognised publicity rights under the ambit of right to privacy[87] by citing the Second Circuit's decision in ***Haelan Laboratories Inc. v. Topps Chewing Gum Inc***[88]***,*** where it was deduced that, 'An individual has the right to exercise control over widespread portrayal of his/her image or life for the purpose of commercial use without their consent'.

Thus, a photographer or news media company shall not infringe upon the privacy of a celebrity in the wake of their ownership of copyrights in photographs or their Right of the Press.

The House of Lords in the case of ***Campbell v. MGN Ltd***[89] noted that, "the widespread publication of the photograph of Naomi Campbell leaving a rehabilitation clinic, which was published in The Mirror, a publication of MGN, was an intrusion of privacy of her personal information, which revealed the person in a state of humiliation and severe embarrassment.

Similarly in the USA, the Supreme Court of Missouri, Division One. in the case of ***Dorothy Barber v. Time Inc.***[90] held that, *"whatever may be the right of the press, tabloids or news reel companies to take*

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[78]*Paparazzi. Access from- https://en.wikipedia.org/wiki/Paparazzi*
[79]*Section 2(c)(I) of the copyrights act, 1957.*
[80]*Section 13 of the Copyrights act, 1957.*
[81]*Section 2(d)(iv) of the Copyrights Act, 1957.*
[82]*B.L Wadehra. Fifth Edition. Laws Relating to Intellectual Property. P 289.*
[83]*Section 2(d)(iv) of the Copyright Act, 1957*
[84]*Section 17(a) and Section 17(b) of the copyrights act, 1957.*
[85]*Nicki Minaj Sued for Posting Photos of Herself to Instagram. Access from: https://news.bloomberglaw.com/ip-law/nicki-minaj-sued-for-posting-photos-of-herself-to-instagram*

and use pictures of persons in public places, certainly any right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed for treatment and recuperation."

Thus, when photograph of a celebrity is taken for an editorial use in public places, not infringing their privacy, or when not taken on the instance of the celebrity, then the ownership of copyrights of photograph rests with the photographer[91] or the News Media company, as the case may be, with respect to contract of service or agreement to the contrary.

CASE STUDY 1-

ISSUE: The Plaintiffs 'Super Music' and 'Rajvir Fims' alleged that, the defendant 'The Bharat TV', a news channel, had broadcasted without authorisation, the plaintiff's copyrighted sound recordings and telecasted audio visual songs from various cinematograph films, for their weekly programmes "My Music Beats" which was purely an entertainment programme. According to the defendant 'The Bharat TV', use of the copyright works by them was under the ambit of fair use, fair dealing and fair comment for the purpose of review and criticism and for reporting current events as under Section 52(1)(a)(ii)and 52(1)(a)(iii)[92]. According to Section 52(1)(a)(ii) and 52(1)(a)(iii) of the Copyright Act, a fair dealing with any work, for the purpose of criticism or review and reporting of current events and current affairs, is not an infringement of copyright. Can a news channel in its programme, telecast copyrighted sound recordings and/or audio visual songs (Cinematograph Films) without obtaining a license from the copyright owner, on the basis of the exception of fair dealing/ fair use, laid down under Section 52 of the Copyright Act. **Explain with the help of the relevant judgment.**

SOLUTION: The use of copyrighted musical works, sound recordings and cinematograph films, without obtaining licence from such copyright owner, only for the purpose. In the above case 'The Bharat TV' broadcasted copyrighted songs and music videos from various cinematographic films, without acquiring consent and license from the respective copyright owners, 'Super Music' and 'Rajvir Films', only for the purpose of making its entertainment programme more enjoyable, informative, attractive and complete, would amount to an unauthorized use. The exception of Fair dealing, as claimed by 'The Bharat TV' cannot be accepted as there was negligible intellectual input involved in making of the programme and the sound recordings and cinematographic films was not utilized for the purpose of review and criticism for reporting current events/affairs as specified under Section 52(1)(a)(iii) of the Copyright Act, 1957. Therefore, a news channel in its programme must obtain a license from the copyright owner, in order to telecast the copyrighted sound recordings and/or audio visual songs (Cinematograph Films). In the case of ***Super Cassettes Industries and Yash Raj Films vs Mr Chintamani Rao & Ors.,*** It was observed by the Delhi High Court that, Neither the sound recordings, the clips of cinematographic films or the literary or musical works as performed, were under review or criticism as laid down under the exception. Instead the programme contributed to the commercial exploitation of the copyright works of Super Cassettes and Yashraj Films.

Therefore it can be concluded that, the exception of fair dealing/fair use in such circumstances will only be applicable in case there is an intellectual input involved in creating the programme and the sound recordings and cinematographic films used is for the purpose of review and criticism for reporting current events/affairs as under Section 52(1)(a)(iii) of the Copyright Act, 1957.

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[86] *1:19-cv-00520 (E.D.N.Y.).*
[87] *31 NLSI Rev 125 (2019). Publicity Rights and the Right to Privacy in India*
[88] *202 F.2d 866 (2d Cir. 1953)*
[89] *[2004] UKHL 22*

CASE STUDY 2-

ISSUE: Model Adva was photographed leaving a rehabilitation clinic, which was published along with an article in 'Reflection', a publication of KPG news media. A claim for breach of confidence and misuse of private information was raised by Model Adva. The News Media company claimed the right to press and copyrights in the picture taken. Will right to press and publication override 'Right to Privacy'? Decide with the help of relevant case laws.

SOLUTION: The Right to Privacy cannot be infringed, for the sake of Right of the Press and Publication. The widespread publication of the photographs of Naomi Campbell leaving a rehabilitation clinic, in The Mirror a publication of MGN was regarded as an intrusion of privacy of personal information by the House of Lords in the case of ***Cambell v. MGN.*** The House of Lords noted the publication of Naomi's pictures put her in a state of humiliation and embarrassment which revealed her personal information.

The US Supreme Court of Missouri had similar views in the case of ***Barber v. Time Inc.,*** where photographers unauthorizedly and forcefully entered into Dorthy Barber's hospital room and photographed her during her delivery despite her protests. The court observed that, Right of the press, newsreel companies or tabloids to take pictures of people in public places cannot invade upon the right to privacy which prevents publication of a picture taken without consent while ill or in bed for treatment and recuperation.

In The Supreme Court of India, Justice Kaul in the case of ***K.S. Puttaswamy & Anr. V. UOI.*** highlighted the significance of Right to privacy on the lines of 'newsworthiness' by stating that *"There is no justification for making all truthful information available to the public. The public does not have an interest in knowing all information that is true. Which celebrity has had sexual relationships with whom might be of interest to the public but has no element of public interest and may therefore be a breach of privacy. Thus, truthful information that breaches privacy may also require protection."*

Thus, the right to press and publication cannot override 'Right to Privacy, of an individual.

KEY CONCEPTS

1. **Fair Dealing-** Fair dealing permits the use or 'dealing' with a copyrighted work without the requirement of paying royalties for such use and seeking consent/permission from the owner[93]. Fair Dealing leads to innovation and creation of new works by recognizing 'certain uses' of copyrighted work which can be beneficial for the society and thus placing limits on instances where copyright owners can acquire payments for the use or exploitation of the exclusive rights in their work[94].
2. **Literary Work -** Literary works includes books, journals and newspaper articles, reports, conference papers, research papers, computer programs, novels, poetry, song lyrics, databases, tables and compilations, etc.

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[90] *159 S.W.2d 291*

[91] *Rights of Owner of Photograph Under the Copyright Act, 1957. (2011) PL January 10. © EBC Publishing Pvt.Ltd., Lucknow.*
Also see: B.L Wadehra. Fifth Edition. Laws Relating to Intellectual Property. P 290.

[92] *The 2012 amendment, amended Section 52(1)(a) and 52(1)(b) of the Copyright Act, 1957. The clause on, 'reporting of current event and affairs', prior to the 2012 amendment was included under Section 52(1)(b), which post amendment has been included under Section 52(1)(a)(iii) of the act.*

[93] *https://www.lib.sfu.ca/help/academic-integrity/copyright/fair-dealing*

[94] *https://www.google.com/url?q=https://fair-dealing.ca/what-is-fair-dealing/&sa=D&source=editors&ust=1632811808708000&usg=AOvVaw0WjeZwb4B0E462LoFysYfR*

3. **Artistic Work-** "artistic work" means,—

   (I) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;

   (ii) a work of architectural; and

   (iii) any other work of artistic craftsmanship;

4. **Photograph-** "photograph" includes photo-lithograph and any work produced by any process analogous to photography but does not include any part of a cinematograph film;

CHAPTER 5

COPYRIGHT IN DIGITAL ERA

The phenomenal integration of the internet has impacted every sphere of our lives. The advancement of technology has provided creators and artists the opportunity and platform to showcase their work to the masses from the comfort of their homes. However, this has made it equally difficult to limit access over their respective works. Thus, awareness with regard to protection of such works, especially in the form of intellectual property is necessary. Among all the intellectual property rights, copyright dominates the cyber space and hence it is very important to know more about copyright subsisting in digital works. This chapter deals with scope and coverage of various copyright issues associated with digital works such as memes, YouTube content, work generated by artificial intelligence and non-fungible tokens and protection of digital rights.

I. MEMES: COPYRIGHT IN DIGITAL ERA

Every day, a humongous amount of content is uploaded, downloaded, and exchanged on the internet. Due to various social media platforms like Whatsapp, Facebook, Reddit, Twitter, and Instagram, it has become easier to upload original content and even easier to reshare and forward such content to a large number of people in one go. Apart from texts, images, audio recordings, and videos, a significant chunk of the content exchanged online includes a specific type of images with or without text, known as memes. These memes have become so popular amongst the internet generation that they have even infused the daily text messages that people send each other, in the form of 'reaction memes,' i.e., memes that describe a reaction to a situation, for instance, the famous 'Surprised Pikachu' meme which is used to demonstrate surprise in situations with predictable outcomes[95]. Moreover, the number of memes made on an individual has become synonymous with their extent of popularity. Every meme builds off the base picture, like the viral Disaster Girl[96], Distracted Boyfriend[97], Spongebob Squarepants[98], etc., and only the captioned text is modified to depict varied scenarios.

The term "Meme" was first coined by the renowned British evolutionary biologist, ethologist, and author, Richard Dawkins in his 1976 book, "The Selfish Gene." Dawkins explained the term by drawing an analogy from biology and said that memes are pieces of information that replicate and change in the same manner that a gene reproduces and evolves. In simpler terms, memes refer to the "replicating units of culture." With the advent of the social media era, memes have been translated into images, animated images, i.e., GIFs, or snippets of videos, that change or more aptly "mutate" over time by a series of derivative authors, bit by bit. Such memes are based on a specific template in which the visuals are fixed while the text/ captions keep getting altered. Memes are generally created as jokes or comments on any popular political or social event, personality, movie, sitcom, song, etc. They are often created by anonymous individuals on social media websites such as Facebook, Twitter, Reddit, and Instagram, without any intention of monetary gain. However, in recent years, memes have been utilized by companies for marketing, advertising, and even licensing purposes. For instance, streaming

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[95] *'Surprised Pikachu Meme,' Available at: https://knowyourmeme.com/memes/surprised-pikachu, (last accessed July 15, 2021).*

[96] *'Disaster Girl', Created in 2007, creator unknown, Available at: https://knowyourmeme.com/memes/disaster-girl, (last accessed July 15, 2021).*

[97] *'Distracted Boyfriend', Originated from the website iStock in 2017 Available at: https://knowyourmeme.com/memes/distracted-boyfriend, (last accessed July 15, 2021).*

[98] *'Spongebob Squarepants', Available at: https://knowyourmeme.com/memes/subcultures/spongebob-squarepants, (last accessed July 15, 2021).*

platforms like Netflix and Amazon ride on the trending meme marketing culture by using snippets from the shows/movies on their platforms as memes to attract the audience. Using memes for marketing is an inexpensive way to create buzz around a product and a creative way to garner consumers' interest. These memes spread like wildfire on social media platforms with rampant sharing with often no credit to the original creator. Since most memes utilize existing images, they are derivative works, and hence, are exposed to copying and infringement. In fact, there are a lot of websites online which provide templates of popular memes for users to create their own memes in just a few clicks. Therefore, it is essential to discuss the kinds of memes that exist on the internet, the copyright issues around them, and, more importantly, what can be considered fair use with respect to memes.

TYPES OF MEMES

Broadly, memes can be categorized into cinematographic stills, rage comic memes, personal photographs, and original works. Even though most memes are derivative works and inherently infringing, many of them are protected under the fair use doctrine. To begin with, in memes created using cinematographic stills, the creator takes a still or a small snippet from the entire movie/TV show, etc., out of context and adds a caption to add a new meaning to the scene, for instance, the excessively used "Rock Driving" meme.[99] Such kind of meme may be protected under fair use, which will be explained in the following section. Another type is rage-comics, which are a series of cartoons digitally drawn to depict human experiences. Derp[100] memes are one of the most popular rage-comics.

Further, there are also personal photographic memes, which use original images of people with captions to depict an emotion. "Success Kid[101] " meme is one such example with a baby at a beach with a smug facial expression. The last category is that of original memes, which are created with the sole intent of being perceived as a meme and not to be viewed out of context by separating the superimposed text. The most famous example is the 'Nyan Cat' meme. Such memes are difficult to modify and easier to infringe, as the image and text both are fixed, and altering anything will change the "essence" of the meme. Except for the original memes, reproduction of most memes may be protected under the doctrine of fair use.

TYPES OF MEMES	
Cinematographic stills	Stills or small snippets from movies and TV shows used out of context with unrelated captions
Rage comic memes	Series of cartoons digitally drawn to depict human experiences
Personal Photographs	Original images of people superimposed with usually funny captions
Original works	Created with the sole intent of being perceived as a meme with the specific superimposed text.

[99] *"Rock Driving" Meme, the meme is made up of several consecutive screen captures taken from the 2009 movie "Race To The Witch Mountain," in which the protagonist Jack while driving asks a question to Sara, to which she replies with a shocking revelation that makes Dwyane The Rock Johnson turn his head with a startled expression; Available at: https://knowyourmeme.com/memes/the-rock-driving, (last accessed July 15, 2021).*

[100] *"Derp," Available at: https://knowyourmeme.com/memes/derp, (last accessed July 15, 2021).*

[101] *This meme has been used as a base image to project success or frustration memes, (last accessed July 15, 2021).*

MEMES AND COPYRIGHT

Under Indian Copyright law, original works of authorship are protected by copyright. The exclusive right to reproduce such works or authorize others to do so vests with the authors or right holders of the copyright. According to Section 13 of the Indian Copyright Act, 1957, such a right subsists in literary works, dramatic works, musical works, artistic works, cinematograph films, and sound recordings. Section 14 recognises a bundle of rights available to creators for their works considering their nature and how it is the exclusive right of the author to do or authorize the doing of the acts provided in the section. Even though such works of creation can exist in any form and not specifically in a physical embodiment. For instance, a literary work need not be published in a book or even written down in a notebook; an impromptu speech is as good as a literary work. However, for copyright protection, these works must be present in a tangible medium, like a book, movie, recording, picture, etc. Copyright protection does not extend to ideas but original expressions of those ideas, and there should exist at least one physical copy of that work.

Memes fall under the category of 'artistic works' defined under Section 2(c) of the Copyright Act, 1957, and any infringing copy of the same will fall under the purview of Section 2(m)(l) of the Act. The pertinent question here is that when does a meme become an infringing copy. A meme created by original pictures by a creator amounts to original work, and in this case, the copyright, including the rights subsisting in the images used, will vest with the creator himself, irrespective of whether the copyright has been registered or not. Further, Section 2(f) of the Act defines the term "cinematograph film" and Section 14 explicitly gives the creator of the film an exclusive right over “a photograph of any image forming part” of that film. Thus, when a meme is created using popular images or scenes from a movie/music video, it may infringe on an existing copyrighted work. So suppose you want to use a screenshot of a scene from the 'Harry Potter' movie in a meme. You can be sued for copyright infringement by the makers of the film unless you have a license to use from them. Since most memes are made using existing images to attract a larger audience, they often infringe upon original creators' copyright. However, every day, thousands of memes are shared and reshared on the internet. If every creator started to institute suit against every share and derivation, the courts would be flooded with meme infringement cases. Generally, memes are created for comic or entertainment purposes and not for monetary gain. A common defense against such infringement is the **fair use defense,** which helps keep memes on people's phones and not on their criminal records.

Under the Indian Copyright law, to argue fair use, the alleged infringer must fulfill two things-(l) the purposes for which the copyrighted work is used, and (ii) the manner of use pertaining to such purpose. Memes are generally used in a humorous undertone to take a sardonic or comical take on something or someone hence the purpose can be justifiable in most cases. However, it is not always easy to determine whether the use behind such a purpose is proper or not. Some memes can be made with an

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[102] *Blackwood and Sons Ltd and Others v AN Parasuraman and Ors, AIR 1959 Mad 410*
[103] *Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994)*
[104] *17 U.S.C § 107.*
[105] *17 U.S.C § 106.*
[106] *Charles Schmidt & Christopher Orlando Torres v. Warner Bros Entertainment, CV 13-02824.*
[107] *“Socially Awkward Penguin,” Available at: https://knowyourmeme.com/memes/socially-awkward-penguin, (last accessed July 15, 2021).*
[108] *“How Copyright is killing your favourite memes,” by Caitlin Dewwy, 2015. Available at: https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes/ (last accessed July 15, 2021).*
[109] *“Grumpy Cat,” Available at: https://knowyourmeme.com/memes/grumpy-cat (last accessed July 15, 2021).*

intention to hurt or offend specific communities or groups of individuals; such kinds of memes constitute improper use. This two-factor test was laid down by the Madras High Court in ***Blackwood & Sons Ltd v. A.N. Parasuraman.***[102] Section 52 of the Indian Copyright Act lays down four factors that help determine whether a use of copyright work is fair or not, although none of them is determinative. Firstly, the purpose or character of the use/ derivative work is relevant as private or personal use is more likely to be considered fair use than commercial exploitation of the copyrighted work. In ***Campbell v. Acuff-Rose Music, Inc.***[103]***,*** the Supreme Court of the United States elaborated on this criterion and held that it is requisite to show transformative addition to the original work, which will help distinguish between the original and the derivative work. The next criterion is with respect to the nature of the copyrighted work. For instance, greater protection is granted to fiction works over non-fiction. Further, the extent of copying or the substantiality of the portion copied from the copyrighted work is necessary to identify, i.e., even if a small portion of the copyrighted work is used, it can result in infringement if it constitutes the substance of the work. The fourth criterion talks about the effect of the use on the potential market with respect to the copyrighted work. This four-prong test to determine fair use has been codified under Section 107[104] of the United States Copyright Act, 1976 as an exception to the general rule of infringement given in Section 106 of the Act, according to which copyright subsists in "*original works of authorship fixed in any tangible medium of expression.*"[105]

India is yet to witness a case involving copyright infringement of a meme, and hence there is no judicial precedent in the country to establish law around the use of memes. However, the US has a more established outlook on the law around copyright protection of memes and the associated fair use defence. In 2013, a copyright infringement suit was filed against the film production company, Warner Bros. Pictures, after they used the famous 'Nyan Cat' and 'Keyboard Cat' memes in their video game 'Scribblenauts.'[106] The company lost the suit as it was using the memes in their product for monetary gain without the permission of the copyright owners, and hence had to pay hefty compensation to the creators of both the memes. In another case, a German blog get Digital ended up paying $868 to Getty Images, an American visual media agency, for infringing a license over the macro image of the "Socially Awkward Penguin" meme[107] (originally taken for National Geographic), by using the image of the penguin.[108]

In 2012, the "Grumpy Cat[109]" meme, a picture of an actual cat named "Tardar Sauce," became viral on the internet due to her annoyed facial expressions in a photo posted by her owner Tabatha Bundesen's brother on Reddit. In 2013, a beverage company, "Grenade Beverages" approached Tabatha to enter into a license agreement for using Tardar Sauce as the face of their line of iced coffee. However, in 2015, Bundesen came to know about a breach of the agreement as Grenade Beverages also tried to market a Grumpy Cat line of coffee grounds and T-shirts, which were not a part of the original agreement. Bundesen filed a copyright and trademark infringement suit against the beverage company, as the company commercially exploited an original work and was awarded $710,000 in damages as a result of a jury verdict in a U.S. Federal Court.[110]

The jurisprudence with respect to memes is very subjective due to the widespread use of the fair use defense against copyright infringement, and hence cases involving such disputes are analyzed on a case-to-case basis. However, like other artistic works, memes are also subject to the four-prong test originally established under the U.S. Copyright law, which helps determine whether a reproduction of an original work can be regarded as fair use or not. Memes today are not just being used for entertainment purposes but have become a way for the present generation to engage in social and

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[110]*Grumpy Cat Ltd. v. Grenade Beverage LLC, Case No. SA CV 15-2063-DOC (DFMx) (C.D. Cal. May. 31, 2018).*

political discourse as well. Today, information can be conveyed creatively through visuals with small captions saving upon information costs as well. Although it is possible to institute suits against copyright infringement of memes, it has always been a path rarely chosen by right holders as memes often benefit the image owners rather than harming them. On the other hand, due to an influx of memes on the internet with anonymous creators, it is often almost next to impossible to obtain licenses or prevent infringement of the subsisting copyright, if any. Therefore, it is essential for law-making authorities to adapt to cultural and social trends and establish novel legislation accordingly.

The following case study attempts to explain copyright issues with respect to memes.

CASE STUDY 1

ISSUE: Let's take the example of the popular fantasy TV series "GOT." Since its beginning, the show has created a buzz worldwide. Fans across the world have been non-stop creating memes using screen captures from the show. One of the most famous ones is the "Brace Yourself" Meme featuring the character "Ned Stark" holding a sword, in which at the upper part of the image has a text saying "Brace Yourself" and the lower part usually has a line which states an expected, but exaggerated event. As a marketing strategy, a popular comic group known as the 'AIC' started using such memes as a part of their own content by adding some modifications and collaborating with other brands for their own and the brand's promotion and economic gain. The producers and makers of the TV show got to know about these memes circulating on the internet and decided to institute a suit against the fans as well as the comic group. As a copyright student and enthusiast, what is your take on the subsistence of the infringement suits?

SOLUTION: The "Brace Yourself" meme is a type of cinematographic stills and original work of the makers of the TV show "GOT." The fans have used screen captures from the show and added text to the images to project a different meaning altogether. These are the kind of memes where a small part of the entire product is taken out of context and used merely at its face value. Applying the four-factor test, such memes are likely to be covered under fair use protection, as only a tiny portion of the entire TV series is used in the meme purely for entertainment and comedic purposes. The memes have not been created with the intention of commercial gain and hence do not affect the copyright holder's potential market. As these memes are being used only for personal use, they should be protected from the infringement suit instituted by the makers of the show.

The next category of memes exploited by the comedy group "AIC" are original memes. In these, the comic group has used original work by taking a character from the TV show and superimposing it on a new background, with products that are not related to the show but depicting a humorous situation due to the interaction between the character and the product. In the above meme, AIC has used the cosmetic brand "Fair and Handsome" and tried to stage a comedic situation where the character of the show "White Walker" used the product to become fair. The group used these memes to market their own content and promote the brand of the product used in the memes. Such use harms the copyright holder's image and affects the show's potential market, hence, constituting infringement. The infringement suit against the AIC is likely to succeed, and such use is not likely to be protected under the fair use doctrine.

CASE STUDY 2

ISSUE: Consider the "You Tried[111] " meme. This meme features an image of a gold star with the text "you tried" superimposed at the center. This meme is a reaction image used to pity someone's failed attempt

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[111]*You Tried, KNOW YOUR MEME, https://knowyourmeme.com/memes/youtried (last accessed July 15, 2021).*

at humor or insult, in most cases, sarcastically. A shipment company, "Gold Star Pvt Ltd," owns copyright and trademark over an image containing a plain gold star with no text on it. However, in 2012, the social networking and microblogging website 'Tumblr' started using the gold star as a reaction image on reblogged posts to show the inadequacy or faults. The meme gained traction, and soon, several meme variations started doing rounds on the Internet. Gold Star Pvt Ltd noticed this and instituted copyright infringement suits against Tumblr and other variations. As a copyright student and enthusiast, what is your take on the subsistence of the infringement suit?

SOLUTION: The practice of rewarding a student with a gold star or any other motivational stamp/sticker goes back to school life when teachers used to award students with different colors of stars according to the quality of the assignment turned in or their behavior. On the internet, clip art images of the gold star have been adopted as genuine compliments towards quality user submissions on several websites for a long time. Subsequently, Tumblr started using the gold star in a scathing way to mock inadequate user submissions.

To find out whether the meme created by Tumblr and other variations amount to copyright infringement or not, we need to apply the four-prong test established under Section 107 of the U.S. Copyright Act and then weigh in each factor in determining if the derivative works are protected under fair use defence or not. With respect to the transformative addition condition, we can clearly see how the meme has been inherently modified by adding the text "You Tried," it has transitioned from a congratulatory message to an expression of mocking; hence, the fair use defence is likely to be favored. Further, Tumblr created the meme for non-commercial purposes, i.e., to sarcastically applaud someone's failed attempt to do something, which is entirely different from the image's original intent. Here, since the judiciary will acknowledge the original image of the gold star as an artistic work and not a reward, the visual similarities (color, size, etc.) between the original image and the meme may be weighed in, inclining towards a possible case of infringement. Even if there are visible similarities, the meme was created for non-commercial use. And finally, no likely harm to the value or potential market of the copyright holder's work is visibly affected. Therefore, the meme is expected to be considered fair use of the original image and not infringing on the copyright.

KEY CONCEPTS

1. Artistic works: Under the Section 2(c) of the Copyright Act, 1957, artistic work may include a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a work of architecture, or any other work of artistic craftsmanship.

2. Cinematographic films: Any work of visual recording produced through a process from which a moving image may be and includes a sound recording accompanying such visual recording and cinematograph shall be construed as including any work produced by any process analogous to cinematography including video films.

3. Fair Use Doctrine: Legal doctrine that allows reuse of copyrighted content under specific circumstances without permission from the copyright owner.

4. Memes: Images/ Videos/ GIFs superimposed with text, usually created for humorous, satirical, critical, or other purpose or effect, are known as Memes.

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[112] *"Hours of video uploaded to YouTube every minute 2007-2019," H.Tankovska, January 26, 2021, last access on June 28, 2021. Available at: "https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/."*

II. YOUTUBERS: COPYRIGHT IN DIGITAL ERA

What do we do when we do not know the solution to a problem? We "Google it!" Since the last decade, YouTube has emerged as the go-to website for any video search, be it a music video, an educational video, a recipe tutorial, movie reviews, or even news content. Bought by Google in 2006 for $1.65 billion, it is an online video sharing platform that allows users to upload and view content in video format. Statistics from 2019 revealed that more than 500 hours of video content were uploaded on the website per minute[112]. With 186 million subscribers and 158.02 billion lifetime views, the Indian music record label T-Series has become the most popular YouTube channel globally, followed by YouTube Movies, Music, and Cocomelon- Nursery Rhymes.[113] PewDiePie is the only solo content creator among the Top 5 YouTube channels.

With such massive traffic on the website, copying and reposting copyrighted material to gain viewership and generate revenue is quite frequent. Such violations harm content creators, their investments and dilutes their incentive to create new content. To prevent such issues, YouTube has an established complaint redressal mechanism which includes takedowns and Content ID claims.

TAKEDOWNS

The legal remedy for copyright holders via the formal notice-and-takedown procedure is governed by the United States Digital Millennium Copyright Act (DMCA), 1998[114]. Through this, a right holder can request YouTube (service provider) to remove the infringing content from the platform, which is also referred to as a 'takedown.' On issuance of a request for a takedown, YouTube sends the uploader a DMCA notice stating that the copyright owner believes that the uploaded video infringes upon his content. Subsequent to this legal action, if the uploader takes no counteraction or disputes the claim, the uploader is issued a copyright strike. The video is removed from all of YouTube, resulting in a takedown which takes effect 7 days after the request. If a creator receives three copyright strikes to their account, it is deactivated.

Furthermore, under Section 512[115] of the DMCA, online service providers (OSP) like YouTube that host user-generated content are excluded from liability in the form of a 'safe harbor' if they comply with the 'notice-and-takedown' provisions of Section 512(c) of the DMCA, 1998. This subsection requires YouTube to act expeditiously whenever copyright owners raise a takedown claim and remove or disable access to the infringing material. The Indian Copyright Act embodies a version of intermediary safe harbour provisions under subsections (b) and (c) of Section 52(1). The primary requirement for availing this safe harbour, irrespective of the kind of intermediary, is that there must be only “transient or incidental storage” of the infringing content. The term “transient or incidental storage” has not been defined in the statute. However, there are definite limitations to the ways in which its scope may be understood. For example, Section 52(1)(b) and Section 52(1)(c) exclude several intermediaries, like online marketplaces, content sharing websites etc., as they are likely the most prone to be subjected to intermediary liability. In 2019, in ***Tips Industries Ltd vs Wynk Ltd.,***[116] the Bombay High Court denying Defendant the safe harbor, held that the storage of Plaintiff’s sound recordings upon the Defendants' customers' devices cannot be considered “transient or incidental” to the services provided by the Defendants, under Section 52(1)(b) of the Act, as the offline storage either permanent or temporary of

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[113]“Top 100 Subscribed YouTube Channels,” last access on 28 June, 2021, Available at: “https://socialblade.com/youtube/top/100/mostsubscribed.”
[114]17 U.S.C. §§ 101, 104, 104A, 108, 112, 114, 117, 512, 701, 1201-1205, 1301-1332, 4001 (2012).
[115]17 U.S.C. § 512 (2012).
[116]Tips Industries Ltd. v. Wynk Music Ltd., Notice of Motion(L) No. 197 of 2018 in Commercial Suit IP (L) No. 114 of 2018

electronic copies of the sound recordings on the customer's devices was the primary selling point of the Defendants' business.

When a takedown notice is sent to an alleged infringer, a written statement by the copyright owner is necessary, which states that they possess a good faith belief that their content is being infringed.[117] This puts the onus of tracking the misuse of their content on copyright holders, excusing OSPs from any duty, making takedowns a less preferable choice for the creators.

CONTENT ID CLAIMS

If every claim is taken to court, a large chunk of content on YouTube would be under scrutiny on trial, making it extremely tiresome for creators and consequently discouraging them from sharing their works online. Further, it is not viable for content creators to track every video uploaded on the platform and check whether it infringes upon their copyright. In 2007, the media conglomerate Viacom filed a $1 billion lawsuit against YouTube[118] and its parent company Google, alleging that the website had "willfully blinded itself" against copyright infringement by permitting its users to upload and view Viacom's copyrighted content. On the other hand, Google argued that it was protected from liability under the 'safe harbor' clause of the DMCA, 1998. Consequently, in 2013, YouTube established an automated system called Content ID, a digital footprint tool, which facilitates the creators to identify and manage their content on YouTube. Under this, any video uploaded on YouTube has to first go through a scan and compare it with the existing database of files by content creators on the website. Suppose the system identifies any match against an existing file. In that case, the copyright owners are provided with the power to decide the fate of the video whose content matches one of their works on YouTube. Whenever a match is found, the video is flagged with a Content ID claim.

Unlike the copyright takedown notices, Content ID claims are self-monitored by YouTube and are not defined by the US Copyright law. Such a claim does not directly lead to a copyright strike on a creator's channel. Whenever a newly uploaded video matches with a copyrighted work on YouTube, the copyright owner receives three options-block the video, monetize it, or track it[119]. The block works with territory-specific restrictions on blocking, and a video is made unavailable for viewing only in territories in which the creator asserts his rights. The video remains visible in other locations unless the copyright owner, who implemented the block, asserts worldwide rights, which would lead to complete removal of the video from the platform, also known as a 'takedown.' By monetizing a video, it will become available to advertisers as inventory at a certain rate, who in turn may bid and buy it in an auction. Following this, ads will appear in or around the video as a pop-up, and the advertiser pays YouTube based upon the number of times the advertisement is shown on that video. This money is split between YouTube and the copyright owner. If a video is disputed or the owner is not identifiable, all revenue proceeds go to YouTube's escrow until the dispute is settled. Another option provided to the copyright holder is just to track the video, allowing it to remain viewable for users. This lets the rights holder track the viewership and other statistics of the video and does not assign advertisements to the content. However, copyright owners rarely choose to track as it does not benefit them in any way and generally block or monetize a video. Once a copyright owner decides what to do with the claimed content, the uploader is sent a notification regarding the same for acknowledgment. The uploader may choose to dispute the claim, which will, in turn, put the uploaded content on hold until further review.

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[117] *17 U.S.C. § 512(c)(3)(A).*
[118] *Viacom International Inc. v. YouTube, Inc., 2010 WL 2532404 (S.D.N.Y 2010).*
[119] *"How Content ID works," YouTube Help, last accessed on June 28, 2021. Available at: "https://support.google.com/youtube/answer/2797370?hl=en."*

FAIR USE

Content creators on YouTube often resort to the phrase "No infringement intended" in the information section of their video or give credits to the copyright owner to avoid copyright issues while using copyrighted content. Unfortunately, this does not help in any way. The best option to steer clear of copyright problems is to create original content. However, it is not always easy to generate entirely new material. Moreover, many videos are inherently dependent on copyrighted content, for instance, music covers, dance videos, reviews, and reaction videos. As a relief, the Fair Use doctrine comes into play here, allowing creators to use portions of copyrighted material without obtaining permission from the copyright owner under certain circumstances. Different jurisdictions around the world have varying Fair Use legislations. For instance, under the Indian Copyright Law, "private/personal use (including research), criticism, review, reporting of current events or reproduction of a literary, dramatic, musical or artistic work" may be accepted as fair use. If a creator incorporates another creator's copyrighted content into their videos, to determine whether it is fair use, they need to consider the following:

1. Purpose for using the copyrighted content-A creator needs to make sure that the use is transformative and whether their original content adds a new meaning to the copyrighted material. Further, one should also clarify whether the use is for commercial or non-profit/educational purposes, as one can rarely claim fair use doctrine for commercial use.
2. Nature of the copyrighted content-A creator needs to check whether the copyrighted content is extracted from works of fiction like movies or cartoons, or it is from works of fact like footage from media coverage. Works based on facts are more likely to come under the purview of fair use.
3. Target audience for the new video-If a work using the copyrighted content is being made for the same target audience and is likely to act as a substitute for the copyrighted work, the new video will hamper the copyright owner's ability to generate revenue off the original video. Thus, the new video will most likely not be acknowledged as fair use. A parody is an exception to this rule.

In 2007, Holden Lenz, a thirteen-month-old toddler, was merely bouncing up and down to the legendary singer Prince's song "Let's Go Crazy," playing on a CD player, when his mother, Stephanie Lenz, recorded him and posted the thirty-second video on YouTube, titled "Let's Go Crazy #1," for her friends and family to see. This adorable clip reached the world's largest music record label, "Universal Music Group," which sent YouTube a takedown notice for the video under the DMCA, alleging infringement of Prince's song. Lenz disputed the claim; consequently, the US District Court ruling in favor of Lenz held that companies should take fair use under consideration before issuing takedown notices.[120] However, in another instance in 2019, MrBeast, a popular YouTuber, received a copyright strike on his video titled, "I Put 100 million Orbeez in My Friend's Backyard," in which his friends were singing Bon Jovi's song, "Livin' on a Prayer." There was no kind of background music or tune playing in the video, just his friends singing. As a result, Mr. Beast had to remove the song part from his video before re-uploading the video. Even though the fair use doctrine is practiced, it is preferable for content creators to be as original as possible and take appropriate licenses from copyright owners before using any excerpt from the original work.

COPYRIGHT CLAIMS ON SOCIAL NETWORKING PLATFORMS

Similar to YouTube, Facebook and Instagram also have a Copyright Policy in the form of Terms of Service and Community Standards.[121] To prevent copyright strikes, one must make sure before posting

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[120] *Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015).*
[121] *Available at: https://www.facebook.com/help/1020633957973118.*

content on the platforms that it does not violate someone else's copyright. However, one does not get to monitor the number of strikes they receive on these platforms, and one has to keep track of them manually. Copyright claims across Facebook are variably enforced, based on an automatic content filtering system, and the period for which the strikes last are decided by the platform. If you post a video on Facebook, and it is removed for copyright reasons, you will receive an email informing you about the options you have from there. You may counter the claim by providing a license from the copyright owner and showing that you were permitted to post the video in the first place. Further, you may even submit an appeal against the copyright strike. If one repeatedly posts infringing material, their account may be disabled under the repeat infringer policy. Since Instagram is owned by Facebook, a similar copyright claim system is followed on that platform as well.

CASE STUDY

The following case study attempts to explain what constitutes copyright infringement on YouTube and the remedies available to copyright owners.

ISSUE: Ms. Diva, a famous dancer, and choreographer has started a YouTube channel under "Dance with Diva." She plans to upload regular dance tutorials on contemporary songs. She decided to upload her first original choreography on pop singer Britney Spears' widely famous track "Circus." In the information section of the video, Ms. Diva mentions that she does not own the copyright to the song used in the video and gives credits to Britney and her record label for it. However, an hour after the upload, she receives a notification from YouTube informing her that her video infringes Britney's copyright on the song. Therefore, the video is blocked and not viewable in any country. Ms. Diva disputed the claim arguing that she uploaded an original dance choreography and gave full credits for the soundtrack to its copyright owners. Further, she intended to promote and generate revenue off her dance steps and not the song. Ms. Diva is worried that such copyright claims would occur on her every video because she does not create original songs.

As a copyright law student, determine whether the copyright infringement claim on Ms. Diva's dance video is justifiable and advise her on how to go about her future uploads.

SOLUTION: The Content ID system runs a check on every new video uploaded on YouTube. It is more likely for videos using popular copyrighted work of big record labels to be detected through this system over less known content. Since Britney Spears' "Circus" is a popular soundtrack globally and is already available on YouTube on Britney's channel, the Content ID will detect the song being used in any other video. As a direct answer to the above question, Ms. Diva did infringe on Britney's copyrighted song in her dance video, irrespective of the credits provided in the information section. Such kind of use does not constitute fair use under the Copyright law and in addition, such work has not been transformed sufficiently according to the "YouTube Fair Use Guidelines." Moreover, it is entirely in the copyright owner's hand to block, monetize or track a video, and hence Ms. Diva cannot predict what might happen to her upcoming uploads.

For Ms. Diva to legally use copyrighted works as background soundtracks in her dance videos, the best way is to secure a license or permission from the copyright owners to use their music. Some of this music might be free under Creative Commons (a system that allows content creators to use some copyrighted work for free by providing a free public copyright license) or maybe in the public domain. If not, Ms. Diva may be required to pay a licensing fee to the owner of the copyrighted songs she will use in her videos. Such licenses are known as "Synchronization License" and are required for posting a copyrighted song along with a video. Generally, for commercial music, the creator may approach the publisher or the song's composer, or a copyright society (IPRS), asking for a license. Copyright

societies act as a link between song producers and the users. They have the right to grant licenses of works to interested users in exchange of a fee which they share with the copyright owners. One can request for such licenses by going to websites of copyright societies. The Content ID system cannot determine whether a creator has a license in advance; hence, the creator has to reach out to the copyright owner to retract copyright claims.

KEY CONCEPTS:

1. **Content ID Claim:** If a content creator uploads a video on YouTube that contains copyright protected work, the video will receive a Content ID claim, resulting in a block, monetization, or tracking of the video.
2. **Due diligence:** Due diligence refers to the process of obtaining sufficient and reliable information about a third party to help uncover any fact, circumstances or set of conditions in order to avoid any offence or harm committed by that party in the future.
3. **Fair Use Doctrine:** Legal doctrine that allows reuse of copyrighted content under specific circumstances without permission from the copyright owner.
4. **Synchronised Licenses:** Agreement between a music user and the owner of a copyrighted content, that grants permission to release the song in a video format (YouTube, DVDs, Blu-ray discs).
5. **Takedown:** Removal of a video from YouTube on the issuance of a takedown notice by a copyright owner, whose content is infringed by the uploaded video.

III. COPYRIGHT AND ARTIFICIAL INTELLIGENCE (AI): COPYRIGHT IN DIGITAL ERA

The famous 17th-century Dutch painter, Rembrandt, was an extraordinary artist, with his works exhibited in several prestigious museums across the globe. After more than 300 years after the artist's death, in 2016, the Dutch multinational banking and financial enterprise, ING Group collaborated with J.Walter Thompson and Microsoft to create the "next Rembrandt" by combining art and artificial intelligence, .i.e., to have a machine produce a new Rembrandt painting as if the Dutch virtuoso had himself painted it. A team of data scientists, developers, AI, and 3D printing experts analyzed the previous paintings of the artists on the level of high-resolution photographs and depth images. All the discovered data was fed into a machine which, with the help of AI, developed its version of a Rembrandt painting. This painting reflected all qualities of the genius artist but at the same time was a brand-new painting and not a copy of an existing one. The question arises here: Who is the actual author of the work, and will it attract protection under the copyright law? Can we call the data scientists and all the other experts who extracted data from Rembrandt's paintings and programmed them into a machine, as the original authors? In essence, can we accept a machine as an author when it comes to copyright?

Not just paintings, with the help of AI, the Google-owned company DeepMind created software that can produce original music by just listening to existing recordings. For more than five decades, computers have been creating works of art in various forms. However, most of these works relied primarily on the creative input of a human programmer. The machine acted as a mere tool like a paintbrush or musical instrument to help the actual author create art. With the rapid development of technology, machine learning has become widely popular as a form of artificial intelligence in recent years. Machine learning is a present-day technical mechanism that equips a system to self-learn without being programmed by a human. Such a system has a built-in algorithm capable of learning from the data input and evolves and makes independent decisions. For instance, a musician inputs the basic notes used to create music in a machine and a collection of tunes generated from various musical instruments. With this

information, using machine learning, the machine self learns and creates a brand-new song with almost no human intervention.

AI-GENERATED AUTHORSHIP

Over the years, copyright law has always acknowledged a living individual behind a creative work. The famous English doctrine known as the "Sweat of the Brow" even refers to an artist's effort, time, and capital invested in creating a work. This doctrine states that even if the expression of an idea is not original, but if the overall work is not copied and is created through the author's labour, then it can be protected under the Copyright law.[122] An author's idea refers to a human being of flesh and blood, with a unique personality and creativity. Under one of the significant principles of copyright law, the idea-expression dichotomy, an individual's ideas give rise to forms of expression that are further protected as works. In the case of AI, the machine generates the expression; however, it is not easy to determine the origination of the idea. Creativity is always attributed to a natural person, and hence it is unsettling to recognize a machine as an author.

The present copyright regime worldwide revolves around the concept of the "creative human author." However, no jurisdiction provides for fixed criteria that a person needs to satisfy in order to be recognized as an author or a definition of the term "authorship." The legislations are ambiguous when it comes to whether non-human entities can qualify as an author. AI is a relatively recent development in technology and thus, poses new challenges to the existing principles of copyright law. One of the major international treaties relevant to copyright law, the Berne Convention,[123] mentions the term 'author' but does not explicitly define it. However, the treaty stipulates that if the author's name is indicated, they shall be regarded as the author of a literary or artistic work without proof to the contrary.[124] This provision does not define the term author but offers some certainty with regard to the author being a natural or legal person because both can exhibit their names on the work. Further, the other major international treaties, WIPO Copyright Treaty, and the TRIPS agreement remain silent with respect to the definition of 'author,' even though both treaties mandate compliance with the Berne Convention.[125]

POSITION OF NON-HUMAN AUTHORSHIP OF PROTECTABLE WORKS IN INDIA

Initially, in India, the "Sweat of the Brow" doctrine was followed to determine the originality and copyrightability of a work. However, this standard was replaced by the "Modicum of Creativity" test, according to which an author needed to show a minimum level of creativity in work[126] to get copyright protection under the Indian Copyright Act. In *Eastern Book Company v. D.B. Modak*[127] case, the appellants, a legal printing and publishing company, used to publish copy-edited version of Supreme Court judgments, under the title, 'Supreme Court Cases" (SCC) with original formatting, sequence, headnotes, footnotes and various other inputs to make it user friendly. Subsequently, the defendants came out with a software called 'Grand Jurix' and 'the Laws' in the form of CD ROMs which had Appellants' copy-edited version of the judgments as it is, thereby constituting infringement of appellants' exclusive right towards it. The Supreme Court relied on the "Modicum of Creativity" test and held that the work should not only be a result of the author's labour but must also utilize their skills and judgment in the creation of the work.

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[122] *University of London Press, Ltd. V. University Tutorial Press Ltd. (1916) 2 Ch 601.*
[123] *Berne Convention for the Protection of Literary and Artistic Works as amended on September 28, 1979.*
[124] *Berne Convention, Article 15 (1).*
[125] *WIPO Copyright Treaty, Article 1; TRIPs, Article 2(2).*
[126] *Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).*
[127] *Eastern Book Company & Ors vs D.B. Modak & Anr (2007) Appeal (civil) 6472 of 2004.*

Under Section 2(d) of the Indian Copyright Act, 1957, the term 'author' is defined with respect to various copyrightable works but does not suggest the legal personality of an author or clarify whether it applies to purely human beings.[128] Section 17 lays down different instances of ownership of copyrightable work when a work has been done under a contract of service or apprenticeship for artificial persons such as the international governmental organizations. In *Rupendra Kashyap Vs. Jiwan Publishing House Pvt. Ltd,*[129] the Central Board of Secondary Education (CBSE), a public undertaking, was recognised to be the first owner of the copyright subsisting in the examination papers on which examinations were annually conducted by it. Section 2(d)(vi) of the Act refers to any literary, dramatic, musical or artistic work which is computer-generated and protects "the person who causes the work to be created." In this definition, the usage of the expression 'the person who causes the work to be created' is pertinent as it indicates that the involvement of a person in creating a certain expression of an idea is that individual's contribution. The Act nowhere explicitly deals with the creation of protectable works where the actual creator or the contributor of the 'expression' is a machine or a non-human person.

In 2005, the Delhi High Court in *Amarnath Sehgal v. Union of India*[130] acknowledged an author's moral rights under section 57 of the Copyright Act and observed that the author has a right to preserve, protect, and nurture his creations through his moral right. Moreover, it was held that the rights of paternity, preservation of integrity, and that of retraction came to the author from the fact that "a creative individual is uniquely invested with the power and mystique of original genius, creating a privileged relationship between a creative author and his work."[131] Here, the right of paternity refers to the right of an author to claim authorship of work and a right to prevent all others from claiming authorship of his work, while the right of integrity gives author the right to prevent distortion, mutilation or other alterations of his work, or any other action in relation to said work, which would be prejudicial to his honor or reputation. Therefore, it is evident that in Indian law, a living or legal person is given more emphasis and the authorship of AI remains unexamined. AI requires human interference to initiate the process of creating something, but the question of who exactly is the author or creator of the generated work continues to exist.

POSITION OF NON-HUMAN AUTHORSHIP OF PROTECTABLE WORKS IN THE EUROPEAN UNION

Similar to the Indian position, the EU legislation is also ambiguous with respect to AI authorship. Except for cinematograph and audio-visual works, computer programs, and databases, EU copyright directives remain silent on the issue of whether only human beings can be regarded as authors. Article 1(5) of Directive 93/8322[132] (the Sat-Cab Directive) lays down that for cinematographic or audio-visual works, the principal director shall be considered its author or one of its authors, allowing Member States to provide for others to be considered as co-authors. Further, Article 2(1) of Directive 2009/24[133] (the Software Directive) states that the author of a computer program shall be a natural person or a group of natural persons who have created the program or, where the legislation of a Member State permits, the legal person designated as the right-holder by that legislation. Directive 2006/116[134] refers to the

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[128]*Copyright Act, 1957, section 2 (d) "author" means,-(I) in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer;(iii) in relation to an artistic work other than a photograph, the artist;(iv) in relation to a photograph, the person taking the photograph; (v) in relation to a cinematograph film or sound recording, the producer; and (vi) in relation to any literary, dramatic, musical or artistic work which is computer generated, the person who causes the work to be created.*

[129]*1996 (16) PTC 439 Del.*

[130]*2005 (30) PTC 253 Del.*

[131]*Avishek Chakraborty, "Authorship of AI Generated Works under the Copyright Act, 1957: An Analytical Study," Nirma University Law Journal 8, no. 2 (July 2019): 37-54*

calculation of the term of copyright protection to the life of the author as 'physical persons.' However, article 4(1) of Directive 96/9 (the Database Directive) accepts the possibility of the author of a database not being just a natural person or group of natural persons who created the base.

In ***Infopaq International A/S v Danske Dagblades Forening***[135], the Court of Justice of the European Union interpreted the meaning of originality as "author's" own intellectual creation to all categories of work and also held that copyright protection should apply only to a subject matter which is original in the sense that it is the author's own intellectual creation. The 'author's own intellectual creation' indicates that the author should "*stamp his personal touch or reflect his personality in the sense that he expresses his creative abilities in an original manner by making free and creative choices.*"[136] This tacitly implies that AI cannot be categorized as an author, and the work it creates will not be considered an original creative work.

POSITION OF NON-HUMAN AUTHORSHIP OF PROTECTABLE WORKS IN THE UNITED STATES OF AMERICA

Under the US Copyright Act, 1976, a copyrightable work should be created by an 'author,'[137] yet it does not define the said term. The Supreme Court of the United States, for the first time in ***Feist Publications v. Rural Telephone***,[138] concluded that information alone without a minimum of original creativity could not be enough to be protected under copyright law, giving the 'Modicum of Creativity' test. In the case, Feist had copied data from Rural's telephone listings to include in its own telephone directory without Rural's consent and was sued for copyright infringement. The Court ruled that telephone listings contained in Rural's phone directory were not copyrightable and that, therefore, no infringement existed. Here, the Court held that there should be originality in the presentation of the copied data, with respect to selection and arrangement, in order to be copyrightable.

Furthermore, as an exception to other jurisdictions, the US has discussed the issue of human and non-human authorship in the popular 'Monkey Selfie' case[139] where the US District Court dealt with the question of whether an animal can be an owner of photographic work. In this case, a Celebs crested macaque named Naruto had used a photographer named Slater's camera to take a picture of itself. The Court dismissed the claim that a monkey could be the owner of a copyrightable work as the copyright legislation primarily speaks of a 'person' involved in the creation of the work and that for a work to qualify as a copyright-protected work, it has to be created by a human being. Moreover, the US Copyright Office's Compendium,[140] effected in 2017, expressly states that 'to qualify as a work of 'authorship' a work must be created by a human being.[141] The Compendium further suggests that protection is not available to 'works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author,' thereby laying down a solid stance copyrightability of machine-generated works. A very similar take was observed by the Federal Court in Australia in ***Acohs Pty Ltd v Ucorp Pty Ltd***[142] where it was contemplated whether source code consisting of thousands of material safety data sheets generated as an output through a

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[132]*Council Directive 93/83/EEC of 27 September 1993.*
[133]*Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer program.*
[134]*Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.*
[135]*Case C-5/o8, Infopaq International A/S v. Danske Dagblades Forening [2009] ECLI:EU:C:2009:465.*
[136]*He, Kan. 2016. The concept of originality in EU and China. In The governance of IP in EU and China. Edward Elgar.*
[137]*17 United States Code, section 102.*
[138]*Supra at [5]*

computer algorithm was capable of copyright protection considering the original input of data was machine-generated and not the subject of input or work by a human. The Court opined that copyright did not subsist in the source code as it had not been solely authored by a human.

COPYRIGHT AND VIRTUAL REALITY

Another upcoming technology is virtual reality (VR), which allows users to experience a specific physical environment without being present via a computer-generated 3D simulation of a space. The user is required to wear a headset that projects the 3D images and simultaneously blocks out physical reality. The headset also tracks the movements of the user's head and adjusts the visuals accordingly. The most common application of this technology has been in role-playing video games where the player can play as a character of the game by physically performing all the tasks in the game. While this technology is still in its nascent stage, artists have been using it to create 3D artwork integrating light, motion, and sounds, resulting in a 3D cinematic experience for the audience, which may not be possible to create in physical reality. Since all such works involve the author's labour, skill, and creativity, they should also be protected under the Copyright law, as they are equally vulnerable to infringement as any work existing in the real world. However, the law at present does not explicitly acknowledge such kind of work as copyrightable under any jurisdiction, and further, no litigation on this subject matter has been observed. As VR, in simpler terms, is a derivation of physical reality thus, it will be interesting to see how copyright regimes worldwide perceive it.

KEY CONCEPTS

1. **Artificial Intelligence:** It is the simulation of human intelligence processes by machines, especially computer systems.
2. **Artificial Person:** A non-human legal entity recognized by the law and entitled to rights and duties in the same way as a human being. For example, companies, corporations, government agencies, etc.
3. **Author:** First beneficiaries of rights under the copyright law, and they provide a reference point as to how long rights over the work would exist.
4. **Machine Learning:** A branch of artificial intelligence that allows systems to learn from pre-existing data, identify patterns and make decisions independently with minimal human intervention.
5. **Virtual Reality:** A computer-generated simulation of a 3D space, which permits the users to feel as if they are present in an actual physical environment.

IV. NON-FUNGIBLE TOKEN (NFT): COPYRIGHT IN DIGITAL ERA

Collecting unique pieces of artwork through bidding at auctions or buying at exhibitions is a common practice across the world. Such tangible collectibles are seen as status symbols in our society and are often sold for more than their original value. Similarly, imagine owning digital collectibles in the form of digital paintings, videos, GIFs, images, or even tweets and memes. This might sound bizarre, but Jack Dorsey, co-founder, and CEO of Twitter sold his first-ever tweet, which merely reads “just setting up my twttr,” for over $2.9 million. And an iconic GIF of a cat with a Pop-Tart for a torso flying through space, better known as the “Nyan Cat,” was sold for almost $ 600 000. All such digital assets that represent tangible/intangible real-world objects like artwork, sound recordings, video clips, photographs, documents, etc., when sold and bought online are referred to as Non-Fungible Tokens (NFTs). To be

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[139] *Naruto v. Slater, case no. 15-cv-04324-WHO (N.D. calif. 2016)*
[140] *U.S. Copyright Office, Compendium of U.S. Copyright office Practices, section 101 (2017).*
[141] *Burrow-Giles Lithographic C. 111 U.S. at 58.*
[142] *[2012] FCAFC 16.*

specific, an NFT is a unique, non-exchangeable token linked to a digital asset present on an internet platform, which is recorded on a blockchain, which is a kind of digital database that records information in a way that makes it difficult or impossible to change, hack, or cheat the system. These tokens allow the sale of digital commodities and help keep record and authenticate ownership of such assets. A right holder is also conferred with the right to license the use or transfer the ownership of the asset to a third party. However, most digital items bought and sold already exist on the Internet, available for free with their copies on several platforms. For instance, Jack Dorsey's tweet is on Dorsey's public Twitter account, visible to anyone and everyone, then why would someone pay an insane amount of money for it? In March 2021, a graphic designer, Mike Winklemann, also known as "Beeple," sold his artwork "Everydays: the First 5000 Days" collage at an auction for more than $69 million, making it the third most expensive artwork to be ever sold by a living artist. Yet, the absurd part is that all the images used in the collage and the collage itself are available online free of cost. The only rational reason behind such purchases could be "bragging rights." Apart from the above-mentioned rights, NFTs bestow the right holder with the right to own the "original" or one-of-its-kind work of creation. It is similar to owning the original "Mona Lisa" painting or even owning the Taj Mahal.

An advantage of NFTs is that they offer a new platform for digital artists to share and sell their work, further incentivizing new creators. Moreover, it aids in restricting the infinite supply of digital creation by increasing the value of digital creation. However, with respect to the viability of NFTs, it has been widely argued that NFTs use a lot of energy and hence are harmful to the environment due to their enormous carbon footprint. Since NFTs depend on blockchains, an energy-intensive computer function, also known as mining, is involved. There have been demands to switch to an alternative for blockchains; however, that is yet to be explored in depth.

HOW DO NFTs WORK?

Emerged as an in-game currency in 2017, NFTs rose to prominence with a game called "CryptoKitties," in which players bought and bred limited edition virtual cats. Starting from cats, the creators of the game converted in-game items like digital swords, shields, amulets, and other game collectibles into NFTs available for sale for players. Adopting NFTs allowed gamers to transfer tokens, i.e., digital assets, between multiple games and users via NFT specific blockchain marketplaces. Prior to NFTs, in-game assets used to be owned by the game companies; however, NFTs have enabled players to own those in-game assets and sell them on various gaming platforms. Consequently, NFTs opened up to a larger market involving the sale of myriad collectibles, including videos, paintings, music, and even virtual real estate (For example, Decentraland, a decentralized 3D virtual reality platform that allows users to buy virtual land on the blockchain).

NFTs are generally built on the programming languages as cryptocurrency, like Bitcoin or Ethereum, which is also a digital asset used as a medium of exchange for peer-to-peer transactions online, i.e., transactions between two parties directly without a third-party intermediary, similar to the barter system,hence reducing the time of transaction. However, unlike cryptocurrency, which is used as a virtual currency, NFTs are not "fungible," that is, they cannot be traded or exchanged for one another. While cryptocurrency is equal in value (For example, one Bitcoin is always worth another Bitcoin), NFTs represent unique assets and cannot be exchanged for or are equivalent to other assets, hence referred to as "non-fungible." Each NFT is a unique token embedded with some kind of information recorded in the blockchain ledger. Therefore, one NFT can never be exchanged for or equal to another NFT (Jack Dorsey's first tweet cannot be exchanged for, nor is it identical to, Beeple's artwork). It is the information stored in NFTs that makes them valuable, and it may be in the form of any digital asset. As discussed

above, most NFTs are available online for free, but those are just copies, and downloading these copies from the Internet would not make you a millionaire. Only the original work stored in an NFT and recorded in the blockchain ledger holds value.

NFTs can be created by anyone, as anyone can create artistic work and convert it into an NFT on the blockchain, i.e., via "minting" and put it up on a marketplace for sale. Moreover, creators can even affix a commission to their work, which will allow them to earn a fixed amount of royalty every time their work is sold, including resale. NFTs can be bought and sold on various platforms depending upon the kind of NFT (music, video, in-game item, painting, etc.). Some popular marketplaces are OpenSea[143], Rarible[144], SuperRare (specifically for digital artwork)[145], Nifty Gateway,[146] etc. The only prerequisite for trading on such platforms is to deposit cryptocurrency in digital wallets on these websites, the only medium of exchange used in such transactions. In June 2021, the Indian cryptocurrency exchange platform "WazirX" launched India's first NFT marketplace, facilitating the exchange of digital collectibles and intellectual properties. However, the NFT market is in a nascent stage, and its future is still quite uncertain. Moreover, NFTs have been surrounded by several discussions pertaining to corresponding legal issues.

COPYRIGHT LAW AND NFTs

Presently, in India, there is no separate legal framework governing NFTs, with the introduction of the Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019, which is still under review, the legal validity of NFTs is in jeopardy. The Bill advocates a complete restriction on the use of cryptocurrency and institutes a fine or/and imprisonment for those who deal in cryptocurrency,[147] and as the NFT trading is done through cryptocurrencies, it is difficult to predict the future of such transactions. Even RBI issued a circular prohibiting the use of cryptocurrency in 2018[148]; however, the Hon'ble Supreme Court in *Internet and Mobile Association of India v. RBI*[149] struck down the circular and held that it was violative of Article 19(1)(g) of the Indian Constitution which provides for the right to *"practice any profession, or to carry on any occupation, trade or business."* Moreover, since 2021, there has been a noticeable acceptance on the part of the government with respect to cryptocurrency, as there is still no possibility of a concrete ban on cryptocurrency. The government's sole concern is with the anonymity of the transactions and not the cryptocurrency itself. Nevertheless, due to lack of any substantial jurisprudence, the parties indulging in NFT transactions, for now, may have to rely on the provisions of the Indian Contract Act, similar to other usual buy/sell agreements, as such transactions are also kinds of contracts.

Another pertinent discussion revolving around NFTs is as per the Copyright Law. In India, according to Section 14 of the Copyright Act, 1957, the copyright holder of a work owns several rights, including the right to make reproductions and adaptations. When an NFT is bought/sold, the buyer receives a digitalcopy of the underlying work, and the NFT, i.e., tokens, get assigned to the buyer. Since NFT transactions involve making copies of the artistic work and forwarding it to the purchaser, any

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[143] *https://opensea.io/?ref=0x4509a6dd84e88fd0d894726abb036d98e411c966.*
[144] *https://rarible.com/.*
[145] *https://superrare.co/.*
[146] *https://niftygateway.com/.*
[147] *"Non-Fungible Tokens: Examining its Legal Validity in India," by Dharamvir Brahmbhatt and Devarsh Shah, NLUJ Law Review, ISSN: 2326-5320, June 18, 2021, Available on: http://www.nlujlawreview.in/non-fungible-tokens-examining-its-legal-validity-in-India/.*
[148] *Prohibition on dealing in Virtual Currencies (Vcs), April 6, 2018, Available on: https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF.*
[149] *Internet and Mobile Association of India v Reserve Bank of India, 2020 SCC Online SC 275.*

unauthorized reproduction, distribution, or adaptation may amount to copyright infringement. When an NFT linked to a copyrightable work is bought, it confers the buyer with the ownership of the specific copy or version of the work that the NFT represents or is linked to. According to the copyright law expert Dr. Andres Guadamuz,[150] an NFT is *"a cryptographically signed receipt that you own a unique version of a work."* Purchasing an NFT does not give the purchaser an exclusive right of ownership of every copy or version of the creative work. Now, the major question that arises is whether an NFT grants the buyer copyright in the underlying asset or not. Since there has been no precedent in any jurisdiction pertaining to copyright infringement of an NFT, the jurisprudence around it lacks clarity. However, the currently accepted outlook is that an NFT does not transfer copyright subsisting in the original work and the creator of the artistic work remains to be the copyright owner and hence retains the sole right to copy, distribute, modify, publicly perform, and publicly display the work, unless explicitly expressed otherwise in the contract in a signed writing, as required under Section 19 of the Copyright Act. For instance, the lead vocalist of the band "Linkin Park," Mike Shinoda, who sells NFTs on his website, has stated the following term in the purchase contract,

"Only limited personal non-commercial use and resale rights in the NFT are granted, and you have no right to license, commercially exploit, reproduce, distribute, prepare derivative works, publicly perform, or publicly display the NFT or the music or the artwork therein. All copyright and other rights are reserved and not granted."

Therefore, the accompanying agreement governs the scope of the rights transferred with an NFT, and it cannot be presumed that an NFT also transfers copyright in the underlying work to the purchaser unless specified in the agreement. An NFT generally grants the right to use the copyrighted work associated with the digital token for non-commercial use and the right to resell the NFT. Furthermore, NFTs themselves are not copyrightable since they are mere links to artistic works. The software used for creating such NFTs might be copyrightable, but such right remains with the creator of the software and not with a content owner or someone who creates the NFT using the particular software.

Yet, NFTs are susceptible to infringement of copyright in the underlying artistic work. Copyright infringement can occur when an individual is not the copyright holder of a given copyrighted work and still mints an NFT linked to the work, misrepresenting that they are the creator or copyright owner of the work. Such infringement may attract takedown notices. For instance, in the United States, the platforms hosting NFTs without authorization from the copyright holders of the linked artistic works may be issued takedown notices under the Digital Millennium Copyright Act (DMCA), 1998, to remove such content.

Another violation pertaining to NFTs can be in the form of copyfraud, where an individual mints an NFT of a work existing in the public domain, falsely claiming copyright ownership over the associated work.

NFTs are a novel asset, and there is still obscurity with regard to the minting, buying/selling, and even legal validity of NFTs among the general public. NFTs are primarily certification of ownership of digital assets and are mere links to a specific copy of artistic work, and it is vulnerable to mishaps like breaking of link or removal of the host website. Therefore, the buyers should employ due diligence before purchasing NFTs worth millions, as there still remains ambiguity surrounding the worth of the NFT after such incidents. At the same time, due to anonymity exercised on the blockchain, the original creators of the artistic work should be wary with respect to the use and copyright infringements of their works. The fundamental right subsisting in NFTs is to use and resell it, as an NFT represents ownership of a specific lawful copy of an artwork. Furthermore, from an economic perspective, an NFT's value entirely

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depends on what the buyer is willing to pay, and hence demand of such NFT drives its price rather than any external variable. Therefore, it is possible that the resale value of an NFT is less than its original value, or it may not attract any buyer at all. In conclusion, investments in NFTs are still risky, and copyfraud and copyright violations are inevitable, hence there is an urgent need for better governing legal provisions for certain and stable trading.

The following case study attempts to explain copyright issues with respect to Non-Fungible Tokens.

CASE STUDY

ISSUE: Consider Mr. X, who comes across the famous artist Mr. ABC's painting "The Bowl" on the Internet and downloads a picture of it. ABC holds copyright over the painting. X thinks as the painting is in the public domain, available online, he has the right to use it for personal use. However, his friend Mr. Y tells him about NFTs and how he could earn a tonne of money if he had an artwork he could mint as an NFT online. X is easily tempted by this information and tries to mint the picture of the ABC's painting that he downloaded from the Internet into a Non-Fungible Token and uploads it to one of the platforms employed as an NFT marketplace online. Someone bids against the NFT, and X sells it for $500. As a copyright student/ enthusiast, determine whether X has committed a violation.

SOLUTION: Under Copyright law, if someone creates an NFT of copyrighted artwork and sells it without authorization from the copyright holder of that work, he is likely to infringe the subsisting copyright in work. In the given case, Mr. X appears to have committed a violation by infringing the copyright subsisting in Mr. ABC's painting by selling it without his explicit permission. Furthermore, since X sold the NFT, it is in commercial use and hence a copyright infringement under Section 51 of the Indian Copyright Act, 1957. It may be argued that the NFT is not the work itself per se and is just an encrypted code or a link to the work. However, it is a link to the infringing file, and this could be considered a communication to the public, and therefore copyright infringement. Thus, even providing a link to work without authorization to a new audience can be regarded as copyright infringement, even if one is not hosting the work itself.

KEY CONCEPTS

1. **Blockchain:** It is a digital ledger or a database distributed across the entire network of computer systems on the blockchain. The individual blocks record the number of transactions and the participants.
2. **Copyfraud:** It is a false copyright claim by an individual with respect to content that exists in the public domain.
3. **Copyright Infringement:** The use or production of copyright-protected material without the authorization of the copyright owner.
4. **Cryptocurrency:** An encrypted digital or virtual currency based on blockchain, used as a medium exchange for online transactions.
5. **Minting:** The process of validating information, creating a new block, and recording that information into the blockchain, i.e., creating a kind of virtual currency.
6. **Non-Fungible Token:** A unit of data stored on a blockchain that certifies a digital asset to be unique and therefore not exchangeable. NFTs can be used to represent assets such as photos, videos, sound recordings, and other digital files.

V. ONLINE COPYRIGHT INFRINGEMENT: COPYRIGHT IN DIGITAL ERA

In the last decade, the Internet has become more accessible and inexpensive for larger sections of society. Yet, this has led to a simultaneous rise in misuse of content online. On the one hand, the Internet has provided creators from all kinds of backgrounds a common place to exhibit their work on a global level and reach audiences thousands of miles away from one place. On the other hand, it has also opened a pandora's box by making it easier for any user to copy some other user's content available online and replicate it as their own, without any license, thereby facilitating the violation of intellectual property rights. Copyright is one of the most frequently infringed upon intellectual property on the Internet. Every artistic work existing on the Internet, and is original, is protected by copyright and legally cannot be reproduced, published, or sold without the permission of its creator. Therefore, copyright may subsist in, *inter alia,* text, images, music, and video files uploaded and/or transferred via the Internet and would come within the ambit of the term "work" as defined under the Copyright Law. Due to the easy access to the World Wide Web, infringement of such copyrighted works has become quite frequent. However, the bigger question is determining who is liable for such unlawful transmission of copyrighted content created by third parties on the Internet.

HOW DO INTERNET TRANSFERS WORK?

Transfer of information on the Internet involves the participation of several parties, each one having a distinct and pertinent role to play. Among these are multiple intermediaries who facilitate such transactions between two or more communicating parties. For instance, an individual, 'X,' wants to watch a copyrighted movie on the Internet, which is posted by 'Y' without authorization from the owner of the video on a webpage. In order to view the film, 'X' will instruct his software to fetch that page from a host server on which the webpage is stored, and X's software will send a packet across the network lines to the host server mentioned in the web page address (URL), requesting for the page. Then, through the network to which X's computer is connected, the host server shall send the constituting packets of the document to X's computer. This is how most interactions or data transfers on the Internet happen, including those which may constitute copyright infringement, where the significant players are the originator (Y), the end-user (X), and the intermediaries, i.e., the host server and the network.

The originator refers to the individual who generates, uploads, or transmits any electronic message to another individual. The final receiver of such information or electronic message on the Internet is known as the end-user. Most often, such transactions between the originator and the end-user are not direct and go through "intermediaries," which act as a medium for transmission and receive and send the electronic message, or provide a service with respect to the same on behalf of others. Internet Service Providers (ISPs) and Payment Intermediaries are two of the most widely used intermediaries. ISPs are the pillars on which digital transactions stand. They are generally businesses and organizations that offer users access to the Internet and other related services, for instance, email, web hosting of content, mailing lists, search engines like Google, Bing, and even cloud services like Google Drive and OneDrive. With several intermediaries and players acting on just one transaction, it becomes an onerous task to recognize individual liability in the event of a copyright violation in cyberspace.

COPYRIGHT VIOLATIONS ON THE INTERNET

The Indian Copyright Law is codified under the Indian Copyright Act, 1957, which confers creators and authors exclusive rights over any literary, dramatic, or musical work[151]. Whenever an illegal internet

[151] *Indian Copyright Act, 1957, section 51 (a)(I)*

transaction of copyrighted content takes place, such rights are violated. Under the Act, these rights include the rights:

1. to reproduce the work in any material form, including the storing of it in any medium by electronic means;
2. to issue copies of the work to the public,
3. to communicate the work to the public.[152]

We know when copyright is violated, but determining who to blame is still a grey area. In most cases, the originator is blamed for copyright infringement since they initiate unauthorized use with the intention of infringing. In certain cases, even end-users may be held liable, however, it entirely depends upon the degree and extent of the illegal use. For instance, X downloads a song from a website, which hosts pirated content for his own personal use. Even though such an act is a reproduction of copyrighted content without the owner's consent, the end-user may argue that since the content was available online, it projects implied permission of the creator and hence cannot be referred to as infringement. At the same time, if X downloads the music with the intention of reproducing and distributing it for monetary benefits, it is definitely a violation of the subsisting copyright. However, due to developing technology that allows users to maintain anonymity, it has become increasingly challenging to identify liable end-users. The liability with respect to ISPs depends upon the role they play in the transaction. Suppose a service provider merely acts as a carrier, such as a telecommunications service provider like Airtel. In that case, it cannot be held liable for people discussing illegal activities on their phones. However, if an ISP actively hosts content that is infringing upon copyrighted content, it may be held responsible for the unlawful act equally.

POSITION IN THE US

In the US, the Digital Millennium Copyright Act, 1998 provides a remedy against copyright infringement by ISPs and lays down different kinds of liabilities depending on their role in a transaction online. The first kind of ISPs are the ones that act as a medium of transmission and provide connections or routes for transacting content without actually modifying the content. Airtel, Jio, MTNL are a few examples of such ISPs. Search Engines like Google and Bing store cached versions of copyrighted web content in their search databases, i.e., temporary storage of data so that it is easier to redisplay information quickly whenever it is searched for. Section 14 and 51 of the Indian Act extend to such ISPs. However, in the case of Religious Technology Centre v. Netcom On-Line Communications Services Inc, the US courts held that intention behind an infringing act on the part of ISP is a prerequisite for copyright violation. Another form of ISPs is which stores content at the direction of users or third parties, and the ISP controls such content on the host server. In an incident, eBay was held with secondary liability when it facilitated auctioning of pirated copies of "Manson" DVDs by offering an online forum and related services to the third-party sellers.[153] Under the DMCA, an ISP may escape liability only if it does not have actual knowledge or awareness with respect to infringing content on its system; it reaps no monetary gains directly attributable to the infringing activity, or it responded expeditiously to remove or disable access to content claimed to be infringing after receiving a notification from the copyright holder under Section 512(c)(3) regarding the violation. There's also a provision of 'notice and takedown' under the Act, which helps authorities act promptly and take the appropriate action against the infringing ISP. A search database for music, Napster, allows users to transfer music directly from one computer to

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[152] *Ibid, Section 14*

[153] *Hendrickson v. Ebay Inc, 165 F. Supp. 2d 1082, 60 U.S.P.Q.2d (BNA) 1335 (C.D. Cal. 2001)*

another using a "peer-to-peer" network. A&M Records sued Napster in 2002 for copyright infringement as it assisted its users to infringe the record company's copyrights.[154] In this case, even though Napster was not directly contributing to the infringement or generating revenue from the infringing activity, it was well aware of the infringing transaction. It provided services to facilitate it, hence cannot be considered a "passive" infringer. Subsequently, in 2005, the US Supreme Court in ***Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd., et al.,***[155] established the "inducement theory" and stated that a company might be held liable for contributory infringement if they intend to cause an infringement by performing the act of distribution of a device suitable for infringing use and consequently actual infringement occurs. In the said case, the popular movie studio, MGM, sued the respondents for their user's copyright infringements via peer-to-peer networks, alleging that respondents intentionally circulated their software to help users infringe copyright works. Due to the decentralized architecture of the respondent's software, the Ninth Circuit Court did not hold them liable. Yet, the US Supreme Court opined that a software distributor that promotes the use of its tool to infringe copyright 'as shown by clear expression or other affirmative steps taken to foster infringement' is liable for the resulting infringement of their users. Further, the Court holding Grokster as an active infringer in the transaction and reasoned how it had induced infringement through the following:

1. advertising and providing a manual on how to infringe,
2. targeting former Napster users who will infringe repeatedly,
3. failing to take any significant steps to curb the infringement,
4. making profits from the infringement, and
5. circulating a readily available tool on the Internet capable of infringement, and held that Grokster was not merely a passive recipient

POSITION IN INDIA

In India, under Section 63 of the Copyright Act, a party can only be held liable if it knowingly "infringes or abets" the copyright infringement subsisting in work. With the latest amendment of the Act, a new provision with respect to copyright violations on the Internet has been added, which will be discussed in the next section. Another legislation, the Information Technology Act, 2000, indirectly addresses copyright infringement and states that if any person *without the permission of the owner* or any other person who is in charge of a computer, computer system or computer network *downloads, copies, or extracts any data, computer database or information* from such computer, computer system or computer network including information or data held or stored in any removable storage medium, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.[156] Moreover, the IT Act also deals with the offence of "hacking" and states that if any person intentionally causes a wrongful loss or attempts to "destroy or delete or alter" any information residing in a computer resource, it is punishable under the IT Act. In a recent development, under Rule 3(1)(b)(iv) and of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, the government has prescribed that intermediaries (including social media intermediaries under Rule 4(3)(b)) must follow diligence, and in case an intermediary does not comply, it would not be exempt from liability. Therefore, an ISP may be held liable if it tries to alter any information with the purpose of illegal reproduction with the intention to do so. Further, Section 79(1) of the IT Act, 2000

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[154] *A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D.Cal. 2000).*
[155] *125 S.Ct. 2764 (2005).*
[156] *The Information Technology Act, 2000, section 43(b)*

provides the safe harbour provision, and states that an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by it, provided that it fulfils the conditions prescribed in Section 79(2) and Section 79(3) therein. To claim safe harbour, intermediaries should be able to demonstrate compliance with Section 79(2)(c), i.e. observing due diligence while discharging its duties and also observing such other guidelines as the Central Government may prescribe in this behalf, i.e., compliance with the requirements of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, including observing a minimum level of due diligence (Rule 3(1)) and publishing their rules, regulations, policies and user agreements regarding access or usage of its platform. With respect to Section 79(3), the intermediary should be able to establish that it has not conspired, abetted, aided in or induced the commission of the unlawful act on its platform. The Delhi High Court in the case, ***Myspace Inc. v Super Cassettes Industries Ltd.,***[157] held that under Section 79 of the IT Act intermediaries have to follow certain minimum standards, in harmony with the Copyright Act, to avoid liability for copyright infringement. It further opined that if an intermediary is made aware of any illegal acts such as copyright violation, through a notice or red flag being raised by users or copyright owners, it shall be held to have actual knowledge of the infringing content under Section 79(3) of the IT Act.

IMPLICATIONS OF TECHNOLOGICAL PROTECTION MEASURES AND WIPO COOPERATION TREATY ON THE INDIAN COPYRIGHT LAW

The digitized world has made the proliferation of proprietary works from one corner of the world faster, easier and inexpensive, but at the same time, it has adversely affected the rights of creators and copyright owners. Within seconds of uploading any kind of content, multiple illegal copies are made and distributed on the Internet with no credit to the original creator or the copyright holder. To strike a balance between the convenient access of information and to provide incentives to creators for their work and innovation by making sure they receive appropriate monetary benefits from the distribution of their copyrighted works, digital technologies known as Digital Rights Management (DRMs) were developed. One of the most commonly used forms of DRMs is Technological Protection Measures (TPMs) which helps prevent digital piracy by preventing unauthorized use and reproduction of the underlying copyrighted content via passwords, digital locks, digital watermarks, cryptography, etc. This access control technology allows right holders to restrict others from using their intellectual property without their consent. However, TPMs can only go so far as to prevent regular users like you from using such unauthorized material unless you are a closeted hacker! There are several ways to reverse engineer such technology, thus making it quite vulnerable. Circumventing TPMs means breaking the password-protected locks by various means by the users, including computer software and applications specifically designed for such tasks. To avert such violations, TPMs were taken under the ambit of legal protection through updated legislation. The WIPO introduced the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), also collectively known as the WIPO Internet Treaties in 1996, enforced in 2002, recognizing the need to adapt to issues affiliated with the digital age. The WCT, a treaty under the Berne Convention, mainly deals with the protection of works and the rights of their authors in the digital environment. The two most significant works protected under this treaty are computer programs and databases. Under Article 4 of the Treaty, computer-made programs and their multiple forms and modes are protected as literary work under copyright law. Article 5 covers databases or compilations of data or other material in any form that involves the selection or arrangement of information in a novel way. The conventional copyright

[157] *My Space Inc. vs Super Cassettes Industries Ltd., [236 (2017) DLT 478]*

provisions that include the right to reproduction make adaptations, translate or perform in public apply to digital content as well. WCT under Article 11 obliges the member states to provide adequate and effective legal remedies in order to protect TPMs from circumvention and unauthorized use of copyrighted content on the Internet, making it a mandatory provision.

Even in India, several industries have been affected by this phenomenon of digital piracy, especially the entertainment industry. Previous copyright legislations and amendments had no specific provision concerning TPMs; however, after global acceptance of the need for more digitally accommodating laws, the 2012 Amendment of the Indian Copyright Act, 1957 added a provision for the protection of TPMs in the Act to align with the WCT and WPPT. Section 65A of the Act makes circumvention of an effective technological measure that protects any of the copyrights a punishable offense with two years imprisonment and fine. On a case-to-case basis, the judiciary may adjudicate on whether circumvention of an effective technological measure has taken place. Further, Section 65B makes it an offense to remove or alter digital rights information without authorization and to distribute any copyrightable works from which the digital rights information has been removed.

The CASE Act: Small Claims Court for Copyright Infringement

In 2020, new legislation was introduced in the United States known as the Copyright Alternative in Small-Claims Enforcement (CASE) Act 2020, instituting a separate administrative tribunal for copyright claims of up to $30,000. This Act came as a relief for specifically small entities and a blessing in disguise for larger businesses who own massive amounts of copyrightable content. Moreover, the CASE Act also allows DMCA claims arising from contributory infringement by social media platforms and other Internet Service Providers and host servers of web content. Litigation involving copyright violations is often costly and tedious for independent creators and small copyright holders like visual artists, musicians, and authors, and not often worthwhile for larger entities, as generally, the litigation cost is more than the individual value of works. The CASE Act provides a less expensive and convenient alternative to the usual claims resolution process through federal courts of the U.S. Under the Act, the U.S. Copyright Office will set up a Copyright Claims Board (CCB), consisting of a three-member bench of experienced copyright claims officers, to adjudicate upon small copyright claims with potential damages up to $ 30 000. The statutory damages are limited up to $15,000. The CCB hears claims brought by copyright owners against alleged infringers. Further, it allows users to even file requests for a declaration of non-infringement if they believe their use constitutes fair use or is non-infringing. However, the CCB is merely a choice, and a creator can pursue a copyright claim in the federal court as well instead of CCB.

CASE STUDY

ISSUE: Let's consider a website, "Legalcontent.com," that posts legal articles and Indian court judgments and has its own server. In one instance, it posted a copyrighted article without the consent of its author and made it available for download for paid members from the website. Mr. X, a paid member of Legalcontent, was doing some research for his own article and came across the copyrighted article. X found it relevant and downloaded it for his research. As a copyright student or enthusiast determine whether Legalcontent and X have committed copyright infringement with respect to the copyrighted article.

SOLUTION: In the given scenario, since 'Legalcontent.com' has its own host server and has posted a copyrighted article without authorisation, it shall be held liable as the Originator as well as an ISP. Suppose it had been merely a medium to send the users to the location of the article and has merely

provided links to the said copyrighted article. In that case, it might not have been directly held liable, as it would have acted only as a search engine. According to the Copyright Law, there needs to be knowledge and intention along with the act of infringement. Since the website hosted a copyrighted article without the author's permission and was also monetizing it by making itself a paid members-only platform, it has actively infringed upon its copyright and gained monetary benefit attributable to the work.

Mr. X was a paid member of the website, and he had no knowledge with respect to the infringement. He accessed all the documents on the website with the assumption that they had been uploaded with adequate licenses from their authors, and he was in his full right to download them on his computer for his personal research and use. This can be substantiated by Section 52(1)(p) of the Indian Copyright Act, 1957, which holds that *"the reproduction, for the purpose of research or private study"* does not amount to infringement. Therefore, X cannot be held liable for copyright infringement in this scenario.

KEY CONCEPTS

1. **Copyright Infringement:** The use or production of copyright-protected content without the authorization of the copyright holder.
2. **Internet Service Providers:** Organizations that provide Internet connections and services like Search Engines, Mailing, Web Hosting to individuals and organizations.
3. **Digital Piracy:** Illegally reproducing or disseminating copyrighted content on the Internet.
4. **Technological Protection Measures:** Under the Copyright Law, TPMs are measures aimed to prevent copyright infringement by controlling how a work is used and accessed.

CHAPTER 6

FASHION: COPYRIGHT AND DESIGN INTERPLAY

Fashion is the most widely used instrument for projecting one's best self in any cohort. It is a defining characteristic of the times, our culture, and sets the standards for societal aspirations. Fashion is often driven by innovation, and the apparel industry, therefore, employs some of the most creative people. The industry thrives on design innovation and has given us unique trends that end up becoming our way of life. In the apparel industry, most often, designs are made with the intention of enhancing the visual effect of an existing product and are made to appeal to the eye of the customer. However, before their application on an actual product by an industrial process, they are created in the form of artistic works and drawings, which raises confusion with respect to the regulatory authorities. Being an intellectual property, it is necessary to distinguish designs under separate categories based on their intent to extend effective and adequate protection. The two most common intellectual properties under which designs are put are Copyright and Industrial Design.

In India, the Copyright law is governed under the Copyright Act, 1957 which extends protection to original literary, dramatic, musical., etc. works. Under the Act, registration is not mandatory, and works are protected from the moment they are created till the duration of the lifetime of the author or the artist, plus sixty years counted from the year following the death of the author. However, in order to seek legal remedies against copyright infringement, registration of an artistic work under the Act is advisable. The Copyright Act has been amended thrice since it was first published, in 1999, 2002, and 2012 to align the Indian Copyright regime with the global copyright law requirements. The Act provides for both civil as well as criminal remedies in case of copyright violations. Injunctions, damages, and compensation form part of civil remedies, whereas criminal remedies include the imposition of fines and even imprisonment in certain circumstances.

The Indian Design law is regulated by the Designs Act, 2000 that protects original designs of articles in the form of a shape, pattern, configuration, ornament, or combination of colors or lines in 3D or 2D applied to any article by any industrial process or means.[158] To register a design, it must be judged solely by the eye, and the features of the design should be visible, it should be new or original, i.e., should not have been disclosed in the public domain in India or otherwise and significantly distinguishable from already existing designs, and should have industrial applicability. The Act confers protection of ten years, extendible to fifteen years. The articles protected under this Act do not include any mode of construction, trademark or property mark, or any artistic work as defined in Section 2(c) of the Copyright Act. On the other hand, even the Copyright Act denies protection to a design if it is already registered under the Designs Act, 2000. The dilemma emerging here is as to what would come under the ambit of an "artistic work" under Section 2(c) of the Copyright Act and what would be considered as a "design" under Section 2(d) of the Designs Act, 2000, so that one could determine under which legislation would the particular work be protected.

COPYRIGHT AND DESIGN INTERPLAY

Even though there exists a blurred line between copyright and design laws when it comes to artistic works, India has tried to distinguish works into two separate categories by terming them as "articles"

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[158] *Section 2(d), The Designs Act, 2000.*

and "artistic works" under the Design Act and Copyright Act, respectively. Moreover, under Section 15, the Copyright Act has acknowledged the issue of overlapping of protection between the two intellectual properties, i.e., design and copyright, and has stated that an owner of a design will have to forego copyright protection under the Copyright Act once the design has been registered under the Design Act. Further, Section 15(2) reads that copyright in an unregistered design shall cease to exist as soon as the article to which the design has been applied has been reproduced more than fifty times by an industrial process. Prior to the Designs Act, 2000, the judiciary dealt with the confusion between design and copyright in ***Samsonite Corp. v. Vijay Sales,***[159] where the Plaintiff introduced a new range of suitcases, System 4 DLX, which was an improved version of an earlier range, System 4. Plaintiff did not register the designs for the new range but had design registrations for the previous range. Subsequently, the Opponents manufactured a range of suitcases, Odyssey GLX; however, Plaintiff objected since the range looked exactly like System 4 DLX. Claiming copyright in drawings relating to its System 4 range, Plaintiff alleged copyright infringement by arguing that the Opponents' suitcase range was an unauthorized 3D reproduction of Plaintiff's artistic copyright in the drawings in question. The Opponents contended that Plaintiff's drawings were "designs," Since they had not been registered, they did not attract copyright protection. The Court held that plaintiff's drawings were clearly within the definition of "design" under the Designs Act, 1911, hence Plaintiff could not claim copyright protection for the drawings of the earlier range. Since customers tend to buy suitcases because of their shapes and sizes, and the design is merely an attraction with respect to the product, the design on the suitcase was meant to be industrially applied on the suitcases and thus would not be protected under the Copyright Act.

In 2006, the Delhi High Court, in this regard, set a criterion in ***Microfibres v. Girdhar***[160] and established the "Object Test." This test stated that to identify whether a particular work is an "artistic work" or a "design," the object behind such work is significant and needs to be analyzed. The plaintiffs, in this case, had sued the defendants for infringement of the copyright in their floral designs by applying them to the upholstery fabric. The defendants contended that the designs were not protected under the Copyright Act since floral designs were made with the very purpose of application to the upholstery fabric through an industrial process. The Single Bench agreed with the defendants' argument and opined that the floral designs did not have an independent existence and were produced for a subsequent application on an upholstery. Therefore, they will fall under the category of "design" under Section 2(d) of the Designs Act and not under the ambit of copyright protection. On appeal, the Division Bench upheld the decision of the Single Bench but concluded that although, copyright would subsist in the original work and the creator would continue to enjoy copyright protection granted under the Copyright Act in respect of the original artistic work, however, if the artistic work is applied to an article and is industrially manufactured, the design would have to be registered under the Designs Act. Further, if the design has not been registered under the Designs Act, it would continue to enjoy copyright protection till the time it has not been applied on the article for more than fifty times through the industrial process. This decision was relied upon in ***Rajesh Masrani v. Tahiliani Design Pvt. Ltd.,***[161] where the Bombay High Court reiterated that an 'artistic work' is protected under the Copyright Act as long it qualifies as an artistic work. As soon as it is used as the basis for designing an article and is applied by an industrial process or means, it would become registrable under the Designs Act and is registered, it would enjoy a lesser period of protection under Section 11 of the Designs Act. Moreover, if it is not

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[159] *73 (1998) DLT 732.*
[160] *Microfibers Inc. vs Girdhar & Co. & Anr., 2006 (32) PTC 157 Del.*
[161] *AIR 2009 Delhi 44.*

registered, despite being registrable, it would no longer enjoy copyright protection after more than fifty reproductions of the article, under Section 15(2) of the Copyright Act.

Any design created individually or with respect to a product deserves protection against unauthorized use, as it is a work of the intellect. Overlapping of the Copyright Act and Designs Act is inevitable when it comes to artistic works and designs in the fashion industry. Each legislation has a different intent, and hence it is the judiciary's duty to interpret artistic works with precision to determine the adequate law protecting it. A copyright protection's objective is to protect a work's originality and uniqueness, whereas the Design Act aims to maximize a design's commercial value by manufacturing and selling it to the market. To offer enough incentive to the creator and minimize legal costs, it is necessary for the judiciary to segregate the designs based on their application to extend the most effective protection to a work of creation and lay down sufficient legislative activity interpreting the respective legal provisions with respect to both the intellectual properties.

CASE STUDY

ISSUE: Let us understand the interplay between Copyright and Design law with the following example. A fashion label "TARA" creates some original, artistic patterns and uses these as prints for their upcoming range of handbags. TARA has not registered the said designs under the Design Act. Another band, "STYLEX," also in the business of manufacturing and selling handbags, comes out with similar prints on its bags. This leads TARA to sue STYLEX for copyright infringement and passing off. STYLEX contends that the works of TARA are not artistic works worthy of copyright protection but rather designs, and hence they ought to have been registered under the Designs Act. As a copyright student or enthusiast, determine whether the handbag design will be protected under Copyright Act or Design Act.

SOLUTION: Artistic works created for independent existence are different from works created for application on another article by an industrial process. The objective behind creating work is essential to determine the type of legal protection it attracts. An abstract design made in the form of a painting by a painter has independent existence and is copyrightable. However, if the same abstract design is made in the form of a fabric design for the sole purpose of getting printed on an article, design law applies to it.

It is not always clear as to what intention an artist is creating artwork, and hence a clear standard should be followed to determine the adequate legislation. Therefore, copyright would exist in original artistic work for the entire lifetime of the creator plus sixty years. But if an artwork is made with the purpose of industrial application like in this instance for a handbag, it would qualify for independent IP protection under the Design Act and become registrable. As the handbag design qualified as an industrial design, TARA should have registered it. Since the designs have not been registered and yet used for more than fifty times for TARA's products, they no longer attract copyright protection under Section 15 of the Copyright Act, and hence, STYLEX is free to use the designs for their products.

KEY CONCEPTS

1. **Artistic work:** An artistic work refers to a painting, a sculpture, a drawing (including a diagram, map, chart, or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a work of architecture; or any other work of artistic craftsmanship
2. **Copyright Infringement:** The use or production of copyright-protected content without the authorization of the copyright holder.

3. **Design:** Design means only the features of shape, configuration, pattern, ornament, or composition of lines or colours applied to any article, whether in 2D or 3D or 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; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trademark as defined in Section 2(1)(v) of the Trade and Merchandise Marks Act, 1958 or property mark as defined in Section 479 of the Indian Penal Code or any artistic work as defined in Section 2(c) of the Copyright Act, 1957.

CHAPTER 7

COPYRIGHT SOCIETIES (INTERNATIONAL/LOCAL)

Copyright is an exclusive intellectual property right subsisting in a wide variety of original works of musicians, lyricists, composers, authors, artists, etc. Such works cover literary, dramatic, musical, and artistic works, cinematograph film, sound recording, and even computer databases. Copyright law is designed to protect works of intellect and creativity from unauthorized use and reproduction without the consent of the right holder to acknowledge the creator's labor, skill, and capital. Moreover, this right acts as an incentive for creators to produce better work. In every jurisdiction, there is specific legislation established to regulate the copyright law in that particular territory. These laws set standards for a work to qualify for protection under copyright law and also provide for legal remedies in case of a violation with respect to a right. But imagine you own a music label, and every year your label produces hundreds of songs collaborating with several artists. Along with running your business, can you afford to be indulged in issuing and granting licenses to small artists willing to make covers of your songs or local restaurants using your label's songs as background music to enhance the dining experience for their customers. Not just issuing and granting licenses, imagine keeping track of all the radio stations playing songs of your label on their channels every day. It is a tedious task for the creators to monitor every single use of their individual work, disrupting their creativity and workflow. To help the creators better manage their work, another instrument was instituted under the law, known as the copyright society or collective. The objective behind such societies is to oversee collective administration and the protection of copyright interests.

COPYRIGHT SOCIETIES IN INDIA

In India, copyright is governed under the Copyright Act, 1957[162] and Copyright Rules, 2013. Section 33 of the Act provides for the registration of copyright societies in India. These societies are formed by authors and right holders, and each society, registered for a specific class of work, deals with the task of conferring licenses for performance or communication related to any kind of literary, artistic, musical, or dramatic work, and collects fees in pursuance of such licenses. It commercially manages the copyrighted works of its members, prevents third parties from violating such rights, and takes legal action on behalf of the author or the owner in case of infringement. The copyright societies are registered for a duration of five years, which is renewable before or after the expiry of the said term on request. Under Section 33(1) of the Act, registration of a copyright society is mandatory, without which no person or association can issue or grant licenses in respect of any work protected by copyright. According to the Rules, to register, an application is required to be made to the Registrar of Copyright which shall fulfill all necessary requirements. Each society requires at least seven members who should be copyright owners and is registered for carrying out the business of granting licenses related to a certain class of work. After satisfying these two conditions, the application is forwarded to the Central Government, who decides whether the society will be registered or not. Generally, the government permits only one society to register for a specific class of work. Further, after the 2012 Amendment of the Act, a new provision, Section 33(3A) was added making it mandatory for copyright societies to register within one year of the amendment. Even existing societies were mandated to re-register, although no repercussion was mentioned in the Act in case of non-registration.

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[162] *Most recent amendment in 2012.*

Copyright societies collect fees according to its Tariff Scheme formulated based on the period of authorization. The royalties shared with the copyright owners are subject to a maximum of fifteen percent deduction to compensate for the administrative expenses borne by society. Under Section 34 of the Act, any copyright society has the discretion to accept the authorization to administer the issue of license or collection of fees or both by the copyright holder. The right holder can revoke or withdraw the approval according to their will.

The Indian Performing Right Society Limited (IPRS)[163] is one of the oldest copyright societies representing the owners of musical works, including composers, lyricists, authors, and producers. It primarily deals with the registration and licensing of copyrights of members relating to the music industry. IPRS was set up in 1969; however, it was re-registered in 2017 under Section 33 of the Act after the Copyright (Amendment) Act, 2012, came into effect. It has a database of around ten million songs by Indian as well as international artists for which it issues licenses and collects royalties. Currently, it is being headed by the legendary Indian lyricist Javed Akhtar. In 2012, the Delhi High Court granted an injunction by prohibiting Hello FM Radio from playing songs without obtaining a license from the IPRS.[164] Some examples of Indian copyright societies are:

1. Indian Reprographic Rights Organization (IRRO)[165]: Established in 2000, it issues licenses specifically for literary works of authors or publishers.
2. Indian Singers Rights Association (ISRA): Registered in 2013, for Performers (Singers) Rights
3. Indian Performing Rights Society (IPRS): for Authors, Composers and Music Publishers.
4. Recorded Music Performance Limited (RMPL): It manages and licenses its members' public performance and radio broadcasting rights. – Registered on June 18, 2021

Independent authors and creators benefit from copyright societies as they offer an organizational framework for the legal exploitation of copyright and collecting royalties. Having an established authority keeping a check on all the licenses issued and uses of the copyright owner's works ensures that no unauthorized use or copyright infringement goes unnoticed. However, the copyright societies cannot act independently, and as per Section 35 of the Act, are required to be transparent and take the approval of its members concerning various procedures carried out by the society, including administration of rights, collection of royalties, and distribution of the same without any discrimination among the members. Furthermore, the Tariff Scheme set by each society shall be in correspondence with the Copyright Rules. If any individual is aggrieved with the scheme, they may appeal to the Commercial court/ High court in their relevant jurisdiction, and the Court may take an adequate step after a proper enquiry. Along with the Tariff Scheme, the society shall also formulate a Distribution Scheme which shall be proportionate to the royalty income of the society derived from the grant of licenses for the rights in the specific categories of works administered. The Scheme is based on the actual use or reliable statistical data obtained from the industry representing commercial exploitation of the licensed rights. Also, all distributions must be fair, accurate, cost-effective, non-discriminatory, and there should be no hidden charges.

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[163] *Available at :http://www.iprs.org/.*
[164] *IPRS Limited v. Hello FM Radio (Malabar publications Limited),2012 (50) PTC460(Del).*
[165] *Available at: http://www.irro.in/.*

COPYRIGHT SOCIETIES IN OTHER COUNTRIES

Synonymous to copyright societies in India, the US has collective management organizations (CMOs), also referred to as performance rights organizations (PROs) that work as an intermediary between copyright owners and public performers or users (radio stations, streaming platforms, restaurants, cafes, etc.) of such works, especially music. CMOs, generally non-profit entities, issue licenses on behalf of their members, keep track of how often their works are being reproduced or performed, and subsequently collect royalties and pay them their share. The five significant PROs, particularly dealing with the US music industry, are ASCAP, SESAC, BMI, AllTrack, and SoundExchange. These copyright collectives in the US are registered as companies that act as agents of the copyright holders. Each of them has its own tariff policies, and a creator cannot be a part of more than one collective.

The American Society of Composers, Authors, & Publishers (ASCAP) was one of the first non-profit PRO set up in 1914 in the US. It has more than 650,000 affiliates and is run by its own member artists. Another collective, BMI or Broadcast Music, Inc., was started in 1939 to represent relatively newer genres of music like jazz, blues, and country. With more than 800,000 members, it has become the largest music rights organization in the US. These organizations keep a check on radio station logs and television shows to determine the number of times a song is being played or its use as background score or a theme in shows and accordingly pay the copyright owners after collecting royalties from the users.

Similar to the US, the issue and grant of copyright licenses in the United Kingdom are also administered by CMOs, granting rights on behalf of various copyright owners under a single or 'blanket' license for a specific royalty fee. Music, books, newspapers, pictures, etc., have separate CMOs. Even in the UK, CMOs are generally non-profit organizations owned and controlled by their own members. In exchange for handling licenses for copyright holders, they deduct an administrative fee from the royalties collected before paying the shares of the right holders. To keep a check on the CMO governance, the Intellectual Property Office of the UK has set up a National Competent Authority that enforces compliance with the Collective Management of Copyright (EU Directive) Regulations, 2016. The Performing Right Society (PRS) for Music manages the rights of lyricists, composers, and publishers. At the same time, Phonographic Performance Limited (PPL) looks after the rights of record publishers and performers. In order to obtain an exclusive right for a song, one will need to obtain licenses from both the CMOs. The Copyright Licensing Agency (CLA) is another authority that issues licenses on behalf of a collective of CMOs, including Publishers' Licensing Services (PLS), the Authors' Licensing and Collecting Society (ALCS), the Design and Artists Collecting Society (DACS) and Picture Industry Collecting Society for Effective Licensing (PICSEL). The CLA grants rights to users who wish to photocopy, scan or re-use content from magazines, books, journals, and electronic and online publications. Apart from these, several other CMOs are dealing with rights in the media, film, and art industries.

Prior to the introduction of copyright societies, any user willing to use or reproduce copyrighted material had to obtain a license directly from the copyright holder individually with a different contract every time. Since it is tedious to do so, most users used copyrighted content without permission and infringed it, often resulting in lawsuits and expensive legal proceedings. On the other hand, it was equally tiresome for the right holders to keep track of the infringers. Thus, copyright societies have benefitted everyone in every sector by regulating the issuance and grant of licenses. The process has become much more convenient and has led to a decline in the number of violations regarding the unauthorized use of copyright works. The copyright collectives have and at the same time have simplified the process of procuring a license for the end-users.

KEY CONCEPTS

1. **Collective Management Organizations:** An organization responsible for monitoring, licensing, and collecting performance and mechanical rights for their clients. They also enforce the conditions of licensing contracts, and collect and distribute subsequent royalties.
2. **Copyright society:** It is a registered collective administration society formed by copyright owners. It can issue or grant licenses in respect of any work in which copyright subsists or in respect of any other right given by the Copyright Act.

CHAPTER 8

PERFORMERS' RIGHT UNDER THE COPYRIGHT REGIME

Who is a Performer? A person who makes a performance by way of acting, dancing, delivering a lecture, singing, juggling or making a performance in any other way is known as a performer.

Let's try and understand the concept behind 'Performer's Rights with the help of the illustration below-

Illustration- A composer is the author of a musical work so created by him/her, whereas copyright in the lyrics is protected as a literary work and vests with the lyricist. The lyrics sung by a singer in tune with the music composed, will be protected as a sound recording, and copyrights in such sound recording will vest with the producer, under the Copyright Act, 1957.

Now, you must be wondering, sound recording, musical work, cinematographic film and even dramatic, literary and artistic work are protected under the copyright regime. Then won't a singer who sang the song, will have copyrights over such a song?

A singer is a performer as defined under section 2(qq) of the Copyright Act, thus will have performer rights as laid down under Sections 38, 38A and 38B of the Copyright Act, 1957.

In the case of ***Neha Bhasin v. Anand Raj Anand,*** the court held that a performance recorded in a studio or amongst an audience, both will be regarded as a 'live performance' and an unauthorized commercial use of such performance would amount to an infringement of performer's right under the copyright regime.[166]

Provisions of 'Performer Rights' as under The Indian Copyright regime-

1. According to **Section 2(qq),** *'a **performer** includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance'.*
2. When a performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.[167] **Section 2(q) defines performance,** as any visual or acoustic presentation made live by one or more performers.
3. A performer has exclusive rights to record, reproduce, communicate, sell, offer for sale or broadcast his/her performance, without prejudice to rights conferred on authors.[168]
4. However, once by way of written agreement, a performer consents to the incorporation of his performance in a cinematograph film, he/she shall not, in the absence of any contract to the contrary, object to the enjoyment of the performer's right by the producer of the film. Nevertheless, the performer shall enjoy royalties on making performances for commercial use.[169] 'Commercial use' means the exploitation of the performers right by way of reproduction, issue of copies or distribution, communication to public including broadcasting and commercial rental of the cinematograph film[170].

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[166]*Performer' right under the copyright law. Access from - https://blog.ipleaders.in/performers-rights-under-copyright-law/*
[167]*Section 38 of the Copyrights Act, 1957.*
[168]*Section 38A of the Copyrights Act, 1957*
[169]*Section 38A(2) of the Copyrights Act, 1957*
[170]*Rule 68. Explanation 2 of the Copyright Rules, 2013*

5. Even after assignment of his rights either wholly or partly, a performer shall have moral rights to be claimed to be identified as a performer and to restrain or claim damage in respect of any distortion, mutilation or other modification of his performance, prejudicial to his performance.[171]

PERFORMING RIGHTS' LICENSING AND ROYALTIES

Did you know? Playing a copyrighted song in public or in any commercial establishment, for non private reasons, without obtaining a 'Performer's Right Clearance License', can amount to infringement of 'Performer's Right' under the Copyright Act.

Thus, performing or playing a copyrighted song in establishments like restaurants, clubs, concerts, radio, or via online streaming, would require a 'Performers' Right Clearance License/ Public Performance License' and a licensing fee/Royalty to be paid to the 'performer owner' or Performer's society/Copyright Society.

Royalties/Licensing fees are generally distributed/collected annually and varies according to the place or streaming source via which the performance is being utilized. It must be understood that simply purchasing a premium account for spotify or other online streaming app, won't qualify for 'Playing music/song legally in a commercial premises'. There are several factors upon which the Royalty rates depends upon, such as-[172]

i. Square feet measurement of the area/ establishment
ii. The capacity of capacity in an establishment
iii. Status of collection of cover charge
iv. Percentage of gross revenue and per song play (In case of radio stations and TV Broadcasts)
v. Paid or non-paid events
vi. Number of nights the music is played
vii. Whether the music played is for a non-music based programme or a music based programme, recorded or live

Copyright in a performance can be assigned by the performer, but the Right to Receive Royalties for the utilization of a performers' performance in any form cannot be waived off. It is a performer's ultimate right to receive royalty for the commercial exploitation of their performance. However, a performer cannot object to the enjoyment of the performer's right by the producer of the film if he/she agrees to the incorporation of his performance in a cinematograph film. The Right to Receive Royalties can either be assigned by the Performer to his/her Legal Heir or a Copyright Society for collection and distribution of Royalties.

Such licenses can be issued either by the copyright owner/perform themselves or by a Performer's Society registered as a 'Copyright Society'.

Copyright Societies protect the rights of copyright owners by ensuring fair and transparent grant of copyright licenses for the purpose of reproduction, performance and communication to the public.

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[171] *Section 38B of the Copyrights Act, 1957*
[172] *Can you play copyrighted songs in restaurants. access from- https://www.kashishipr.com/blog/can-you-play-copyrighted-music-in-restaurants/*

There are three registered 'Copyright Societies in India', namely-

1. The Indian Performing Right Society Limited (IPRS) - For the rights of Music Composers, Lyricists and Producers
2. Indian Singers Rights Association (ISRA) - Specifically for Performers' (Singers) Rights
3. Indian Reprographic Rights Organization (IRRO) - For Reprographic (photo copying) works

While the IPRS caters to protect the rights of a music composer, lyricist and producers, ISRA is one such Performer's Society which understands the creative input put in by the performers like the singers and was established in 2012, specifically for the protection of performing rights of 'singers'.

According to provisions 3 and 4 of section 18 of the Copyright Act, authors and composers have the statutory right to claim royalties for the utilization of literary and musical work as part of a sound recording or cinematograph films in any form by way of communication to the public, public performance, reproduction or broadcast, except the communication through a cinematographic film in a cinema hall. IPRS collects the royalties for such exploitation on behalf of the authors/lyricists and music composers, who are its members.

In the case of ***IPRS v. Vijay Verma and Anr.,*** IPRS claimed that a hotel in Ludhiana was playing copyrighted songs in its premises without acquiring a license or permission form. The Delhi High Court in its order dated 26th October, 2016 restrained the hotel owner from playing the music/songs in their premises or from allowing any other person to play music/songs in the hotel premises, without a licence or permission from IPRS or the copyright holders.

Indian Singer's Rights Association ("ISRA") is a registered Copyright Society under the Copyright Act, and functions to create Tariff Schemes, Royalty Rates and Royalty Distribution Schemes to protect the rights of performers/singers. The Society is authorized to collect and distribute royalties for the singers/performers who are the members of ISRA and has also made it mandatory to obtain a "Collection Clearance Certificate" for the purpose of making commercial use of a performance as attached in Appendix 1. More than 700 Singers and commercial performers of the Indian Film and Music Industry are the members of ISRA.

ISRA has tariff schemes with different Royalty Rates, applicable for the utilization of the performances of performers via 'Internet by way of on demand streaming services or a web radio', by 'Radio through broadcast', in 'Advertisements and commercials', via 'Music Streaming Service of Songs, Caller Ringback Tone, a Real/True-Tone and Sale/Download of Songs through Mobile/Cellular Networks' and utilization by way of 'broadcast over Satellite or TV Channels through TV Serials / Shows / Programs / Films'. Royalty rates are also applicable for utilization of such performances via audio-visual or audio streaming at places like, Airports, Airlines, Gyms, Hotels, Restaurants, Bars, DJ, Commercial Vehicles like Buses & Taxis, Dance Classes/Schools/Colleges, Railway Stations, Circuses, Clubs, Pubs, Workshops, Factories, Hospitals, Amusement Parks, etc .[173]

According to provision 52(1)(za) of the Copyright Act, 1957 the performance or communication of a literary, dramatic, musical work or a sound recording in the course of any religious ceremony including a marriage or marriage related functions or an official ceremony held by the Central or State Government or any local authority, will be an exception to copyright infringement under the Copyright Act.

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[173]*ISRA. Tariff Scheme. Access from- https://isracopyright.com/tariff_scheme.php*

Furthermore in accordance with exception to copyright infringement laid down section 52(1)(k)(i) of the act, music or recording heard/played in public as part of the non-profit activities of a club or similar organisation or played in an enclosed room or hall meant for the common use of residents in any residential premises, except a hotel or a commercial establishment, as part of the amenities provided exclusively or mainly for residents, would not amount to copyright infringement.

Use of a copyrighted musical, literary, dramatic works or sound recording and cinematograph films in the course of the activities of an educational institution, with a limited audience including staff, students, parents, guardians and other persons connected to the activities.[174]

Thus, no royalties need to be paid in case a copyrighted song is played in audio or audio-visual form through any means in a residential area, in official and religious ceremonies including wedding or social festivities related to marriage and in case of activities of educational institutions and non-profit activities of a club or organization.

ISRA has taken several initiatives for protecting the rights of its members. Since its inception in 2012, ISRA has taken various steps in protecting the performer's Rights of its members by way of initiating legal proceedings against infringers and issuing around 750 claim letters to several radio stations, web sites, hotels, restaurants, TV channels, production houses, mobile operators, sporting and DJ events.

In the case of ***ISRA v. CHAPTER 24 Bar & Restaurant***[175]**,** a suit for a permanent injunction was filed by ISRA against the defendants, 'CHAPTER 24 Bar & Restaurant' refraining them from communicating to the public the repertoire/playlist comprising of Performer's performances of all its members and that of the members of its sister societies, without paying royalties and obtaining a clearance certificate/license from ISRA or doing any act infringing the Performer's rights through any medium like Radio Stations, TV and usage by Mobile Companies and violating the Right to Receive Royalties and their Performer's Rights. The Delhi High Court upheld ISRA's suit by issuing a permanent injunction against 'CHAPTER 24 Bar & Restaurant' and held that, "The playing of songs by the Defendant in its restaurant without payment of royalty to ISRA was a violation of the 'Rights to receive royalty' of the performers who are members of the ISRA. The exploitation of the performances of the members by playing the said performances in its bar and restaurant without obtaining the Performer's Rights Clearance Certificate constituted an infringement of the 'Right to receive royalty' of the members of the Plaintiff Society.

In a similar case of ***ISRA v. Night Fever Club & Lounge***[176]**,** the Delhi High Court held that, *"The playing of songs by the defendant in its Lounge without payment of royalty to the plaintiff was in violation of the right to receive royalty of the performers, who are members of ISRA"* The court, thus refrained the defendants from communicating the playlist comprising of performers' performances without obtaining a licence/ clearance certificate from ISRA.

IMPLICATIONS UNDER TRIPS AND WPPT

Let's first understand the terms 'Fixation', 'Fixed Performance' and 'Unfixed Performance'

1. **Fixation-** Section 2 (c) of the WIPO Performances and Phonograms Treaty defines "fixation" as "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device" Thus, Fixation under the performers' right deals with the performer's 'economic Rights' such as, the right of distribution, reproduction, rental and the right of making available.

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[174] *Section 52(1)(j) of the Copyright Act, 1957*
[175] *CS (OS) No. 2068 of 2015*
[176] *CS (OS) 3958/2014*

2. **Fixed Performance-** The performance made which is fixed/converted into a sound recording is referred to as 'Fixed Performance'.

3. **Unfixed Performance** refers to live performance. It includes the performers' right of communication to the public (except where the performance is a broadcast performance), right of broadcasting (except rebroadcasting),and the right of fixation.[177]

Protection of Performers' Rights under the TRIPS agreement-

TRIPS is an acronym for Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is an international legal agreement between all the member nations of the World Trade Organization (WTO). It requires its member nations to adhere to the minimum standards for the regulation and protection ofdifferent forms of Intellectual property rights, such as copyrights and related rights, trademarks, patents, geographical indications (GIs), industrial designs, patents, integrated circuit layout designs, and Trade secrets/Undisclosed Information. India is a member state of the TRIPS Agreement.

Article 14 under Section 1 of the TRIPS Agreement deals with **"Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations"** which lasts for 50 years from the first fixation or performance [178].

Article 14(1) states that, "A Performer has the right to prevent unauthorized acts, in respect of a fixation of their performance on a phonogram(sound recordings), such as-

1. the fixation of their unfixed performance(Live Performances);
2. the reproduction of such fixation (Reproduction of the sound recording of a live performance)
3. the broadcasting by wireless means and the communication to the public of their live performance.

Protection of Performers' Rights under WPPT

The **WIPO Performances and Phonograms Treaty** (or **WPPT**) is an international multilateral treaty signed by the member states of the World Intellectual Property Organization. The Treaty was formed with the motive to create international uniformity in the protection of Performers' rights and the rights of the producers of sound recordings. India is a member state of WIPO and signatory to the WPPT.

According to article 2(a) of the WIPO Performances and Phonograms Treaty (WPPT), "performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore"

Chapter II of the treaty deals with the **'Rights of Performers',** which includes **Moral rights of the Performer, Economic Rights in Live Performances, Right of Reproduction (Article 7), Right of Distribution (Article 8), Right of Rental (Article 9), Right of Making Available of Fixed Performances (Article 10)**

CASE STUDY

ISSUE- 'Starry Night Club and Bar' took a subscription of Spotify Premium and played Bollywood songs in its commercial premises. ISRA a copyright society, filed a suit against the club for infringing performer's rights for playing the copyrighted songs of their 'performer owners' without taking a clearance certificate from ISRA and infringing the Right to receive royalty of the performers, who were the members of ISRA, a copyright society, established under the Copyright Act, 1957. Won't buying a premium account for Spotify be sufficient to play copyrighted songs, legally in a restaurant, bar or club?

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[177] *India: A Step Towards Protected India. Access from-*
https://www.mondaq.com/India/copyright/735452/a-step-towards-protected-India
[178] *Section 1. Article 14(5) of the TRIPS Agreement*

Explain with relevant judgments and provisions, whether playing the songs without paying royalties and obtaining a clearance certificate, would amount to infringement of performer's rights under the Copyright Act, 1957.

SOLUTION- According to section 38A of Copyright Act, 1957, a performer has exclusive rights to record, reproduce, communicate, sell, offer for sale or broadcast his/her performance, without prejudice to rights conferred on authors. The performer has the right to enjoy royalties on making performances for commercial use as mentioned under Section 38A(2) of the act. Copyright societies as under section 33 of the act, are established to set royalty rates, collect and distribute royalty/licensing fee for any commercial use of a performers' performance.

ISRA is **Indian Singer's Rights Association,** a registered Copyright Society under the Copyright Act, and functions to create Tariff Schemes, Royalty Rates and Royalty Distribution Schemes to protect the rights of performers/singers. The Society is authorized to collect and distribute royalties for the singers/performers who are the members of ISRA and has also made it mandatory to obtain a "Collection Clearance Certificate" for the purpose of making commercial use of a performance.

The Delhi High Court in two different cases filed by ISRA, (**ISRA v. Chapter 24 Bar & restaurant** and; ***ISRA v. Night Fever Club & Lounge),*** held that, The exploitation of the performances of the performers by playing the said performances in a bar/restaurant without paying the royalty and obtaining the Performers' Rights Clearance Certificate would constitute an infringement of the 'Performers' right' and their 'Right to receive royalty' of the members of the Plaintiff Society.

Furthermore, the author of the lyrics and the music composer also has the right to claim royalty for the utilization of the song in any form, including playing the songs in a commercial establishment like a pub or restaurant. Thus, royalty shall be paid and license or permission form shall be obtained from IPRS or the respective copyright owner for utilization of the underlying literary(lyrics) and musical work (music composition) in song.

Thus, playing the songs without paying royalties and obtaining a clearance certificate, would amount to infringement of performer's rights under the Copyright Act, 1957 and buying a premium account for Spotify won't be sufficient to play copyrighted songs, legally in a restaurant, bar or club.

Thus, Starry Night Club and Bar infringed the performer's right as under the Copyright Act, 1957.

KEY CONCEPTS

1. **Permanent injunction-** An injunction is a legal remedy in the form of a court order that compels a party to do or refrain from specific acts. A permanent injunction is the final order of the court through which it permanently restrains a party from doing certain acts or orders to take certain actions (usually to correct a nuisance) until completed.
2. **Repertoire-** It is a list or set of dramas, operas, musical compositions or roles which a company or person is prepared to perform.
3. **Phonogram-** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work; Sound recording is another term for phonogram
4. **Fixation-** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
5. **Broadcasting-** means the transmission by wireless means for public reception of sounds or of images and sounds;

APPENDIX-1[179]

INDIAN SINGERS' RIGHTS ASSOCIATION

818, 8th Floor, Crystal Paradise, next to Janki Centre, Link Road, Andheri (W), Mumbai-400 053.
Phone: +91 22 40104666 / 40123666 • Email: info@isracopyright.com • www.isracopyright.com

PERFORMER'S RIGHT TO ROYALTY ENTITLEMENT UNDER SECTION 38A OF THE COPYRIGHT ACT, 1957

COLLECTION CLEARANCE CERTIFICATE NO. _____

This is to Certify and Confirm that { Name and Address of the User } has complied with its statutory obligation under Proviso to Section 38A(2) of the Copyright Act, 1957, as amended by the Copyright (Amendment) Act, 2012 towards Performers Right Royalty /Fees for the commercial usage/exploitation /utilization & performance of the performance of the Performer Members of ISRA

at Venue :- **{Name of the Venue}**

through the mode and/or medium of:- **{Details}**

for the period:- **{Date(s)}**

{ Name and Address of the User } has made the payment of the said Royalties against Invoice No. _____ dated _____ through _____ on _____

For Indian Singers Rights Association

Authorised Signatory

Date:-

Conditions: 1. Submission is MUST of the list of Performances made/used/exploited/ utilized within Ten (10) days of the date of the Event/ period of clearance.

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[179] *Collection Clearance Certificate. access from: https://isracopyright.com/pdf/ISRA-Collection-Clearance-Certificate-C3.pdf*

CHAPTER 9

WORKS IN PUBLIC DOMAIN AND THE TERM OF COPYRIGHT

The term of copyright refers to the time-period of subsistence of copyright in a work. Work includes cinematograph film, sound recording and published literary, dramatic, musical and artistic works. Chapter V of the Copyright Act lays down provisions related to the term of copyright. The protection of the author's interest and creativity is considered to be of utmost importance, thus the term of copyright is fixed for expeditiously long terms so as to encourage creativity amongst authors. The term of copyright in a work ensures balance between the author's and public's interest. Once the term of copyright in a work ends, such work falls under the Public Domain.

The term of copyright under the Copyright Act, 1957, varies with respect to the nature of work -

I. Published literary, dramatic, musical and artistic works (Section 22)

Copyright in any literary,dramatic, musical and artistic work, subsists for the lifetime of an author and sixty years from the beginning of the calendar year next following the year in which the author dies. In case of joint authorship, the term of copyright in a work will vary according to the author who dies last.

II. Anonymous and pseudonymous works (Section 23)

Term of copyright in literary, dramatic,musical or artistic work (other than a photograph) published anonymously and pseudonymously, shall subsist until sixty years from the beginning of the calendar year next following the year in which the work was first publication. In case the identity of the author in an anonymous or pseudonymous work is disclosed before the expiry of the said period, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the author dies.

III. Posthumous work (Section 24)

A work published, post the death of an author is known as a posthumous work. Subsistence of copyright in a literary, dramatic, musical work or an engraving, or an adaptation of such work, published post the death of the author will be sixty years from from the beginning of the calendar year next following the year in which the work is first published or, where an adaptation of the work is published in an earlier year, from the beginning of the calendar year next following that year.

IV. Cinematograph films (Section 26) and Sound Recording (Section 27)

In the case of a cinematograph film and Sound Recording copyright shall subsist until sixty years from the beginning of the calendar year, next following the year in which the cinematograph film / sound recording is published.

V. Government works. (Section 28)

In the case of Government work, where Government is the first owner of the copyright therein, copyright shall subsist until sixty years from the from the beginning of the calendar year next following the year in which the work is first published.

VI. Works of public undertakings. (Section 28A)

In the case of a work, where a public undertaking is the first owner of the copyright therein, copyright shall subsist until sixty years from the first publication of the work

VII. Works of international organisations.(Section 29)

In the case of a work of an international organisation, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published

VIII. Broadcast Reproduction Right (Section 37(2))

Broadcast reproduction rights shall subsist until 25 years from the the beginning of the calendar year next following the year in which the broadcast is made

IX. Performer's Right (Section 38(2))

The performer's right shall subsist until fifty years from the beginning of the calendar year next following the year in which the year in which the performance is made.

PUBLIC DOMAIN

Public Domain refers to the space where works are not protected by intellectual property rights like copyrights, patents and trademarks.

In case of Copyrights, a work is considered to be in the public domain, under the following conditions-

1. The term of copyright protection in a work expires

Under the Indian law, copyright in a literary, dramatic, musical and artistic work lasts for the lifetime of the author and 60 years additionally post the author's death. In case of performer's right, sound recordings, cinematographic films, public undertakings, works of Indian government and international organization, copyright subsists for a period of 60 years from the year of first publication. The Broadcast reproduction rights last for 25 years from the year of first broadcast.

Once the term of copyright in a work expires, the work moves out of the shell of protection into the public domain, where the contents of the expression of such work can be freely utilized, by any third person, without obtaining a license or consent from the original copyright owner, for commercial or non-commercial purposes. For Instance, a book on historical facts can be freely utilized by an institute or individual by way of distributing copies of the work, scanning, exhibiting and digitising the work, without seeking permission or obtaining license from the legal heir or representative of the author. Publishers can create new editions of a book and Producers can make adaptation of a movie from underlying public domain source material available, without worrying about copyright infringement, once the term of copyright in such works expire [180].

For Example- The term of copyright in bollywood movies like Mughal-e-azam and Hum Hindustani released in the year 1960 have now expired and are in public domain. Thus, making a remake of such films without obtaining a valid license, would not amount to copyright infringement.

The duration of the term of copyright in different works protected under the copyright regime, differs from country to country.

According to the Berne Convention, the term for copyright protection exists for the author's lifetime plus at least fifty years post author's death. The minimum duration of copyright protection in some

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[180] *Copyright and the Value of the Public Domain- WIPO. Access from- https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_econ_ge_1_15/wipo_ip_econ_ge_1_15_ref_erickson.pdf*

genres of works is comparatively shorter. For example, the minimum term of copyright protection in the case of 'movies' is for fifty years while the term for 'applied arts' is for twenty five years according to the Berne Convention. Many countries have gone beyond the minimum period of fifty years and have extended copyright protection up to sixty to seventy years. Few nations have extended the protection even beyond seventy years for certain categories of work. Mexico for instance has the lengthiest term for copyright protection, which exists for author's lifetime plus hundred years post the death of author.[181]

Unlike India and majority of other countries, the duration of copyright in films in United Kingdom, lasts for the lifetime of the principal director, the author of the screenplay, the author of the dialogue, and the composer of music specially created for and used in the film, plus 70 years post the death of the one who dies last amongst the director, music composer of the film or authors of screenplay or dialogue.[182]

Did you know, The Disney movies like 'Cinderella', 'Frozen', 'Beauty and The Beast', 'The Sleeping Beauty', 'Alice in the Wonderland' and many others, are based upon stories in the public domain. 'Frozen' was inspired from Hans Christian Anderson's story, 'Ice Queen (1845)', while the movie 'Alice in the Wonderland' and 'Cinderella' are based upon the story, 'Alice's Adventures in Wonderland' by Lewis Carroll and 'Charles Perrault's folk tale (Grimm's Fairy Tails) (1697)', respectively.[183]

So, you can create another movie inspired from the characters and events of an original tale in the public domain. However, Disney's take on an original tale by creation of a cinematograph film, sound recordings and musical, literary and artistic works, will be subject matter of copyright until such work goes into the public domain, post expiration of the term of copyright.

However, Disney cannot claim copyright infringement against other producers for making and releasing films inspired by an original tale already in the public domain. For Instance, Walt Disney's live action movie 'Cinderella' released in 2015 and Columbia Pictures and Fulwell 73's Amazon Original Movie 'Cinderella' are both based upon the fairy tale 'Cinderella' by Charles Perrault and are respectively copyrighted cinematographic films.

Nonetheless, if someone substantially copies Disney's take on 'Cinderella' and such other movie is nothing but a literal imitation of the copyrighted work with minor variations and there is an unmistakable impression after viewing both the films that the other work is a copy of the Disney's Cinderella, then it would amount to copyright infringement.[184]

Mickey Mouse is the world's most recognizable fictional character and the brand mascot of the Walt Disney Company. The Walt Disney Company's founder and president, Mr. Walter Elias Disney along with the cartoonist Mr. Ub Iwerks, created the famous cartoon character 'Mickey Mouse' in the year 1928. Since his Birth, Mickey has been dearly protected by the Walt Disney Company.

When Mickey made its first appearance in the animated short film 'Steamboat Willie' in 1928, it was protected under the Copyright Act of 1909 under the United States Statutory Copyright law.

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[181]List of countries' copyright lengths. Access from- https://en.wikipedia.org/wiki/List_of_countries%27_copyright_lengths
[182]Section 13B of The Duration of Copyright and Rights in Performances Regulations 1995
[183]Disney Movies based on the public domain. Access from- https://www.forbes.com/sites/derekkhanna/2014/02/03/50-disney-movies-based-on-the-public-domain/?sh=49ea9be329ce
[184]RG Anand v. Deluxe Films.1978 (4) SCC 11

According to the 1909 Copyright Act, the term for copyright protection existed for 'fifty six' years after the first publication, which meant that Mickey's protection under the copyright law would have ended the year 1984. Thus, to stop 'Mickey's' first incarnation in 'Steamboat Willie' from leaving Disney and entering the 'Public Domain'. The Walt Disney Company lobbied legislatures to have Mickey Mouse's copyrights extended. The enactment of the Copyright Act, 1976 replaced the 1909 act, extending Mickey's life from fifty six years to seventy five years, buying 'Mickey' additional nineteen years until the year 2003. However, the Walt Disney Company wanted additional years for its famous mouse, so the company started lobbying the US Congress, a legislature of the federal government of the United States, and succeeded yet again.[185] The Copyright Term Extension Act (CTEA) of 1998, also known as 'The Mickey Mouse Protection Act' and the 'Sonny Bono Act' was enacted which extended the term of corporate copyrights from seventy five years to 95 years, thus bestowing Disney's 'Mickey Mouse' with copyright protection until 1st January, 2024. Thus, Mickey mouse's original incarnation in 'Steamboat Willie' will go under 'Public Domain' in the year 2024. Nonetheless, The later incarnations of Mickey Mouse will still be a subject matter of Copyright and an Intellectual property of the Walt Disney company.[186] For Instance, the first coloured Mickey Mouse, who made his appearance in the 1935 animated short film, The Band Concert and the Mickey in the 1935 film series *On Ice* will be Disney's copyright until 2031. While the incarnation of Mickey in the film *Fantasia* released in 1940, won't go into the public domain until 2036. Mickey has gone through various changes throughout the years, and it becomes necessary to carefully analyse significant changes in the incarnations of 'Mickey' so as not entangle with Disney's existing copyrights.

2. Works not Copyrightable

Certain works or things which are not copyrightable, are also included in the 'Public Domain'. For Instance, news, facts, general knowledge, historical facts, current events, current affairs, folk tales, mythology, religious texts, scientific discoveries, common sayings and elements, etc, are not copyrightable and hence forms part of the 'Public Domain'.

It is evident that, 'idea per se' is not copyrightable. However, the creative expression of an idea based upon facts, myths, folklore, common elements, etc, will be subject to copyright protection.

In the case of ***J.K. Rowling and Ors. v Uitgeverij Byblos*** [187], 'Rowling' along with 'Warner Bros.' filed a case against a Russian author 'Dimitry Yemets', prohibiting distribution of 7000 copies of his book entitled 'Tanja Grotter and the Magic Double Bass', which had a striking resemblance with 'Harry Potter and the Philosopher's Stone'. 'Dimitri Yemets' argued that Rowling used several elements in her book which existed in the public domain, like children with magical powers, an orphan child, magical objects, flying broomsticks, etc, which were also used in the Tanja Grotter book and that common ideas and elements in the public domain and a plot or storyline does not fall under the ambit of copyright protection. However, the Dutch Court ruled against 'Dimitri Yemets' and in favour of J.K. Rowling and held that, 'Dimitri Yemet's book was an adaptation of Rowling's book and there was a high degree of similarity between the two books, thus Dimitri Yemet's work cannot be considered to be a new and original work as under Article 13 of the Dutch Copyright Act 1912'. On the argument w.r.t., elements taken from 'Public Domain', the court went on and stated that, 'The use of elements from the public domain by 'Rowling' in her book cannot diminish the fact that the storyline was well developed and her work is subject to copyright protection.'[188]

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[185] *The Fight to Continue Mickey Mouse's Copyright. Access from- https://thecourtroom.org/the-fight-to-continue-mickey-mouses-copyright/*

[186] *Mickey mouse and the changing copyright law : an analysis. Access from- https://blog.ipleaders.in/mickey-mouse-changing-copyright-law-analysis/*

[187] *BV [2003] ECDR 23 S J. A. Rullman*

3. **Permitted uses of works through Open Source Licences and Creative Commons** Copyrighted works such as research papers, articles, youtube videos, etc, offered to the public by an unrestricted licence, such as an open access license, like Creative Commons (CC) licensing systems, also falls under the public domain, where users can access, distribute, share and build upon the materials available to the public.

   Example- Wikipedia, is a free encyclopedia, supplied by volunteer contributors, which can be used for commercial and non-commercial use alike. Being an important global resource, Wikipedia in itself is emblematic of the digital public domain. The availability of photographs and illustrated material in the public domain (either due to copyright term expiration or open and unrestricted licensing) potentially benefits Wikipedia platform.[189]

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   A Creative Commons (CC) license is copyright license which enables free distribution and access of a copyrighted "work" thus giving the public the right to freely use, share or build upon the author's original work, on the condition that the author is acknowledged for his work[191]

CASE STUDY

ISSUE: Keppy Rogers created a book entitled 'Garry's Adventure' which had a striking resemblance with J.K. Rowling's 'Harry Potter', wherein there was a strong resemblance between the two main characters and the structure (prologue, plot, headway, climax, anti-climax and ending) of both stories. Aggrieved by the act of Keppy Rogers, J.K. Rowling filed a case of copyright infringement against Keppy Rogers. Keppy Rogers argued that J.K. Rowling used several elements in her book which existed in the public domain, like children with magical powers, an orphan child, magical objects, flying broomsticks, etc, which were also used in the Garry Adventure book and that common ideas and elements in the public domain and a plot or storyline does not fall under the ambit of copyright protection.

Decide with the help of a relevant judgment, whether Keppy Rogger's act of developing a story on the same plot and storyline, using similar elements present in the public domain would amount to copyright infringement.

SOLUTION: Copyright does not protect ideas but it does protect the creative expression of ideas taken from elements present in the public domain. However, writing and publishing a book which had a striking resemblance with another in terms of the plot, headway, ending, prologue, characters and theme, in short the basic structure itself, would be an act of copyright infringement.

In the case of ***J.K. Rowling and Ors. v Uitgeverij Byblos***[192]***,*** 'Rowling' along with 'Warner Bros.' filed a case against a Russian author 'Dimitry Yemets', prohibiting distribution of 7000 copies of his book

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[188]*Harry Potter Duels Tanya Grotter: The Magic of International Copyright. access from- https://blogs.princeton.edu/cotsen/2018/06/tanya-grotter-and-the-magic-of-international-copyright/*
[189]*Wikipedia, the free encyclopedia. access from- https://en.wikipedia.org/wiki/Wikipedia:The_Free_Encyclopedia#:~:text=The%20subtitle%20of%20Wikipedia%20is%20the%20free%20encyclopedia%20that%20anyone%20can%20edit.* '
[190]*https://www.elsevier.com/about/policies/pricing*
[191]*Creative Common License. Access from- https://en.wikipedia.org/wiki/Creative_Commons_license*
[192]*BV [2003] ECDR 23 S J. A. Rullman*

entitled 'Tanja Grotter and the Magic Double Bass', which had a striking resemblance with 'Harry Potter and the Philosopher's Stone'. 'Dimitri Yemets' argued that Rowling used several elements in her book which existed in the public domain, like children with magical powers, an orphan child, magical objects, flying broomsticks, etc, which were also used in the Tanja Grotter book and that common ideas and elements in the public domain and a plot or storyline does not fall under the ambit of copyright protection.

However, the Dutch Court ruled against 'Dimitri Yemets' and in favour of J.K. Rowling and held that, 'Dimitri Yemet's book was an adaptation of Rowling's book and there was a high degree of similarity between the two books, thus Dimitri Yemet's work cannot be considered to be a new and original work as under Article 13 of the Dutch Copyright Act 1912'. On the argument w.r.t., elements taken from 'Public Domain', the court went on and stated that, 'The use of elements from the public domain by 'Rowling' in her book cannot diminish the fact that the storyline was well developed and her work is subject to copyright protection.'

Thus, it can be concluded that Keppy Rogger's act of developing a story on the same plot and storyline, using similar elements present in the public domain would amount to copyright infringement.

KEY CONCEPTS-

1. **Copyright infringement-** Copyright infringement refers to the unauthorized use of someone's copyrighted work.
2. **Lobbying-** The practice of promoting, opposing, or in any manner influencing or attempting to influence the introduction, amendment, repeal or enactment of legislation before any legislative body
3. **Legislation-** the process of making or enacting laws.

CHAPTER 10

EXCEPTIONS AND LIMITATIONS OF COPYRIGHTS

There are certain limitations and exceptions under the copyright regime, which under certain conditions imposes limitations on the economic rights of the copyright owner, wherein the protected work may be used with or without payment of a compensation to the right holder or without taking an authorization from the copyright owner. Such limitations exist so as to create and maintain an appropriate balance between the public interest and the rights of copyright holders. The limitations and exceptions to copyrights are country specific, varying with respect to the economic, social and historical conditions of the country in question. International treaties such as the Berne Convention, Rome Convention, TRIPS Agreement, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty provides general provisions related to the application of exceptions and limitations of copyrights, wherein application and determination of the exact scope of such general provisions are left to be decided by the specific countries / national legislators.[193] For Instance, Article 13 under section 1 of the TRIPS Agreement dealing with Copyrights and Related Rights, lays down that, "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

The Rome Convention allows certain free uses of copyrighted works compatible with fair practice, as specified under its Articles 10 and 10bis, as follows-

1. Quotations available to public, including quotations from newspaper articles and periodicals in the form of press summaries
2. Illustrations in publications, broadcasts or sound or visual recordings for teaching (The extent of such use is determined by specific national legislation of country implementing the provision)

   Note: Use of such works (quotations and illustrations) shall be made subject to citing the source and name of the author.
3. Reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire
4. Reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character.

   Note- The conditions for the reporting of current events and permitting reproduction of articles published in newspaper or periodicals, is subject to the country-specific national legislation. The sources of such articles shall be clearly mentioned to avoid breach.

STATUTORY EXCEPTIONS OF COPYRIGHT INFRINGEMENT & FAIR DEALING

The term 'statutory' refers to the laws or rules which have been written down formally[194] in a statute. An exception which is provided for or recognized in the statute / law / Act itself is known as a 'statutory exception'. A statute is the law written down formally by the legislative branch of the government[195] .

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[193] *Limitations and Exceptions. Access from- https://www.wipo.int/copyright/en/limitations/*
[194] *Statutory. Access from - https://www.collinsdictionary.com/dictionary/english/statutory*
[195] *Statute. Access from- https://www.merriam-webster.com/dictionary/statute*

A copyright owner has exclusive right to do or authorize certain acts such as, reproduce, issue copies, assign, license and communicate the work to the public, make adaptation and translation of his work, etc. Every class of work allows the copyright owner to have specific exclusive rights over his work. For instance, a copyright owner has the right to make or authorize the making of a cinematograph film or sound recording in respect of the Literary, dramatic and musical works. Section 14 of the act lays down a copyright owner's exclusive rights.

According to Section 51 read with section 14 of the Copyright Act, the unauthorized act of invasion of the exclusive rights held by the copyright owner by way of reproducing, making copies, storing, selling or offering for sale or communicating the work, without obtaining consent or license from the owner, would amount to copyright infringement. The Infringement of copyright is punishable with a fine which may extend to Rupees two lakhs and maximum imprisonment of three years. A civil suit can also be initiated in order to obtain an injunction against such copyright infringement.[196]

However, there are certain acts which are statutory exceptions to copyright infringement. Some uses of the copyrighted work or acts done by a third person, do not require the third person to obtain permission or license from the owner, thus creating limitations on the exclusive rights normally granted to the owners of copyright and are known as "exceptions and limitations" to copyright.[197]

Fair Dealing/Fair Use- The limitations and exceptions imposed on the exclusive rights granted to the copyright owner under the copyright laws, is known as the Doctrine of 'Fair-Dealing/Fair Use'.

There are four factors which define the fair nature of the dealing-

1. Purpose of use;
2. Amount of the work used,
3. Nature of the work; and
4. Effect caused by use on the original work

One must note that, even though the terms 'fair dealing' and 'fair use' are used interchangeably, the term 'Fair Dealing' is prevalent in India and the UK, while countries like the USA use the term 'Fair Use'.

Even though the term, 'Fair Dealing' is not defined under the Copyright Act, 1957, the concept of 'Fair dealing' is applied as under section 52(1)(a) of the Copyright Act, 1957.A fair dealing with any work would not amount to a copyright infringement if done for the following purposes-

1. Private or personal use, including research
2. Criticism or review
3. The reporting of current events, current affairs and a lecture delivered in public

Further, storing any work in electronic medium for the purpose of private/personal use, research, criticism, review, delivering lecture and reporting of current affairs and events will also not amount to copyright infringement.

Section 52 of the Copyright Act, further elaborates other exceptions to copyright infringement, which includes, 'the reproduction of any work for the purpose of a judicial proceeding', 'the reading or recitation of reasonable extracts from a published literary or dramatic work in public', 'the reproduction of any work by a teacher or a pupil in the course of instruction or as question to be answered in an

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[196] *Online Movie Piracy. Access from- https://www.globalpatentfiling.com/blog/online-movie-piracy-combating-%E2%80%98rogue%E2%80%99-and-%E2%80%98hydra-headed-rogue%E2%80%99-websites*

[197] *Limitations and Exceptions. Access from- https://certificates.creativecommons.org/cccertedu/chapter/2-4-exceptions-and-limitations-to-copyright/*

examination', 'performance made in the course of the activities of an educational institution', 'Recording heard in residential premises, or as part of club or other non-profit activities', 'the making or publishing of a painting, drawing, engraving or photograph of a work of architect', 'making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work, permanently situated in a public place', etc.

EXCEPTIONS RELATED TO COPYRIGHTABILITY AND INFRINGEMENT OF COMPUTER PROGRAMMES AS A LITERARY WORK

A computer programme is 'a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result[198], protected as a literary work under the Copyright Act, 1957.[199]

Exception to Copyrightability of Computer Programmes

Computer programme is a literary work copyrightable under the Copyright Act. However, since computer programmes carry technical effect with it, the question of its patentability has been debated since ages.

According to Section 3(k) of the Patents Act, 1970, Computer Programmes per se is not patentable. However, the term 'per se' was inserted post the Patents (Second Amendment) Bill, 1999 in order to ensure that the computer related inventions were not rejected patent protection, as clarified in a report of Rajya Sabha on the Patents (Second Amendment) Bill, 1999.

The term 'per se' means in itself or intrinsically. Thus, the interpretation of Computer Programmes 'per se' would be, a computer programme itself and alone and not the computer programmes which are developed further and might include other things, like technical effect and technical contribution.[200]

The Delhi High Court's cutting edge judgment in the case of ***Ferid Allani v. Union of India***[201] laid down that, the computer programmes with technical effect and advancement are patentable under the patents act, 1970.The Court in this case acknowledged the fact that, the word, 'per se' was included in order to ensure that the inventions developed and based on computer programmes is not restricted or withheld from protection as patentable inventions and further held that, "the bar on patenting was with 'computer programs per se' specifically and not on all inventions based upon computer program. Thus, when an invention demonstrates a 'technical effect' or a 'technical contribution' it is patentable, even though based upon a computer program.

Thus, even though computer programs are literary work protected under the Copyright Act, 1957, In case a computer programme includes things developed further and demonstrates a technical effect or technical contribution, then it is eligible to be patentable under the Patents act, 1970.

Exception to Infringement of Computer Programmes

A copyright owner of a computer programme has the exclusive rights specified under Section 14(b) of the Copyright Act, which includes reproduction, making copies, communicating the work to the public, making adaptations, and selling or giving on commercial rental or offer for sale. Doing any act specified as exclusive rights of the copyright owner, without authority would amount to copyright infringement.

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[198] *Section 2(ffc) of the Copyright Act, 1957*
[199] *Section 2(o) of the Copyright Act, 1957*
[200] *Patentability Of Computer Programmes With Technical Effect & Contribution: In Light Of FeridAllani v. UOI https://www.mondaq.com/India/patent/897160/patentability-of-computer-programmes-with-technical-effect-contribution-in-light-of-feridallani-v-uoi*
[201] *W.P.© 7/2014 and CM APPL. 40736/2019*

Furthermore, A knowing use of infringing copy of computer programme is an offence under the copyright law punishable with imprisonment for a term extendable upto three years and with a maximum fine of two lakh rupees. In case an infringing copy of a computer programme is not used in the course of trade, business or commercial gain, the court may not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees [202].

However, according to Sections 52(1)(aa), 52(1)(ab), 52(1)(ac) and 52(1)(ad) of the Copyright Act, the following acts do not amount to copyright infringement of computer programmes as literary work-

1. the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme for the purposes such as-
   i. Utilization of the computer programme for which it was supplied
   ii. Making back-up copies purely as a temporary protection against loss, destruction or damage
   iii. Obtaining information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme, in case such information is not otherwise readily available
   iv. the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underlie any elements of the programme
2. the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use

CASE STUDY

ISSUE: Mr. Addy developed a "device for accessing information sources and services on the web" based upon computer programmes and applied for grant of patent. His application was rejected since the computer programmes are subject matter of copyright and protected as a literary work under the Copyright Act, 1957 and does not constitute to be a patentable invention as defined in Section 3(k) of Patents Acts 1970. Mr. Addy claimed against the rejection of his application for a patent for the invention. He contended that his invention was not a mere software which is simply loaded on to a computer. It requires a particular method of implementation and is accompanied by technical effect and technical contribution.

Explain with the help of a relevant judgment, Can Computer Programmes which is a subject matter of copyright be patented and whether Mr. Addy's invention, if accompanied by technical effect and technical contribution, would be sufficient to be accepted as a patentable invention?

SOLUTION- Section 3(k) of the patents act, 1970 restricts 'computer programme per se' from getting patented, since computer programmes as literary work is a subject matter of copyright under the Copyright Act, 1957.

The term 'per se' means in itself or intrinsically. Thus, the interpretation of Computer Programmes 'per se' would be, a computer programme itself and alone and not the computer programmes which are developed further and might include other things, like technical effect and technical contribution.

The Delhi High Court in the case of ***Ferid Allani v. Union of India,*** stated that,

"Innovation in the field of artificial intelligence, blockchain technologies and other digital products would be based on computer programs, however the same would not become non- patentable inventions -

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[202]*Section 63B of the Copyright Act, 1957*

simply for that reason. It is rare to see a product which is not based on a computer program. Whether they are cars and other automobiles, microwave ovens, washing machines, refrigerators, they all have some sort of computer programs in-built in them. Thus, the effect that such programs produce, including in digital and electronic products is crucial in determining the test of patentability."

The court finally held that, ***"If the invention demonstrates a technical effect or a technical contribution it is patentable even though it may be based on a computer program."***

Therefore, in the issue above, Mr. Addy's invention, even though based upon computer programme, if demonstrates a technical effect or technical contribution, would be a subject matter of patent protection under Patents act, 1970. Such inventions based upon computer programmes if patentable as an 'invention' would then fall outside the realm of copyright protection as 'Literary work'.