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INTRODUCTION

What is copyright? An arrangement creator in the United States will answer that copyright is an instrument of buyer government assistance, animating the creation of the most stretched out conceivable exhibit of abstract and imaginative works at the least conceivable cost. A specialist on the European landmass will say that copyright is, best case scenario watered-down adaptation of creator's correct - that great common-law custom that puts the creator, not the customer, at the focal point of insurance. The individuals who contend against copyright assurance will tell that copyright is an imposing business model that, unfortunately, infers up the cost of the merchandise in the commercial center. A high protectionist of copyright may react that copyright is a property right no more, no less - and one without which we would have not very many inventive works in the commercial center. A US tirade authority will tell that copyright is one of the most grounded net supporters of the country's equalization of hade. A teacher in a creating nation will answer that copyright is the thing that holds up the traffic of getting reading material under the control of his understudies. An anthropologist may state that copyright is the image of a country's way of life desires.

Going up against this welter of rivalry points of view, Professor Lyman Patterson saw that the essential and proceeding with the shortcoming of copyright law is the "nonappearance of basic standards for copyright." It appears that the cynicism of the educated researcher isn't right since there exists a connecting perspective on copyright, a view that accommodates most if not the entirety of the opposition antiphonies, and one that offers a sound remedy for the open arrangement too. Under this view, it recommended that copyright isn't tied in with ensuring creators or distributors, nor is copyright independently about making sure about creators' government assistance or purchaser's government assistance. Copyright isn't linked in with supporting global exchange adjusts, nor is it about ensuring craftsmanship, high or low. Copyright is about none of these things, and the copyright is pretty much every one of them.

Copyright, in a word, is about initiation. Copyright is something related to supporting the states of inventiveness that empower a person to make out of nowhere, and exceptional, eating up work. Copyright is as much about the pages of erased content, the scenes that lie on the cutting room floor, for what it's worth about the refined work, the last, cut, that eventually arrives at the creator's open. Be that as it may, copyright and origin - are just to some degree about the

demonstration of creation. If creation is all there was to source, copyright could serenely disregard the creator jotting in his far away garret. Origin, in its contemporary sense, infers a creator, yet a crowd of people; words were spoken, yet people addressed.' By initiation, is implied creators conveying as straightforwardly as conditions permit with their target groups. Copyright continues the very heart and quintessence of start by empowering this correspondence, this association. It is copyright that makes it feasible for crowds - markets - to frame for a creator's work, and it is copyright that makes it possible for distributors to put up these works for sale to the public.

Nothing can with more prominent legitimacy be known as a man's property than the products of his mind. The property in any article or substance gathering to him because of his mechanical work is never denied him; the work of his psyche is no less strenuous and, therefore, no less deserving of the insurance of the law. In any case, since copyright in the cutting edge structure is a relatively late legitimate idea and long and productive times of Western human advancement have existed without it. The inquiry which, in this way, emerges is; what is the legitimization for a copyright framework?

Four significant contentions can progress for copyright law. In the first place, the creator is the maker or producer of the work, which is the statement of his character. He ought to have the option to choose whether and how his job is to be distributed and to forestall any injury or mutilation of his scholarly posterity. The creator, similar to some other laborer, is qualified for the products of his endeavors. The eminences he is paid for are the wages for his scholarly work. Besides, in the cutting edge world, intense speculation is expected to make the making of specific practices, for example, works of engineering or movies, conceivable. As the reason for the production of for all intents and purposes all works is to make them accessible to people in general, that procedure as well, for example, production and conveyance of books or records is costly. These speculations won't be made except if there is a sensible desire for recovering them and making sensible benefits. Besides, the convention of unfair enhancement may become possibly an essential factor if the individuals who make inventive commitments out and about of the work from its maker to its client, were not redressed. Thirdly, the works delivered by makers structure an extensive national resource. Thus, the consolation and the compensating of innovativeness are in the open enthusiasm as a commitment to the advancement of the national

culture. At long last, the scattering of attempts to vast quantities of individuals produces connects between classes, racial gatherings, and age gatherings and, along these lines, makes for social attachment and makers in this way render social assistance. On the off chance that the thoughts and encounters of a maker can be shared by a wide-open inside a short space of time, they add to the improvement of society.

MAJOR SYSTEMS OF COPYRIGHT

1. The Droit d' Auteur of Civil Law Systems

. These are individualistic. The privilege in the work springs from the demonstration of individual creation, the work is a piece of the character of the creator and stays connected to him for a mind-blowing duration. It is a human right with unusually strict suggestions. In the details of the Droit d' auteur at the center stage is the work. It is the formation of the writer's brain and is scholarly and spiritual until it is fixed recorded as a hard copy or some other substantial structure. The obsession is the physical epitome of that work, for example, a book or a road of music which its proprietor can utilize, a loan or sell however he sees fit some other property

2. The Common Law or Copyright Systems

The philosophical establishment of copyright rather than the Droit d' auteur is humbler. It is the option to forestall the replicating of natural material, and its item is to secure the proprietor of the copyright against any generation or utilization of that material which he has not approved. Copyright, in its substance, is a negative idea. It is the option to keep individuals from managing something that is yours and has been inappropriately taken by somebody. Copyright, as the word recommends, was in its cause an option to forestall replicating, that is multiplication.

3. The Socialist System

The law of the recent U.S.S.R. depended on the communist convention, which underlined the social significance of the creator however asserted that he could truly work on the off chance that he spoke to and portrayed the thoughts and the life of a communist society. Copyright was viewed as an instrument for the administration of standard procedure.'" As the enthusiasm of culture, all in all were principal and, in this manner, won in the circumstances where that intrigue collided with that of the creator, the financial privileges of the individual creators were viewed as

less significant, yet a portion of the moral rights of the creators like the privilege of paternity and the privilege of the respectability of the work were defended. The production and spread of the work were in the hands of state distributing houses, firm organizations, phonogram organizations or theaters, and the determination of what works are scattered was made by them under state control. This gives a few similitudes with the arrangement of benefits in eighteenth-century Europe and offers with it the nearby partiality between the idea of copyright and state restriction.

In the previous U.S.S.R, open execution of copyright works by the broad communications, principally communicating, and the film was liberated from the installment of copyright, just like the press. Different exhibitions out in the open were dependent upon a mandatory permit giving the creator a privilege to evenhanded compensation and the equivalent applied to the creator's chronicle right. Then again, the term of copyright was stretched to consent to the Universal Copyright Convention.¹⁶ Most of the other some time ago Socialist Countries are individuals from the Berne Union and have current laws which possess a center ground between the previous Soviet Union and Western Europe.

HISTORICAL ACCOUNT OF COPYRIGHT LAWS

The original realized copyrights showed up in Renaissance Italy. Before the finish of the 1460s the art of printing had been presented in Rome and Venice, and, with the issuance of a progression of benefits identifying with books and printing by the Venetian Cabinet, Senate, and other legislative bodies, during 1469-1517, that city immediately expected the lead in Italian printing. These benefits included importation establishments the first, in 1469, granted the German printer Johan of Speyer the excellent benefit to direct all imprinting in the city for a long time as a byproduct of building up the specialty. In late medieval beginnings, the copyright benefit had nothing to do with the consolation of scholarly inventiveness or creativity of articulation. Privileges of intellectual property, including distributed works, remained lawfully unprotected in Europe until the fifteenth century when the presentation of the print machine made the prizes of distributing or copyright infringement far more prominent than any time in recent memory. The innovation of printing likewise changed the financial matters of the replicating industry, by generously expanding the divergence between the expense of the first printed duplicate and the unit expenses of resulting duplicates. Copyright law, from its birthplaces, has been formed more by the financial aspects of "production" than by the financial

matters of "initiation." The benefit framework spread to all pieces of Italy, at that point to Germany, lastly to England, where the principal benefit given in 1504. As the printing business turned out to be increasingly prosperous, a new guideline was required to understand its unique objectives. Benefits were given distinctly for new books and were pulled back if the book was not printed inside one year of the issuance of the benefit. Also, the expanding production of the book business was joined by duplicating free-riding conduct. Duplicating of this nature was seen as a break of the open request and was consequently endorsed by a fine that was payable to the specialists. Progressively ordinary were the copyrights given to editors and distributors for singular works composed by others; these were trivial imposing business models, denying production of the work without the authorization of the grantee. Distributors were before long rushing to the legislature to save notable titles for themselves, in the desire for either distributing themselves or offering the privilege to another printer sometimes not too far off; in 1517 the subsequent deficiency of available titles made the Senate repudiate all such copyright benefits from this time forward to new and beforehand unprinted works. There before long followed imposing business models as selective licenses to print or sell a whole class of books for a stipulated term; denials of the importation of books printed abroad; licenses for the improvement of printing and typography. The first general copyright law on the planet came as a pronouncement gave by the Council of Ten in Venice in 1544-45, denying the printing of any work except if composed authorization from the creator or his immediate beneficiaries had been submitted to the state yet no arrangement was made to keep up a register of ensured works. This progression was incited by the proceeded with unapproved printing of works for which copyrights had been allowed. A further measure coordinated toward progressively complete guidelines of the printing industry came in 1548-49, with a Council order building up a group into which every one of Venice's printers and book retailers were to be composed. All through Europe, imported books, flyers, and pictorial material were liable to reproducing and deal without pay for their originators. In England, copyright was, in any case, just a syndication establishment conceded to control the matter of printing and distributing. It had nothing to do with the consolation of "opportunity of articulation," nor was it proposed to advance initiation essentially. By the by, while copyright was cornered by the printers of the Stationers' Company, creators in England had individual property rights in their unpublished, original copies, just as legally binding insurances under the custom-based law. So, under these plans, it was vital for a

stationer, i.e., a printer-copyist, to acquire the creator's authorization to distribute his original copy, although the creator didn't hold the copyright. The advanced statutory assurance of creators' copyrights in the U.S. furthermore, Britain emerged in the mid-eighteenth century nearly as a chronicled mishap. In England during the end many years of the seventeenth century, the death of the time of political and strict oversight made it progressively hard for the Stationers' Company to show the Government the control of the new print machines that were jumping up all through the nation; when the Licensing Act that had offered teeth to its restraining infrastructure was permitted to pass in 1694, the opposition heightened as nation book shops straightforwardly spurned the precept of ceaseless copyright which the Company had looked to build upon the proof of assignments enlisted in its record books. Following 15 years of progressively disorderly states of unregulated rivalry, the London book retailers finally figured out how to make sure about new legislation⁶³, Moreover, to open up the exchange, the Act of Anne wiped out the organization imposing business model on the holding of copyright: anyone presently could hold the copyright for another work. As opposed to patent establishments in Europe, scholarly works remained, to a great extent, unprotected until the appearance of Gutenberg's print machine in the fifteenth century. And still, after all, that there were not many original copyrights allowed—most were awards, benefits, and restraining infrastructures. The law offered insurance to the creator by giving fourteen-year copyrights, with a fourteen-year reestablishment conceivable if the creator was as yet alive.

HISTORY OF COPYRIGHT IN INDIA

As indicated by the Indian way of thinking, "the nonattendance in a practitioner of want to guarantee it as his own doing is the image of accomplishment of extreme information." In the previous days, the works were made either for the sake of God or administration to humankind. The maker of work never wanted to secure his/her work. There is no job of the maker, and it is believed that whatever work was made through him was simply crafted by God. He was lucky enough to be right now .in the early ages, there were no methods. Yet, the memory of the researchers to protect these academic works for descendants The danger of the work being step by step overlooked and lost after a hole of hardly any age, being compressed or altered or advanced by the information and experience of those whose recollections were the transporters of the work with the progression of time. There likewise existed the chance of different

researchers who were not the genuine creators getting the acknowledgment for the work. In old occasions, Indian researchers bore in their brain that God was the wellspring of each doing or being; truth be told, he was the primary maker. Consequently, researchers incline to maintain a strategic distance from origin rights. This impartial demeanor of writers, to the extent guaranteeing the privilege of creation, is concerned persevered in India all through the Mugal realm too. The Urdu language, which appeared because of an amalgamation of Indian and European dialects and which has immense writing of its own, likewise reflects comparable patterns as there are a few books, sonnets, stories, and so on the initiation of which is yet uncertain. The possible idea of copyright in India was presented in the time of the British rule. At the point when the artistic Copyright Act, 1842, was passed by the British parliament realizing numerous adjustments in the law of copyright, it was additionally made relevant in British provinces other than Britain himself. Hence, this demonstration, which given to insurance of copyright in books distributed on British soil, naturally got an expansion to British India. For the requirement of copyright in the regions under the organization of east India company as likewise for advancing the endeavors of information and learning in these zones the Governor-General in Council, on December 18, passed the duplicate right Act, 1847 which gave insurance of copyright to works distributed in the territories under organization just because since the authorization of British Act of 1842, i.e., the abstract Copyright Act, 1842. As indicated by the 1847 establishment, the term of copyright was for the lifetime of the creator in addition to seven years after death. In any case, for no situation could the total duration of copyright surpass a time of forty-two years. The administration conceded a necessary permit to distribute a book if the proprietor of copyright, upon the demise of the writer, wouldn't permit its production. The demonstration of encroachment involved in an individual's unapproved printing of a copyrighted work for (or as a piece of an endeavor of) "offer contract, or exportation," or "for selling, distributing, or presenting to deal or contract." Suit or activity for encroachment was to be organized in the "most elevated neighborhood court practicing unique common purview." The Act gave explicitly that under an agreement of administration copyright in "any reference book, audit, magazine, periodical work or work distributed in a progression of books or parts" will vest in the "owner, projector, distributer or conductor." Infringing duplicates were considered to be duplicates of the owner of copyrighted work. Significantly, in contrast to today, copyright in work was not programmed.

Enrollment of copyright with the Home Office was compulsory for the authorization of rights under the Act. In any case, the Act additionally explicitly held the subsistence of copyright in the creator, and his entitlement to sue for its encroachment to the degree accessible in law other than the 1847 Act. As we will see, this booking of other "copyright-type" laws was discarded in later enactments. RR Dada Changi in his book on the duplicate right says that British India had been spoken to by India office in Britain at the Imperial copyright meeting of 1910 which had firmly gone before the presentation of the copyright Bill in British Parliament which, in spite of some underlying deterrents, at last, went through both the houses to turned into the Copyright Act, 1911. This got viable from first July 1912 in Britain, and the Indian government previously attempted to take into certainty the nearby governments in the domains under organization rule to change the Imperial Act of 1911 to get it to tune with Indian prerequisites. In this way, the British Act was upheld in Indian on Oct. 31, 1912. Autonomous India agreed with a high need to detailing of her law on copyright. The Indian Copyright Act 1957 canceled the Indian Copyright Act 1914 ("the 1914 Act"), which had practically fused the entire of the Imperial Copyright Act 1911. The amendment of the 1914 Act happened inside a minor seven years of Independence. "Aside from the way that the United Kingdom Act didn't fit in with the changed sacred status of India, it got important to authorize an autonomous, independent law regarding the matter of copyright in the light of developing open cognizance of the rights and commitments of the creator and in the light of experience picked up in the working of the current law during the most recent forty years. New and propelled methods for correspondence like telecom,litho-photocopy, and so on additionally required certain corrections in the current law." The Indian Copyright Act noted alteration multiple times since 1957, for example, in the year 1981,1988,1992,1994 and 1999. India is a creating country, has continuously attempted to keep herself side by side of changing occasions and tried to acquire the law congruity with the best laws regarding the matter on the planet. Visit changes in the copyright Act bear a declaration to this reality.

HISTORY OF COPYRIGHT IN U.S.A

Although Copyright law started in the seventeenth century in Europe, United States copyright law can be followed its underlying foundations straightforwardly in the British Statutes of Anne. The British Statute of Anne (1709) was utilized as a layout for making the Copyright Act and

considered enrollment as essential for acquiring copyright insurance. Be that as it may, such assurance was conceded distinctly to US residents' distributions inside the US region. Just three private Copyright Acts were passed in America before 1783, two of the demonstrations were restricted to seven years; the other was constrained to a term of five years. The Continental Congress had no power to give copyright, Instead, it passed goals urging the States to "secure to the writers or distributors of any new book, Copyright of such books for a specific time at the very least fourteen years from the primary production; and to make sure about to the said writers, if they will endure the term initially referenced, the Copyright of such books for another term of time no under fourteen years. The primary Copyright Act in the United States passed in 1790 under the title "An act for encouragement of learning" by making sure about the duplicates of maps, graphs, and books, to the writers and owners of such copies. This is the initial step to make sure about copyright as per the demonstration in the United States. This demonstration gives a restrictive option to the writer to distributing and distribute maps, diagrams, and books for a time of 14 years with the privilege to reestablishment for another extra 14 years term if the writer was as yet alive. Right now was no arrangement to approve different sorts of works, for example, melodic syntheses or papers, and explicitly noticed that it didn't disallow replicating crafted by remote creators.

Copyright was first settled in the United States Constitution which announced that Congress reserved the option "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Article 1, segment 8, provision 8) " to more readily characterize the extent of copyright by giving it an expansive confining in the Constitution, Congress passed the principal Copyright Act in 1790 and later updated it in 1831, 1870, 1909, 1976, 1998, and most as of late changed a few times, most as of late by the Digital Millennium Copyright Act (DMCA). Copyright law guarantees security to the makers under the laws of the United States to the creators of "unique works of initiation," which incorporate scholarly, sensational, melodic, imaginative, and specific other academic works. This assurance is accessible to both distributed and unpublished works. The target of the Copyright Act is to advance Progress of Science and just as for the centerpieces, writing, music, and different works of creation, to profit people in general. The United States perceives no outright, characteristic right to a creator in keeping others from duplicating or, in any case misusing the work. The copyright laws gave creators constrained

property rights to their works, however, for a definitive motivation behind profiting people in general by empowering the creation and dispersal of more works. The creator's advantage is optional to that of the general population. The equalization in copyright was drawn by restricting property rights to the creator's specific strategy for communicating a thought or data. Copyright never offers rights to the thought being expressed or in realities or different components in the open space which a creator may fuse into his work. Others are allowed to communicate a similar idea as the creator did, or utilize same realities, as long as they don't duplicate the creator's unique method for delivering the thoughts or facts. Also, even these rights allowed to the creator's demeanor restricted by term and are dependent upon specific exemptions allowing open use under constrained conditions.

STATEMENT OF THE PROBLEM & OBJECTS OF THE STUDY

In today's world, copyright has a unique role, particularly in the context of Development. The impact of technological developments has led to certain new events. Prominent amongst these concerns' piracy, that is, the illegal reproduction and distribution of protected works and other flagrant infringements of copyright. Piracy has become much easier to perpetuate, and it has become more widespread with the new means of reproductions. The losses caused by piracy to publishers, producers of audiovisual works, and phonograms and, consequently and inevitably, to authors are getting increasingly more significant. This Development is particularly detrimental to the cultural life of developing countries like India. National production of books, audiovisual works and phonograms can be suffocated at birth, and without such production, there is no outlet for the Development of national creativity. The increase in piracy could lead to a far-reaching cultural dependence and the fading away of national cultural identity. Collective administration of copyright and provisions of suitable infrastructure for this purpose is particularly important in today's context. It is the jurisdictional disputes that make Internet copyright violators think that they are above the law. If a picture is taken from a copyrighted American source, placed on Usenet in England, downloaded to a news server in France and then retrieved in India, who is going to chase whom? It is indeed a crucial issue as to how to protect an author in these circumstances and needs serious consideration as is aimed in this study.

HYPOTHESIS

On the whole, thus, it can be safely said that Indian law as on the Statute book does not sound all that immature and is almost at par with that of U.S.A. and International standards, yet it has so far not been put to any real use. The Indian Judges should also develop greater sensitiveness towards copyright violations.

What, therefore, is urgently required is the generation of copyright consciousness as an aspect of India's social, economic and cultural development.

SCOPE OF STUDY

The Indian Copyright Law have vigorously obtained from the English framework, and this way, any conversation on India Copyright law should fundamentally revolve around the British Copyright law. As American Copyright law has additionally been affected by the British Common law conventions preceding far-reaching statutory advancements, as America has evolved from a moderately in the reverse nation to the mightiest intensity of the world, it is in the wellness of things that while looking at Indian Copyright law, a response is had to the American encounters in this regard. The study wanted to make a similar appraisal of Indian Copyright law with that of U.S. Copyright laws.

RESEARCH METHODOLOGY

The analysis goes to be disbursed on the doctrinal methodology. The statutes, books, reports, Acts & articles distributed square measure getting to be the instrumentation of the analysis. Case laws unit of measurement, additionally, the necessary a piece of the socio-lawful analysis. Moreover, the comparative research does serve at least three useful functions. First, comparative research can throw doubts on the usefulness of strongly entrenched views. Secondly, it may suggest a suitable solution to legal problems. Thirdly, comparative study tends to aid in assembling which principles applicable in the field concerned, are fundamental and which are secondary. The present study makes an effort to achieve all the three functions of comparative research.

REVIEW OF LITERATURE

According to Cornish (2001), patents give temporary protection of technological inventions and registered designs to the new appearance of mass-produced goods. Copyright provides longer-

lasting rights in, for instance, literacy, artistic and musical creations, trademarks are protected against initiation so long at least as they continue to employ in the trade. Srivastava (2001) discussed the legal aspects of Intellectual Property Rights and information technology products. It shows that the fastest-growing electronic medium causes an increased chance of infringement of copyright. The inadequacy of the existing Indian Copyright Amendment Act also discussed. Library professionals are concerned with copyrights as they work closely related to the acquisition, storage, and retrieval of information. The author discusses the copyright issues in-depth in his book.

Steve Jobs, the former Apple CEO, believes that online music stores do not threaten the music industry; it is the highest piracy rates that accomplish that task. This apprehension in the contemporary, ever-expanding technology-driven world seems entirely tenable and supported with sound reasoning states Jauhar (, 2011). The Copyright Act 1957 presents the face of modern copyright protection afforded to different intellectual works. It is a crucial statement of intellectual property rights in the Indian legislation governing this domain, as well as being compliant to the TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights. This act has been acceptably referred on many occasions on global platforms, on account of its being one of the most elaborate and well-structured pieces of legislation in the field of intellectual property law. India continues to project significant piracy rates with little regression in the trend even though the Indian Copyright Act is still very much in force.

In India and the United States of America, even on very minute copyright issues, hundreds of books and articles have been written. It will indeed be an arduous task to present an authentic survey of everything written on copyright law in these two countries. Such an exercise is undoubtedly out of the scope of the present study. Suffice, it is to say that a considerable body of literature exists in both India and America on this vital area of law. Similarly, in a large number of articles written in both countries and elsewhere, a comparison of British rule has been made with that of American law and vice - versa. But there are very few works in which a comparative assessment of American & Indian laws has been made and thus the relevance of the present study. But the research has taken up only a few issues relating to copyright and therefore has a limited scope.

PLAN OF STUDY

Using the research techniques both doctrinaire as well as comparative methods of research, the study has been divided into 5 chapters:

Chapter 1 examines the question of copyright protection under International law. It discusses principles of International Copyright Conventions, national treatment, limitations of the policy of national treatment, and the system of applying International Copyright Conventions to the national law.

Chapters 2 to 5, examine the vital aspects of subjects of copyright in the two countries. Only such issues have been taken which have been affected by the technological developments and about which the law has been recently amended in the countries selected by the present study.

Chapter 2, thus, deals with the question of copyright in literary, dramatic, and musical works. The issue of "originality" and various types of works protected as literary, dramatic & musical works form the subject matter of this chapter.

Chapter 3 discusses a crucial area of copyright i.e., copyright in architectural designs. The question of ownership of copyright of an architects' work during the course of employment or where his services were only partially hired are discussed. The issue of publication as to architectural designs and recent legislative changes in this regard are also examined.

Chapter 4 discusses the crucial issue of performers' rights under copyright laws. It examines the status of a performer in the two countries under study. The judicial response in this regard is also put to critical evaluation.

Chapter 5 discusses the question of infringement of copyright in, U.S.A., and India. The various types of infringements and issues relating to them are examined along with the civil and criminal remedies available under the two copyright systems in case of an infringement of copyright. The recent legislative activity as to criminal remedies is also taken care of

By summing up the whole study and discussing the various conclusions which are derived from wise independent and self-explanatory chapters of this study.

CHAPTER 1

POSITION OF COPYRIGHT IN INTERNATIONAL LAWS

1.2 INTERNATIONAL COPYRIGHT LAW

In the realm of the law of movable (physical) property, the law applicable to decide ownership is, generally, the law of the country where the property is acquired. If one bought goods in country A and takes them to country B, the question whether one has become the rightful owner of goods is to be decided by the law of country A. The position is different with regard to copyright. The property in the work, however, is governed by the law of country B, if that is where the right is claimed. Thus, 'the center of gravity' of the work is the country where protection is claimed.

Copyright law, like patent law, started as a privilege conferred by the prince and developed into a right conferred by a statute. Such statute law gave protection to the right owner but, like all other statute law, only within the territory of that state. However, once it was conceded that the creators of new works of many kinds should be protected, such protection becomes at best only partially effective and at worst totally ineffective if it is confined to national frontiers. The idea that copyright arises from the act of creation of the work and not from any administrative act leads naturally to the idea that once the right exists, it should be valid anywhere. There is no good reason why a creator should be entitled both to moral recognition and to the pecuniary rewards of his works only in his own country and not abroad. But even more important than the moral imperative is the Gresham's law on international currencies that bad money drives out good money applies to works and copyright protected matter. If a 'work' protected by copyright in country A is not protected in countries B and C so that it can be freely reproduced in these countries, it may be imported into country A where it will then compete with copies on which copyright has been paid. As the imported copies will not have paid any copyright, they will be

cheaper and will, therefore, drive the home - made product, which has paid copyright, out of the market.

The effect is the same as if a tax was put on a home product, whereas the same product was allowed to come in from abroad tax free. The greater the mobility of persons and goods the more serious will be the result of this phenomenon. To cope with it (as well as protecting its citizens abroad) a state has to give a certain amount of reciprocal protection to foreigners.

1.1.1 The Treatment of Foreigners in Copyright Law:

When faced with the question of the rights of foreigners in a country (country x) the following questions have to be answered in the following order;

- (a) Can the foreigner claim protection under one of the international conventions to which country x is a party? (in countries where such conventions are self- applying e.g.U.S.
- (b) If not, can he claim protection under a bilateral agreement to which a country is a party?
- (c) If not, can he claim protection under the national law of country X relating to foreigners?

In this third case, national law may provide that he can claim no greater protection than that granted in his country of origin or it may apply the rule of material reciprocity. As the great majority of countries which are of importance for copyright purposes are parties to one of the International Conventions, bilateral agreements have lost most of their importance. Thus, in most cases one will have to see whether the foreigner claiming protection is covered by one of the conventions and if not whether he is protected by the national law of the country where protection is claimed, in its provisions relating to foreigners.

The treatment of foreigners, apart from conventional protection, varies considerably and within the confines of this study, a summary of comparison between the major United States and India will suffice by way of example

- (1) In the Republic of Germany, works are protected if they are first published in Germany or are works by German Nationals or assimilated persons (stateless persons and refugees)
- (2) In Italy, works are protected if they were first published in Italy or the author resides in Italy

In both Germany as well as Italy foreign authors are protected (over and above conventional protection) subject to reciprocity

(3) In the United Kingdom, works are protected if their maker at the time of publication is a qualified person (qualified persons are British and Irish nationals or persons domiciled or resident in the United Kingdom), or if they are first published in the United Kingdom or an associated territory

(4) In France, foreign works are protected even if neither the author is a French national nor the work was first published in France The only condition is that an exclusive right in the work exists in the country of origin However, it is perhaps significant that a few years after the French Copyright Act, 1957, France passed a law to the effect that if a country which is not a member of any of the conventions to which France is a party does not grant adequate and effective protection¹ to work first published in France, works first published in such a country are not protected in France .

(5) The United States having won independence from Britain and wanting to create their own culture became protectionist. Copyright was granted only to American citizens and residents in the United States. Even a century later when copyright was gradually granted to some foreign authors (country by country) copies of a foreign work had to be printed in the United States (under the so-called 'manufacturing clause').

(6) In India,² foreign works are protected if either the author is an Indian citizen or domiciled in India or the work was first published in India. Such an order of giving protection is to be issued by the central government and will take into account the doctrine of reciprocity

1.1.2 The History of International Copyright Treaties

We have noted in the chapter on historical development that the first international treaties dealing with copyright were bilateral agreements both in Europe and in America. In both cases they were found unsatisfactory as they produced particularly in America, a mosaic of differing

¹ Article I of the Universal Copyright Convention

² Indian Copyright Act 1957, Section 40-43

relationships leading away from harmony instead of towards it. They came to an end in Europe with the creation of the Berne Convention in 1886 and in America - for all practical purposes - with the creation of the Universal Copyright Convention in 1952. The Pan American experience is illuminating in this respect. The first multinational treaty was the Montevideo Convention in 1889, thus, almost contemporary with the Berne Convention 1886. Just as the Berne Convention was initially a mainly European Convention but open to all countries, so the Montevideo Convention aimed at establishing a Pan - American Copyright system but was open to all countries and ratified by many American states as well as European ones. However, there was an essential difference The Berne Convention was based on the principal of national treatment³, treating foreigners like nationals if they belonged to member countries, thus, accepting broadly speaking the *lex fori* Under the Montevideo Convention on the other hand the rights of an author were governed by the law of the country of first publication or the law of the origin of the work which followed the work into all other countries of the Union, thus accepting the principle of the *lex origims* This meant that a court in country A when adjudicating on works originating from countries B, C and D had to apply three different foreign laws, those of countries B, C and D, whereas under the principle of national treatment the court would have applied only the law of country A its own Thus national treatment is a better principle There followed five further inter-American Copyright Conventions not open to non-American states⁴. The most successful one was the Buenos Aires Convention 1910 which was ratified by 17 Latin American republics and the United States It has changed to the principle of national treatment. After the second world war the members of the Pan - American Union signed a revised convention in Washington DC in 1948 which was fashioned on the principle of the Berne Convention a number of minimum rights and the principle of national treatment If copyright was obtained in one state, a statement appearing on the work indicating the reservation of copyright confers copyright in all states without any formalities. A notice like 'copyright reserved' was sufficient. Fourteen Latin American countries ratified it but the United States could not accept the granting of copyright without any formalities which were required under its own national law and did not ratify. With the largest American market outside the convention, it could not become really effective and the Latin American republics were clearly seeking worldwide rather than merely Latin American

³ Berne Convention, Article 5(1)

⁴ Mexico City Convention 1902, Rio de Janeiro Convention 1906, Buenos Aires Convention 1910, Havana Convention 1928, Washington Convention 1948

protection, which had to include both the U.S. and Europe. They turned towards the Universal Copyright Convention created six years later in 1952 and although the Pan - American conventions are still operative, it is the Universal Copyright Convention that governs relations between the Latin American states and the United States and the Berne Convention as well as the Universal Copyright Convention governs the relations between them and the European States. Thus, all copyright and neighboring rights Conventions are now based on the principle of national treatment.

1.1.3 The Principles of International Copyright Conventions

Seeking to apply the general principles of private international law to a multinational copyright treaty, theoretically, two of the policies would appear to be suitable: the *lex loci* and the *lex fori*. The adaptation of the principle of *lex loci* (or *lex originis*) leads to the policy of the country of origin of the work. This means treating work as a person and saying that its nationality is either that of its father (the author) at the time of its birth, which would be the time of its creation. If it remains unpublished or the time of its first publication, if published. Alternatively it would be the nationality of its birth place, that is the country of its first publication. Like a person the work would then, so to speak, have a passport and take its nationality with it wherever it goes. For example, if India is a convention country, the work of an Indian author, first published in India, would have in the U K or France the same rights as it has in India. The adaptation of the principle of *lex fori* to copyright leads to the policy of national treatment, or as it is sometimes called, the principle of assimilation. This means that persons protected by the convention can claim in all contracting states the protection that the law of that state grants to its own nationals. Foreigners, if belonging to a convention country are 'assimilated' to nationals. The work of the same Indian author, published in India, would have in the United Kingdom the equal rights as if it were created by a U K author and first published in the U K. It will be seen that the advantage of adapting the first principle, would be that the same work will receive the same treatment in all member countries. The disadvantage is that lawyers and courts will continuously have to apply a large number of foreign laws, sometimes several laws in the same transaction or court case. The advantage of the second principle, the *lex fori*, is that courts will always apply their own code. The disadvantage is that the same work will get varying levels of protection in convention countries according to the national law of the land where the protection is claimed.

1.1.3.1 National Treatment (Assimilation):

In practice, the second principle, that of national treatment, has proved to be the only viable one. This is so mainly for two reasons, one psychological and the other political. The psychological reason is that courts prefer to apply their own law which they know to having to apply foreign law which they do not know, and thus, the quality of judgements will be better and the law, therefore, more specific under the principle of national treatment. The political reason is that right owners in countries of low level protection will realize that they get better treatment abroad in high level protection countries than they get at home and will bring pressure to bear on their governments to raise the level of protection at home. Thus, as the high level protection countries give a lead, the level of protection will gradually rise everywhere, thus, getting nearer to the ideal of uniform treatment but on a high level. National treatment is also in accord with the ideal of international law that all men are equal before the law, regardless of whether they are nationals or foreigners, and in a period of history where more and more eminent authors and creators are expatriates or refugees, conventions have also assimilated these to nationals so that they enjoy the same privileges in the country of their choice. The principle of national treatment also means that both the question of whether the right exists and the question of the scope of the right are to be assured in accordance with the law of the country where the protection is claimed. A beneficial spin-off of the principle of national treatment is that confiscating measures valid under the law of the country where the confiscation takes place have no validity in other countries. These countries have to treat the right owner as they treat their own right owners regardless of how he is treated in his own country. For these reasons the principle of national treatment was adopted as the basic principle of the Berne Convention in 1886⁵ and of the copyright and neighboring rights conventions which followed the Berne Convention.

1.1.3.2 Extensions of the Principle of National Treatment:

(1) Minimum Rights:

The principle of national treatment extended in the copyright Conventions by providing minimum rights which may be claimed in all Convention countries *jure conventions* regardless of the national legislation. In a strictly conceptual sense, these minima are no rules relating to

⁵ It was first proclaimed by the 'Societe des gens de letter's at their Conference in Paris 1878, which was the forerunner of the Berne Convention, see ROTH LISBERGER, THE BERNE CONVENTION (1961) p 6

conflict of laws as they contain no reference to another legal system. They also do not compel a convention country to grant these conventional rights provided as minimum rights to its nationals because the convention deals only with international situations and therefore if nothing else is provided in the convention only compel a state to grant these rights to foreigners who are nationals of member states, However, the principle of national treatment without minimum rights, Jure conventions might produce a serious imbalance which states would find unacceptable If countries A and B were members of a convention which provides only for national treatment and has no minimum rights and country A grants performance and broadcasting rights as well as reproduction rights. In contrast, country B grants only reproduction rights, the effect would be that the nationals of country B would enjoy performance and broadcasting rights in country A. Still, nationals of country A would not enjoy these rights in country B because the nationals of country B do not enjoy them either This could produce a severe disequilibrium which would be unacceptable to country A ".⁶

The history of copyright and neighboring rights conventions bears this out The Berne Convention which was agreed at a time when the level of protection granted to authors still varied greatly from country to country started with only a minimum term and a translation Tight jure conventions The first task was to get as many countries as possible to accept these 'minimum rights' in their legislations which they had to do before they could ratify the convention. Having thus created a common minimum level of protection in these respects, the Revision Conferences added further minimum rights. The high level protection countries gave a lead to the low level protection countries and It was hoped that the right owners of the lower protection countries enjoying rights abroad which they did not have at home would bring pressure to bear on their governments to introduce them These hopes subsequently, proved amply justified When the Universal Copyright Convention was negotiated over 60 years later, the difference in the level of protection with regard to the rights covered by the convention had become less marked, and thus less stringent measures to ensure against unacceptable differences in the level of protection were required. The term of 25 years post mortem auctoris⁷ and the

⁶ STEWART, STEPHEN, INTERNATIONAL COPYRIGHT & NEIGHBOURING RIGHTS, second ed , 1989 (London, Butterworth) at p 39

⁷ Universal Copyright Convention, Article VI

translation right⁸ are minimum rights Whereas Article I requiring contracting states to provide for the adequate and effective protection of the rights of copyright owners and Article X requiring contracting states to adopt such measures as are necessary to ensure the application of the convention are only general guidelines; however, this was considered enough to ensure that differences of levels of protection under the national treatment rule were not too great.

In the Rome Convention⁹, the first neighboring rights convention, the principle of national treatment is accompanied by minimum rights for each of the three beneficiaries a right against unauthorized fixation for performers, a reproduction right for phonogram producers and broadcasters, a performance right in phonograms (subject to reservations) for producers and performers. If reservations are made the reciprocity rule can be applied to the states making a reservation. Thus, the principle of national treatment combined with minimum rights to assure a common denominator is moderated by the reciprocity rule to avoid injustices being caused by large divergences of levels of protection. Minimum rights also make the gradual growth of a convention possible. The convention can start with a small number of minimum rights and add others as the years go by at revision conferences, thus providing a road towards both uniformity and higher standards of protection. The Berne Convention, for instance, started with the translation right and added the right of public performance and the broadcasting right, the *Droit moral*, the cinematograph right. The Universal Copyright Convention provided for the translation right only and in its revised version in 1971 added the reproduction right, the broadcasting right, and the public performance right.

(2) Formalities:

In a sense freedom from formalities is also an exception of the principle of national treatment as it compels national laws to grant rights to works from convention countries without making such rights subject to formalities which may otherwise be required This can be done either by requiring the granting of rights without any formalities like the Berne convention¹⁰ or by laying down a maximum of formalities which may be necessary to secure protection like the Universal

⁸ Ibid, Article V

⁹ Rome Convention 1961

¹⁰ Berne Convention, Article 5(2)

Copyright Convention¹¹ with the symbol (c) of the Rome convention and the Phonogram convention¹² with the symbol (p) accompanied by the name of the copyright owner and the year of first publication.

1.1.3.3 Limitations of the Principle of National Treatment:

1. Reciprocity:

The principle of national treatment can be limited, sometimes severely limited by the rule of reciprocity which in International law can be either 'material' (or 'substantial') reciprocity or 'formal' (or partial) reciprocity.

'Material reciprocity' means that country A will protect the citizens of country B in the same manner as country B protects the citizens of country A. General rule the Copyright Conventions are opposed to material reciprocity though there are exceptions¹³. This is made plain in the 'Declaration Against Material Reciprocity' which is included in the Report of the 1971 Paris Revision of Berne Convention." One of the advantages of avoiding material reciprocity in Copyright Conventions is that the courts of member states do not have to interpret the laws of other member states to see whether protection is given in respect of a particular right. The rule of national treatment enables them instead to apply their own law to foreigners. A disadvantage is that it permits sometimes great disparities between the effective levels of protection so that the citizens of high-level protection countries get less rights in some Convention countries than they enjoy at home, whereas the citizens of low protection countries get better protection in some Convention countries than they get at home. However, this is balanced by the advantage that wide-ranging copyright relations are facilitated between countries of differing ideologies and differing stages of economic development.

'Formal reciprocity' in copyright convention means that each member state will protect the works or citizens of other member states in some manner. Still, from such reciprocity, nothing is to be implied about the nature of the protection. That is, generally, determined by the rule of national treatment. The 'comparison of terms' under the Berne Convention" is an example. The term of protection is dealt with in the conventions by laying down a minimum time: 50 years post

¹¹ Universal Copyright Convention, Article III

¹² Phonogram Convention, Article III

¹³ The droit de suite in the Berne Convention (Article 14 bis) or the 'Comparison of terms in the Berne Convention (Article 7/8)

mortem auctoris, but countries are free to grant a longer-term. Comparison of terms means that a country that allows a longer term than 50 years to its nationals needs only grant that longer-term to foreigners if that term is also permitted by their country of origin. For example, the Federal Republic of Germany given 70 years pma , but Germany needs only gives 50 years' pma to the United Kingdom & India right owners because that is the term of their national law. It does not have to provide the full 70 years it gives to its own national.

2. Reservations:

The rights granted by convention can also be limited by reservations, which allow countries to ratify the agreement but to withhold the giving of some rights wholly or partly. Some conventions, e.g., the Phonogram Convention, permits no reservations, others, e.g., the Rome Convention, provides for several.¹⁴ The reservations can relate to the scope of a right or the connecting factor, e.g., the reservation regarding the points of attachment in the Rome Convention or to a whole right, e.g., the performance right in phonograms in the same convention. The making of reservations is usually accompanied by the application of the rule of reciprocity so that the nationals of country A which has made the reservation can be deprived of the exercise of those rights in country B because the nationals of country B are not granted these rights in country A.

1.2 THE SYSTEM OF APPLYING INTERNATIONAL COPYRIGHT CONVENTIONS TO NATIONAL LAW;

The application of an International Convention by a country is the method by which the convention of International law becomes part of the national law of the country. At the Diplomatic Conference, which establishes the convention, countries which are represented by an accredited plenipotentiary usually sign the convention. However, such a signature has no legal consequences, although it may carry with it a moral obligation to ratify at a later stage. If a country is not represented at the Diplomatic Conference or if its representative did not sign the convention, it can later 'accede' to it.

How the international law contained in the convention is translated into the national law of a state depends on the Constitutional law of that state.

¹⁴ STEWART, STEPHEN, supra note 27, p 42

(i) In some countries, international conventions are self-applying. No further legal or administrative action is necessary. The provisions of the convention become part of the national law and override previous legislation. The convention is 'self-executing.' This is the case, for instance, in France, Germany, Italy, and Latin American countries. It leads to the interpretation of the text of the convention itself by the national courts.

(b) Some countries, on the other hand, do not regard agreements between sovereign states as part of the law of the land. Conventions are not binding on their citizens until ratified by the legislature. This is the case for instances in the Nordic countries. U S A and India in these countries, national legislation is needed to make the provisions of a convention binding on its nationals. This may be done by making the whole convention part of the national law, thereby falling for interpretation by the national courts. It may also be done by drafting national law to comply with the convention. In that case, it will be for the national courts to decide whether to take the convention text into account when interpreting the national law.

Thus, as is revealed from the above discussion, it can safely be said that international copyright law has done a commendable job in strengthening the copyright protection world over. In fact, it is one of those areas where international law has influenced developments at the Municipal laws. Moreover, unless adequate protection is afforded to foreign authors, in the fast-changing modern world which has come so close as to reflect a global village particularly after the recent advent of the Internet, copyright law would become meaningless. It is indeed satisfying to note that the International law dealing with copyright problems has now achieved a certain amount of uniform standards of copyright protection for the creators of intellectual property.

CHAPTER 2

COPYRIGHT IN LITERARY, DRAMATIC & MUSICAL WORKS

It has been observed in the preceding chapter on subjects of copyright that there are at least two groups of countries as far as subjects of copyright are concerned. Some national legislations (U.K., U.S.A., India) provide for a definition of works protected, while others do not such as Italy. Broadly speaking there are two categories of works. The first is one which includes works named in the Berne Convention, 'literary and artistic works' which includes dramatic and dramatic-musical works. The second is a category of recent types of works: cinematography films, sound recordings, broadcasts etc. This chapter examines the issue of copyright protection in literary, dramatic and musical works. The question of originality and literary value in this regard are discussed at length. The various types of works which have been held as "literary works" are given a detailed treatment. The question of copyright protection to dramatic works, essential requisites of dramatic works and its types such as pantomime is considered in some details. Similarly, the issue of copyright in musical works and the judicial response in this respect are also examined.

2.1 COPYRIGHT IN LITERARY WORKS:

2.1.1 Statutory Definitions:

By Section 2(1) and (2) of the U.K. Copyright Act 1956, Copyright is conferred in respect of "literary works". This repeats, in substance, Section 1 of the Copyright Act 1911. In that Act, however, "literary work" was defined, as including "maps, charts, plans, tables and compilations" whereas, in the Act of 1956, it was defined,¹⁵ as including "any written table or compilation"¹⁶, so that maps, charts and plans are no longer protected as literary works but are protected as artistic works under the definition of "drawings"¹⁷.

The Act of 1956, by Section 48(1), defines "writing" as including any form of notation, whether by hand or by printing, typewriting or any similar process. Presumably this definition would also be applied to "written", so that a compilation expressed in any form or notation will be protected as a literary work, for example, in braille or shorthand.

Notwithstanding the inclusion in the definition of "literary works" of compilations, it was assumed this relates, not only to compilations of literary material, but also compilations of literary and artistic material and even of artistic material alone. The Copyright, Designs & Patents Act 1988 has, however, now provided that "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes

- (a) a computer program, and
- (b) table or compilation

In the United States, the Copyright Act of 1976 extends copyright protection to literary works' which are defined as works, other than audio-visual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, films, tapes, discs, or cards in which they are embodied.¹⁸ The term "literary work" does not connote any criterion of literary merit or qualitative value and includes catalogues and directories; similar factual reference or instructional works; compilations of data; computer data bases, and computer programs.¹⁹ Under the repealed Indian Copyright Act, 1914, like its counterpart in England, the term "literary work"

¹⁵ U.K. Copyright Act, 1956, Section 48 (1)

¹⁶ It appears that the addition of the word "any" has not added anything to the definition; per *Upjohn J. Football League Ltd. V. Little Woods Pools Ltd.* (1959) Ch. 637 at p. 650.

¹⁷ U.K. Copyright Act, 1956, Sections 3 (1) (a) and 48 (1).

¹⁸ U.S. Copyright Act, 1976, Section 101.

¹⁹ House Rep. No. 94-1476, at p. 54.

included "maps, charts, plans, tables and compilation. But under the 1957 Act, these are no longer treated as, literary works" but protected as "artistic works".

Under the Indian Copyright Act of 1957 which heavily borrowed from the U.K. Copyright Act of 1956, copyright subsists, under Section 13, in three classes of work: (a) original literary, dramatic, musical and artistic works;

(b) cinematography films; and

(c) records.

Literary, dramatic and cinematographic works are defined inclusive by the Act whereas artistic, musical works and records are exhaustively defined by Section 2. These differences in the way in which the definition clause has defined different categories of works have led (as will be noted later in the chapter) to some crucial differences _in respect of range of copyright protection.

The 1994 Amendment has now provided for an improved definition by laying down that "literary work" includes "computer programmes, tables and compilations including data basis."²⁰

It is clear from the above discussion that the three countries whose copyright laws are studied here have brought changes in the definition of "literary works" in order to keep pace with the technological challenges in general and that of software development in particular.

2.1.2 Literary Works & Originality:

Copyright in the three jurisdictions (U.K., U.S.A., & India) which form subject matter of present study subsists only if the literary work is "original". In *University of London Press Ltd. V. University Tutorial Press*,²¹ Peterson J. concisely stated that a "literary work" in law, means anything written or any printed matters and observed as follows : "Copyright Acts are not concerned with the originality of ideas, but with the expression, of thought, and in the case of "literary works" with the expression of thought in print or writing". The learned judge further observed as follows²²: It may be difficult to define "literary work" as used in this Act, but it seems to be plain that it is not confined to "literary work" in the sense in which that phrase is

²⁰ Indian Copyright (Amendment) Act, 1994, Section 2 (0)

²¹ (1916)2 Ch. at p. 601.

²² Ibid, at p. 608

applied, for instance, to Meredith's novels and the writings of Robert Loïs Stevenson. In speaking of such writings as literary works, one thinks of the quality, the style, and the literary finish which they exhibit. Under the Act of 1842, which protected 'books', many things which had no pretensions to literary style acquired copyright; for example, a list of registered bills of sale, a list of foxhounds and hunting dogs, and trade catalogues; and I see no ground for coming to the conclusion that the present Act was intended to curtail the rights of authors. In my view the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political, or electioneering literature and refers to written or printed matter". The question is not whether the materials are entirely new and have never been used before nor even that they have never been used before for the same purpose. The originality which is required relates to the expression of thought; the law does not require that the expression must be in an original or novel form, but that the work must not be copied from another work, that it should originate from the author.²³ The real question is whether the same plan, arrangement and combination of materials have been used for the same purpose, or for any other purpose; if they have not. the author of the said plan, arrangement and combination of materials is entitled to copyright for the said production although he may have gathered hints for his plans and arrangement from existing and known sources. He may have borrowed much of the material from others, but if they are combined in a different manner from what was in use before, he is entitled to a copyright, in fact, in literature, in science and in art, there are and can be few things, which in an abstract sense, are strictly new and original throughout." The man who goes along a street of a town and takes down the names of the inhabitants, with their occupations and street numbers, may obtain a copyright for his compilation (in the words of Lord Halsbury in *Welter V. Lane*²⁴ where he compares a person compiling such a directory, and a reporter of a speech in respect of copyright in their product) but anyone else may even use the other man's work to the extent of checking and verifying results, so long as he is not guilty of appropriating the results of another man's skill and labor. The principle is that a man shall not avail himself of another's skill, labor and expense by

²³ *Macmillan & Co. v. Cooper* 48B 708 (RC); *British Broadcasting Co. V. Wireless League Gazette Publishing Co.* (1926) Ch. 433, *L.B. (Plastics) Ltd. V. Swish Products Ltd.* (1977) F.S.R. 87; *Dutt (S.K.) V. Law Book Co.* (1954) A.L.J. 125; *Govindan V. Gopala Krishna Kone* (1955) Mad. W. N. 361.

²⁴ (1900) A.C. 539 at p. 540

copying his written products thereof. In the cases of works not original in the proper sense of the term, but composed or compiled from sources common to all, the fact, that one man has produced such a work, does not take away from anyone else the right to produce another work of the same kind and in doing so to use all the materials open to him; the guiding principle in all these cases, where the work of an author which cannot be absolutely original from its very nature, is that the author must bestow such mental skill and labor on his work so as to give it an original character and not make merely a colorable imitation if he uses earlier works on that subject; any new and original plan, arrangement or compilation of old material will entitle the author to copyright therein, whether materials, therein are new or old; and whatever be his own skill, labor and judgement, a person writes, he may have a copyright therein unless it be directly copied or closely slavishly imitated from another's work.²⁵

In U.S. also to be entitled to copyright, thus, the work must be original, that is, it must be the result of independent labor and not copying²⁶. However, the work need not be the first of its kind. _Although the concept of newness or novelty is a prerequisite in the law of patents, it has no place in copyright law. It is sufficient, under copyright laws of U.K., U.S.A. and India that the work of each author is new to him, that is, that it is original with him, and not copied from the work of another.²⁷

The question of originality was also; considered by the Privy Council in the case of MacMillan & Co. Ltd. V. Cooper (K. & J.p²⁸ in which it was alleged that there was copyright in a selection on abridgment of a non-copyright. Lord Atkinson, in delivering the judgement of the court said : It will be observed that it is the product of his labor, skill, and capital of one man which must not be appropriated by another, not the elements, the raw material, if we use the expression, upon which the labor and skill and capital of the first have been expended. To secure copyright for the product it is necessary that labor, skill, and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material". At a later stage in his judgement Lord Atkinson

²⁵ Ghafur Baksh V. Jwala Prasad. 43 All 412; Spiers V. Brown 6 W.R. 352; Hogg V. Scott (1874) L.R. 18 Eq. 444.

²⁶ DRONE, S. EATON, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879) 199-200

²⁷ See Nimmer. B. Melville, "The Law of Ideas", 27 CALIF. L. REV. 119 (1954); Also see Simonton V. Gordon, 297 Fed. 625 (S.D. N.Y. 1924) and Nichols V. Universal Pictures Corp. 45 F. 2d. 119, 121 (2d Cir. 1930).

²⁸ Supra note 13

said : What is the precise amount of the knowledge, labor, judgement or literary skill or taste which the author of any book or other compilation must bestow upon its compositions in order to acquire copyright cannot be defined in precise terms. It is here, as was pointed out by Mangham J. in Cambridge University Press V. University Tutorial Press, Ltd²⁹, that the real difficulty arises. There is no guiding principle as to the quantum of skill or judgement required except that a man shall not avail himself of another's skill, labour, and expense by copying the written product of it. It is submitted that, in determining whether the work is original and entitled to copyright the work must be looked at as a whole and if, notwithstanding that the author has used existing subject-matters, he has expended sufficient independent skill and labour, he will be entitled to copyright protection for his works. Thus it is clear that neither original thought nor original research is essential, and that the standard of originality required is a low one?

2.1.3 Literary Works Must be in Print or Writing:

In respect of literary works, it is essential that the same must be in print or writing, i.e. some form of notation in the work is essential. Writing is sufficient. Obviously, a work cannot be orally published. It is not worth its while for the writing to express any meaning. There is copyright in a list of meaningless words, e.g., in a system of shorthand," or a telegraphic code.³⁰ According to Peterson J. in University of London Press V. University of Tutorial Press³¹, : in my opinion, a copyright is given to the first produce of a book whether the book be wise or foolish, accurate or inaccurate, or of literary merit or of no merit whatsoever. Similarly, it was observed in Mishra Bandhu & Others V. S. Kosha³², by Sen. J. as follows:

In text-books on arithmetic or books of the above description, the amount of originality of the author may be small, but the expression of his thought, skill and labor may be tremendous, and it is that which is protected by law

2.2 COPYRIGHT IN DRAMATIC WORKS;

The copyright laws of U.K., U.S.A. and India as of most countries of the world now recognise copyright in dramatic works. In the United Kingdom, under the law prior of 1911, performing

²⁹ (1928)45 R.P.C. 335.

³⁰ Anderson D. L. & Co. V. Lieber Count Co. (1917) 2 K.B. 469

³¹ Supra note 10.

³² A.I.R. (1970) M.P. 261

rights could only be claimed in respect of any "tragedy, comedy, play, opera, force, or any other dramatic piece or entertainment"³³ or in respect of "any musical composition",³⁴ but under the Acts of 1911 and 1956, the right to perform a work in public is included in the copyright of all literary, dramatic and musical works.³⁵ The definition of dramatic work in the U.K. Act of 1956 is slightly different from that in the U.K. Act of 1911, and the difference may be of material importance. As observed above, in the Act of 1911, dramatic work was defined as including "any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form which is fixed in writing or otherwise. In the Act of 1956. dramatic work is defined as including "a choreographic work or entertainment in dumb show, if reduced to writing in the form in which the work or entertainment is to be presented". The expression "any piece for recitation" is left out, presumably because its special mention was thought unnecessary. But the change from it fixed in writings or otherwise, to "if reduced to writing in the form in which the work or entertainment is to be presented". may have significance. It was thought that, under the Act of 1911, a sketch or dramatic performance might acquire copyright protection if filmed or recorded at the moment of performance, but it would seem clear that this is not so under the Act of 1956. But the U.K. Copyright, Designs & Patents Act 1988 has now provided for a more simpler definition by laying down that "dramatic work" includes a "work of dance or mime".³⁶

The Indian copyright law as has been discussed in the chapter on historical development has closely followed the British enactments, and therefore, on the issue of "dramatic works" as well, the Indian law is almost similar to that of its counterpart in England.

Thus, the Copyright Act of 1957 says that "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, but does not include a cinematograph film. In the U.S., dramatic works, including any accompanying music, are entitled to copyright protection, and the terms are not defined by Statute since such terms have fairly settled meaning. Prior law also did not define dramatic works, but former copyright office regulations included within the classification of "dramatic and dramatico-musical compositions" works which are dramatic in

³³ U.K. Dramatic Copyright Act, 1933 (3 & 4 Will, 4, c. 15), Section 1.

³⁴ U.K. Copyright Act, 1842 (5 & 6 Vict. C. 45), Sections 20,21

³⁵ U.K. Copyright Act, 1956, Section 2 (5) (6).

³⁶ U.K. Copyright, Designs and Patents Act, 1988, Section 3(1).

character such as the acting version of plays for the stage, motion pictures, radio, television and the like, operas, operators, musical comedies and similar productions, and pantomimes. Under prior law, a dramatic work was defined as a work in which the narrative was not related, but was represented by dialogue and action' that is, a work which tells a story so that the audience sees the event or story live.³⁷

Copyright may protect not only the dialogue of a drama, but also all such means of expression as the author uses to give dramatic significance to the scenes of his work.³⁸ But mere motions, voice and postures of actors and mere stage business are not subject of copyright protection. A copyright owner's protectable property in a play consists of development, treatment, and expression of elements such as theme, locale, settings, situations, ideas, and bare basic plots, but the elements in themselves are not protectable, since it is expression of ideas, not ideas themselves, that is protected.³⁹

2.2.1 Essential Requisites of a Dramatic Work:

A dramatic work is something that is capable of being written or printed or reduced to some permanent form, subject, however, to its being so reduced, that it discloses a plot or a story and indicates the mode by which it should be expressed i.e. either with dialogue or by action. The expression of such work is called a dramatic performance. Hence, for any work to constitute a dramatic work, three ingredients are essential viz

- (i) it must be reduced to a permanent form,
- (ii) it must disclose a plot or a story and
- (iii) it should be capable of being performed either with dialogue or by action or both.

2.2.2 Dramatic Work & Publication:

The term "performance"⁴⁰ includes any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematograph film, or by means of radio-diffusion, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of

³⁷ Kalein Co. V. Harper Bros. 222 US 55

³⁸ Sheldon V. Metro-Goldwyn Pictures Corp. (CA 2 NY) 81 F 2d 49.

³⁹ See V. Durang (CA 9 Cal) 711 F 2d 141

⁴⁰ Indian Copyright (Amendment) Act 1994, Section (q) lays down that 'performance' in relation to performers right means any usual or acoustic presentation made live by one or more performers

such lecture. However, it should be noted that public performance of a dramatic or musical work during the lifetime of the author is not publication of the work. In the case of such performance, the work will still remain an "unpublished work" existing only in the manuscript of the author and is to be considered as an 'unpublished work'. There cannot be oral publication, nor can there be any publication of a single copy. The test as to whether or not there has been an issue to the public would seem to be if copies were available to the public in sufficient quantities.⁴¹

If a dramatic work remains unpublished at the date of the death of the author, the public performance of such work after the death of the author will constitute publication of the work, and the provisions relating to "posthumous Works" will apply.⁴²

2.2.3 Actors Gags not Copyrightable:

It is to be observed that at no time actor's gags have been recognized by the copyright acts. By the term Gag is meant a minor incident or sequence of minor incidents, usually of a humorous nature, closely related to and made vocal by gestures and intonations.⁴³ The dictionary meaning of the term gag is "words inserted by an actor which are not in his part; (slang) a joke, especially on the music-hall stage: In Tale V. Full hrook⁴⁴ Lord Justice Vaughan William observed : Gag cannot be within the act; if it were, its authors would be actor not the writer of the piece, nor would it make any difference if the actor and the author were one and the same person, for the act does not extend verbal alterations and additions which vary from week to week and possibly from night to night in order to keep up with the events of the day.

Similarly, actors "stage business" which includes mannerisms, gestures, expressions and other acting devices improvised by a skilled actor to portray his own role is not copyrightable.

2.2.4 Pantomimes and Choreographic Works:

In the United States, the 1976 Act has now specifically added "pantomimes and choreographic works" to the categories of copyrightable subject matter.⁴⁵ The terms are not defined in this statute, apparently on the basis that their meanings are well - settled. Under prior law, such

⁴¹ Indian Copyright Act 1957, Section 3 (1).

⁴² Indian Copyright Act 1957. Section 24 (2).

⁴³ Bloom & Hamlin V. Nixon 125 Fed. 977 (1903)

⁴⁴ (1908) 1 King's Bench Division 821.

⁴⁵ U.S. Copyright Act 1976, Section 102 (a) (4).

works were protectable only as part of a dramatic work. It was recognized that in pantomime the whole action is represented by gesticulation, without the use of words, and that it would deny the title of drama to pantomime as played by the masters of the art. Similarly, choreography that told a story, portrayed characters, or depicted emotions was copyrightable. Although the law now explicitly recognizes all forms of choreography, that should not be construed to include social dance and simple routines.⁴⁶

2.3 COPYRIGHT & MUSIC WORKS:

2.3.1 Definition of Musical Works:

There was no definition of musical work in the U.K. Copyright Act of 1911 and that of 1956. The Musical (summary Proceedings) Copyright Act 1902, which has now been repealed, defined a musical work as meaning "any combination of melody and harmony, or either of them, printed reduced to writing, or otherwise graphically produced or reproduced", thus expressly confining musical works to those which are printed or written. The Indian Copyright Act, 1957 has bodily lifted this definition.⁴⁷

If the question is whether, if A improvises a tune in B's presence, which B carries away in his head and subsequently publishes, A has copyright in the tune, which he can sue B for infringing, probably A has no copyright in his tune, and in any case, the difficulties in the way of proving that B's published work is an infringement of A's improvised tune will be well high insuperable. What the Act protects was musical "work" and the expression seems to imply that the tune shall be recorded in some permanent form before it becomes entitled to copyright. This view is confirmed by the provision that, in the case of an entertainment in dumb show or a choreographic work, it must be reduced to writing in the form in which the work or entertainment is to be presented, and also by the requirement that a work is made when first reduced to writing on some other material form. But the U.K. Copyright, Designs & Patents Act 1988 now solves such problems by defining "musical work" as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. The 1994 Indian Amendment has also brought in a new definition which is much wider than the previous one "Musical Work" now means " a work consisting of music and includes any graphic

⁴⁶ Hosue Rep. No. 94-1476, at p. 54

⁴⁷ Indian Copyright Act 1957, Section 2 (p).

notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music".

The 1976 United States law on the question of musical work is far less ambiguous. It extends copyright protection to "musical works, including any accompanying words".⁴⁸ Since musical works which are fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device are copyrightable, copyright may be obtained regardless of whether the music composition is notated in conventional written form, is recorded on tape or disk, or is embodied in some other material object or medium. Whenever a song is copyrighted as a musical composition, both the words and music are protected. Words alone, unaccompanied by music, are also entitled to copyright protection as a literary work, but a statutory copyright does not give a monopoly over an idea or a musical phrase; it merely protects against the unlawful reproduction of an original work. Although a musical composition is made up of rhythm, harmony, and melody, rhythm and harmony have been in the public domain for so long that neither can be subject of copyright; hence, originality must be found in the melody.

2.3.2 Copyright in Musical Works & Films:

Since musical works in films raise questions of copyrights of different persons, under the Indian Copyright Act of 1957, a major controversy arose on this issue.⁴⁹ The Indian Performing Rights Society (IPRS) announced a tariff of fees, charges and royalties for public performance of composers of musical works and others on 29 September, 1969. The litigation arose between IPRS and the Exhibitors Association of India before the Copyright Board. Its decision of 16 May, 1973 was reversed on appeal by the Calcutta High Court on 13 February, 1974. The Supreme Court affirmed the decision on 14 March, 1977. The Board held the view that the composers of music retained their copyright in their musical works embodied in the soundtrack of the film provided that such lyrical and musical works were written and that the authors had not validly transferred their rights to the owners of the film. The High Court reversed this decision. It held that, under proviso to Section 17 (b), the owner at whose instance the film is made becomes the first owner of copyright and, in terms of that clause when valuable consideration exists "the

⁴⁸ U.S. Copyright Act 1976, Section 101.

⁴⁹ 1 P.R. Society V. E.I. M.P. Association, A.I.R. 1977 S.C. 1443.

composer can claim a copyright in his work only if there is an express agreement" to that effect between him and the owner of the film. It accordingly held that there was no copyright of the authors of the musical works in the first place which could be validly assigned to IPRS. Since the matter raised substantial questions of law of general importance the High Court certified an appeal to Supreme Court on two questions First, is an "existing and future" right of "music... composer, lyricist capable of assignment?' Second, can the producer of a film defeat the same right by engaging such persons.*' On the first question, the apex court had no hesitation in ruling that an existing and future right of a music composer and lyricist is capable of assignment. To this extent, this reaffirmation is welcome as the error of assuming that there just can not be any such right when a film is produced, and all such rights pass on (because of valuable consideration) to the owner of the film has been authoritatively rectified. The High Court's decision on this issue was clearly negative. To the second question, the court held that the film producer can defeat the rights of composers and lyricists by having recourse to Section 17 under which he becomes the first owner of copyright.

This decision on this is certainly misconceived since under the Act there is no bar on the multiple claims of copyright. For example, in the case of record there may exist the owner of copyright in the recorded work and the owner of copyright in the record. Anyone wishing to perform the musical work in which these two sets of copyright exist must take permission from both owners (say, a jukebox operator). The same may be said about copyright in musical work and copyright in film; they are distinct and co-existing. The IPRS case marks unfortunately a beginning of an overall trend of consistent misapplication of law. In *Fortune Films Ltd. V. Dev Anand*⁵⁰ following IPRS case, copyright was denied to actor acting in a film.

Thus, it can be concluded by way of conclusion that copyright in literary, dramatic and musical works is almost well settled in the three jurisdictions which form subject - matter of present study. A large variety of works are protected as "literary works" though in cases of musical works the latest amendments in U.K. and India were long overdue and will go a long way in protecting musicians.

⁵⁰ A.I.R. 1979 Bom. 17.

CHAPTER-3

COPYRIGHT PROTECTION & ARCHITECTURAL PLANS, DRAWINGS AND DESIGNS

An 'architect' expresses his thought and reveals his artistic personality in his 'writings'⁵¹. In this respect, he is similar to all other creators of intellectual properties. Unlike the writer of books, the architect is not limited to words. In addition to words, he uses, among other things, technical signs and symbols and graphic representations to communicate his ideas. The architect might be compared to the composer of music. The architect's signs, symbols, and graphic representations are to the builder what a composer's notes and performance instructions are to the musician. Generally speaking, all of the architect's writings are put under the collective caption of "plans, drawings and designs". Architects, generally use the "drawings" to cover all written expressions of their art. How much protection is available to the creator of architectural plans, drawings, and designs under copyright principles? How the protection to architectural works came to be recognized? And whether this protection is similar in scope to that granted to such producers of intellectual property as authors, artists, and composers? are the major queries which this chapter undertakes to examine. It also examines issues such as ownership of property, copyright in plans,

⁵¹ Term "architect" should be recognised as referring to "designers" as well

infringement of copyright in architectural works and the question of publication in this regard etc.

3.1 ARCHITECTURAL WORKS UNDER BERNE CONVENTION;

The original Convention of 1886 covered "les oeuvres de dessin de peinture de gravure". It also included les lithographies together with illustrations and geographical charts. These are "artistic works", par excellence, as distinguished from literary works. They are different form of expression of the intellect. The expression oeuvres de dessin is very broad in the French language, comprising even sculptures. Architectural works were not included in the Convention of 1886, except that "plans, sketches and artistic works relating to architecture were enumerated in Article 4. While the claim of the architect to copyright in his plans, designs and sketches was widely recognized, that of copyright in the construction was generally not. At the three Berne Conferences which elaborated the Convention of 1886, the question was not discussed. It was in 1890 that the Belgian author Jules de Borchgrave for the first time raised a plea for the protection of architects, and following further discussion, especially at the Congresses of the International Association, a proposal was made by many delegations at the Paris Conference of 1896, for the inclusion of works of architecture, besides works of sculpture, in the enumeration of artistic works.⁵² It was rightly argued that an edifice may embody an original creation on the part of an architect, the same as a artistic work of a sculptor. The protection afforded by the prohibition of copying the plans or drawings of an architect was not sufficient, because this did not protect against copying of the architectural work itself. Plans or drawings are not absolutely essential to the construction of such works.

This proposal was objected to on the part of the German delegation on the ground that there are constructions lacking any artistic character, and their reproduction could not be considered an infringement of a work of art. The British and Norwegian delegations were also opposed to the inclusion. The fact was that in no country at that time were architectural works explicitly protected by legislation, although in some countries the law was construed to afford copyright protection to such works. It was, therefore, agreed to insert in the Final Protocol a stipulation on works of architecture similar to that of choreographic works.

⁵² LADAS, STEPHEN. P., THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, VOL I (1938) New York, P.223.

Thus, paragraph I of the Final Protocol, as amended by the Additional Act of Paris, provided:

In the countries of the Union in which protection is granted not only to architectural plans, but also to the actual works of architecture, such works are admitted to the benefit of the provisions of the Conventions of Berne and of this Additional Act.

It was clearly understood, in view of the general principle of Article 2, that in countries in which this protection existed, nationals of other countries of the union were to be protected without condition of reciprocity.

At the Berlin Conference in the year 1908, the German government abandoned in this, as in several other questions, its previous narrow attitude, and proposed the works of architecture be protected by the convention.⁵³ This was agreed upon, and the works in question were inserted in the enumeration of literary and artistic works in Article 2. It was understood at the conference that protection was to be secured on original artistic works of architecture, and not on common constructions which did not reveal the personality of the author. The purpose for which the building was to be used should be immaterial. A building might at the same time be useful and artistic. It mattered not that its utilitarian value predominated over its artistic character. Works of architecture include palaces, churches, triumphal arches, monumental fountains, and the like. Ornaments, forming an inseparable part of a building, may constitute the principal characteristic of a construction, and they are to be deemed covered by the protection accorded to architectural works. On the other hand, such ornaments, when separable, such as statue within a niche, are works of sculpture and protected as such. The protection of these works involves protection against their being copied by the construction of similar edifices as well as the graphic reproductions (drawings, photographs, etc.) Several countries of the Union, before or after the Conference at Berlin, amended their laws, with the view of affording protection to architectural works.

3.2 COPYRIGHT IN ARCHITECTURAL WORKS UNDER COMMON LAW

As said above that an architect expresses his thought and reveals his artistic personality in his "writings". To cover all written expressions of their art, the architects normally use the word "drawings". However, the word has acquired too narrow an interpretation in the average person's

⁵³ In the meantime, Germany legislated for the protection of architectural works in Article 2 of the law of January 9, 1907

vocabulary to warrant its use as a complete description of an architect's writings. Nor is the term "design" an apt means of describing all of an architect's writings. Like a carefully phrased campaign promise, it means different things to different people. For our purposes, a design is not only a two-dimensional model of such work, it is also any eye-pleasing drawing, detail, pattern, form or arrangement of material which is primarily intended to have an artistic or ornamental effect. The artistic use of wood strips, or "trim" on the exterior of a house to enhance its charm is an example of the latter use of the term "design".⁵⁴ In addition to drawings and designs, an architect uses the ' 'plan", a two dimensional medium, to express his ideas for the erection of three-dimensional structures. For structures such as houses, the most basic plan is the "floor or ground plain". This is a graphic or schematic drawing which delineates the form, size, room arrangement, and construction features of one floor of a structure as if seen from overhead, ceiling or roof removed. The floor plan gives a horizontal structural description. To describe vertical planes, such as walls, windows, doors or facades, "elevations" are employed. These may be "framing elevations" which reveal the construction details, or "skeleton" of a structure, or they may represent the completed vertical planes with their "skin" on. And, of course, there are interior and exterior elevations. The modes of expression or writing available to the architect are many. Yet the law was clear that his unpublished work, be it denominated plan, drawing or design, was protected under common law principles from any unauthorized use.⁵⁵ The wrong - doer was enjoined and, in some cases, held liable for damages. Of course, the work must be original as well as unpublished, that is, it must be the result of independent labor and not of copying. However, the work need not be first of its kind." Although the concept of novelty is a prerequisite in the law of patents, it has no place in the fields of common law[^] or statutory copyright.⁵⁶ Novelty is a concept incapable of clear-cut definition. Novelty does have some measurable basis where its scope is limited in territory and time. To require an author, who has created something original, to warrant and prove that it is also novel, that it has never been done before anywhere at any time, is to confront him an obstacle too difficult to overcome. History

⁵⁴ Designs, in the latter sense, may be protectable under either the copyright or patent laws, or under both. Copyright protection is not dependent upon the intended use of the object upon which the copyrighted design is placed. *Rosenthal V. Stein*, 98 U.S. P.Q. 180, 205.

⁵⁵ DRONE, S. EATON, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (1879), 101, 102.

⁵⁶ "Unlike the subject matter of a patent, copyrighted material need not be new, but only original". Clark, C.J., in *Baker V. General Electric Co.*, 162 F. 2d 141 (2nd Cir, 1947); *Chamberlin V. Urin Sales Corp.*, 150 F. 2d 512 (2nd Cir 1945); *Fisher V. Dillingham*, 298 Fed 145 (S.D.N.Y. 1924).

has recorded numerous incidents where two gifted men, working unaware of the other's efforts, have arrived, almost simultaneously, at the same results or discoveries. Yet if absolute novelty must be proven before either could restrain the unauthorized publication of his work, neither would receive protection. It should be sufficient that the work of each author is neM' to him, that is, that it is original with him, and not copied from the work of another.⁵⁷ An original unpublished "naked idea" was not protectable at common law." The undeveloped idea that a house should be built in a circular form to permit all the rooms to receive sunshine at some time in the day is an example. At this stage, the idea is nothing but a thought ephemeral, intangible, impermanent. To be protected at common law, the unpublished original work must be expressed in a concrete or tangible manner. This does not mean that the author's thought must be set forth in some kind of writing, and that each premise must be completely developed. The requirement of concreteness for intellectual productions would appear to be satisfied where the creator's thoughts are contained in such non-abstract form as would permit the impress of his mark of ownership. Should the unpublished work be "not capable of distinguishable proprietary marks" because of its vagueness of expression, it would be proper to deem it non-concrete. It would be non-protectable because non-persuasive, and non-persuasive because it lacked *indicia certia*.

As an eminent English jurist has observed⁵⁸: The subject of property is the order of words in the author's composition : not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, not the ideas expressed by those words, they existing in the mind alone, which is capable of appropriation. As indicated, the architect employs a specialized form of writing. He expresses himself, primarily, by the use of technical signs, symbols, and graphic representations. Substitute these terms for the term "words" in the above quotation, and one will note its applicability to an architect's intellectual productions.⁵⁹ Publication counsel could advise, "do this - avoid doing that", and all would be well - the common law copyright would be preserved against any unauthorized reproduction.

⁵⁷ Nimmer. B. Melville in his article 'The Law of Ideas', 27 Calif L. Rev. 119(1954), points out the confusion engendered by many courts by their misuse of the terms originality and novelty. Confusion must result as to the true nature of copyright where the courts interpret the element of novelty as an aid to establishing the originality of a work in those cases where both the plaintiff's and defendant's properties use similar stock incidents and characters. It is submitted that when courts speak of the requirement of " a n e w c o n c e p t i o n o r n o v e l a r r a n g e m e n t " they mean only that an author's work must be sufficiently different in expression or development as to indicate that it is original and not copied from the protected work of another or from public domain material to which the plaintiff had access. See *Simonton V. Gordon*, 297 Fed 625 (S.D.N.Y. 1924)

⁵⁸ Erle,J.,in*Jefferys V. Boosey*,4H.L. Cas815, 867, 10 Eng. Rep. 681, 702(1854).

⁵⁹ Katz, S. Arthur , "Copyright Protection of Architectual Plans, Drawings, And Designs", 19 *Law and Contemporary Problems* (1954), 224, atp.232.

But, alas! the law was not clear, the theory of publication is simple enough, but its correct application to a particular set of facts is another matter. At least in three reported cases from United States of America, courts have discussed as to what constitutes a publication of architectural plans, drawings, and designs. A New York Appellate Division case⁶⁰ held that the filing of unpublished plans in a municipal building department which required such filing before construction could be approved, was such a publication of the plans as to destroy the architect's common law rights in them. A Missouri Appellate Court⁶¹ and a Philadelphia city court have held that the building of structure from hitherto unpublished plans, and its exposure to public gaze, was also such a publication as destroyed the common law copying in the plans.

It is submitted that these cases are wrong in principle and destructive in practice of an architect's intellectual property. Should these three lower court cases be deemed to represent the true state of the law, an architect may never properly exploit his unpublished intellectual productions. The two acts which the nature of an architect's calling require him to perform, in order to earn his living, are turned, by these three decisions into the very means of depriving him of the right to profit from his own labour at the exact moment such profit is realisable. From the business point of view as well as law, these decisions are unjust and unsound. This contention is supported by an examination of the authorities on the concept of publication.

3.2.1 Publication:

"Publication", as a legal term, is possessed of many definitions. It means one thing in the law of wills, another thing in the law of defamation, and yet another in the law of copyright. The act publication communicates the content of a work to others, generally by the circulation of copies. However, the copyright law distinguishes between communications which divest one of his common law rights in his work, and communications which do not. The former act is deemed a general publication, the latter, a limited publication. "The use of the word "publication" in these two senses is unfortunate, and has led to much confusion,"⁶²

⁶⁰ Wright V. Eisle, 86 App. Div. 356 N.Y Supp. 887. (2nd Dep't 1903).

⁶¹Gendell V. Orr, 13 Phil. 191 (1879). It is difficult to agree with the reasoning of this case or of Kurfiss V. Cowherd, *ibid.*, persuasive on the point that erection of a building is a publication of its technical writings

⁶² Townsend, J., in Werckmeister V. Amercian Lithographic Co., 134 Fed. 321. 324 (2d Cir. 1904). to the same end. Hough, C.J., in Associated Press V. International News Service, 245 Fed, 244, 250, 251 (2d. Cir, 1917).

By definition, a general publication is such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public.⁶³

A limited publication is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. The above definitions are certainly succinct. But, as a matter of practice, how may one type of publication be distinguished from another? The nature of the work concerned has some bearing on the question." For example, the performance of dramatic piece or a musical composition is never any kind of a publication thereof. Here the law admits of no doubt.⁶⁴ However, the certainty one seeks in the law becomes less apparent when other intellectual productions are examined. For instance, it is not only wholly clear whether the act of exhibition per se of a painting is a publication, and, if so, whether it is general or limited. In so far as the technical writings of an architect are concerned, they are neither dramatic or musical works, nor intended solely for exhibition purposes. It is evident, therefore, that they are capable of being published, in the fullest legal sense of that term.

But the nature of the intellectual production aside, what other factors determine whether a communication is a publication, and if so, whether it is general or limited? Is the printing of copies a general publication? Does the amount of copies matter? May a work be published generally by the circulation of manuscript copies?

It is submitted that the mechanical means employed to reproduce a work, or the number of copies made and distributed are not determinative of the question of general publication. The test is one of intention. The U.S. Supreme Court has declared⁶⁵: It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property.

⁶³ Townsend, J., in *Werckmeister V. American V. American Lithographic Co.*, supra note 24. See also judge Yankwich's scholarly treatment of the point in *White V. Kimmell*, 94 f. Supp. 502 (S.D. Calif, 1950).

⁶⁴ *Ferris V. Frohman*, 223 U.S. 424 (1912) established this point in American law. The same rule obtains by statute in Britain, Copyright Act, 1911, 1 & 2 GEO, 5, c. 46.

⁶⁵ *Day, J., in American Tobacco Co. V. Werckmeister*, 207 U.S. 284, 299-300 (1907).

Clearly, an author is not to be lightly divested of his common law protection, and hence of his property, without clear indicia of his intentions. For the law to find a general publication, the facts surrounding the publication must reveal a desire to abandon all rights in the work. A creator of intellectual productions who by conduct, custom or contract, restricts the use or circulation of his work has made no general publication.⁶⁶ Thus an architect who discloses his unpublished plans drawings or designs to a prospective client, or services of clients, does not do so with the intention of abandoning his rights in his work. Such publication as he makes is certainly a limited one. Does an architect intend to make a general publication when, in conformity with the dictates of a building ordinance, he files his plans in a governmental office? Obviously not. The purpose of the filing requirement is to protect the public from unsafe construction - not to divest the architect of his property. Conversely, if the filing is intended as a condition precedent to the states' action of granting a limited monopoly to the creator, as where a patent right is concerned, the filing is tantamount to a general publication." This is wholly proper. Since the creator has obtained the exclusive right to exploit his work for a limited time, he is not harmed by having his production exposed to public examination. The filing of architectural plans for building permit purposes should be held, at most, to be a limited publication. The architect files solely with the intention of receiving government approval of his plans.

The requirement that plans must be filed and approved before a building permit is issued is a valid exercise of a municipality's police powers. It is submitted, however, that such an ordinance is patently unconstitutional where it is construed as working a general publication of an architect's plans. In effect, such an ordinance takes an architect's property without due process of law.⁶⁷

Let us examine the question whether the architect intends to make a general publication of his plans by building the structure they describe. The answer must be in the negative. It is only by repeated uses of the same set of plans (or modifications thereof) that the architect commences to profit from his intellectual production. But business intentions aside - is it legally sound to suppose that a completed structure is a publication of its plans ? It is submitted that it is not. For

⁶⁶ "the law recognises a vital distinction between the public and private circulation of copies. The owner may circulate copies of a work among a limited number of persons, with the understanding and on a condition that it is not to be made public. In such case no publication takes place, notwithstanding that the copies so distributed are printed." DRONE, S. EATON, supra note 6, 290

⁶⁷ BROWN, "Due Process of Law, Police Power and the Supreme Court", 40 Haw. L. Rev. 943 (1927).

a work to be published it must be reproduced, that is, there must be an issuance of copies to the general public. A completed structure is no more a copy of its underlying plans than a phonograph record is a copy of its underlying musical notations. An architectural plan is a technical writing. It is capable of being copied only by similar technical writings that is by other plans etc. A structure is the result of plans, not a copy of them." It follows that building a structure and opening it to public gaze cannot be a publication of its plans.

After the Paris Act of 1971, the construction of a work of architecture is not a publication thereof in most countries. For the above reasons, it can be concluded that neither the filing of plans in a government office, nor the erection of the structure described in such plans constitutes a general publication of the ideas. An examination of Anglo-American legal history explains duality of copyright i.e. common law as discussed above and statutory copyright to be discussed below. The first English Copyright Statute (8 Anne, c.19) as noted in chapter on historical development was passed in 1709. It was designed to aid authors of published works by giving them the right to have penal sanctions applied to infringers. The court of king's Bench interpreted this statute in 1769 in *Miller V. Taylor*⁶⁸. It held that the act was declaratory of the common law, that it was a penal statute which gave an additional remedy to an author in his fight against literary piracy, and that it was not intended to divest the author of his perpetual common law right in his property, whether published or unpublished.'

In 1774 the Statute was again subjected to scrutiny. The case of *Donaldson V. Becket*⁶⁹ come before the House of Lords upon an appeal from a decree by the Lord Chancellor which had made perpetual the injunction granted in *Miller V. Taylor*. It was the defendant's argument that, the Statute of Anne was not declaratory of the common law. But introductive of a new law, to give learned men a property they had not before. By a court of six to five, the eleven judges hearing the argument of the case voted to reverse *Miller V. Taylor*. They held that the statute did take away an author's common law right in his published work. The law in the United States remained in accord with *Donaldson V. Becket* till 1976 revision of Copyright Act. The Statute of Anne, c. 19, not being a part of the common law, was never applicable to the United States. Nevertheless,

⁶⁸ Supra note 1

⁶⁹ 98 Eng. Rep. 257. 41

the United States Supreme Court in *Wheaton V. Peters*⁷⁰ cited the above decision as its authority for holding that the first federal copyright law, the Copyright Act of 1790, destroyed common law rights in published works. Thus, in both the United States and the United Kingdom, copyright in published works was earlier deemed to be a creature of Statute.

Since the passage of the Copyright Act of 1911, there has been no common law copyright in the United Kingdom, all intellectual productions, published or unpublished, being protected only by statutory fiat.

In United States, the dual system continued till 1976 because the U.S. Copyright Act of 1909 itself provided that nothing in the Act should be construed to annul or limit the right of the author of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent. But this dual system proved unwieldy, particularly in view of technological advances which diminished the importance of publication as the principal factor determining which body of law applied. By passing the 1970 Act, congress intended to abolish the dual system and to adopt a single system of federal statutory copyright from "creation", that is, from the time a work is "fixed" in a copy or phonorecord. For

the first time the Copyright Act of 1976 now provides that on and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright, whether created before or after that date and whether published or unpublished, are governed exclusively by the Federal Copyright Act, and that after such date no person is entitled to any right in any such work under the common law or statutes of any state." After the effective date of the Act, all legal and equitable rights equivalent to copyright are governed exclusively by the new Act.

3.3 STATUTORY COPYRIGHT PROTECTION TO ARCHITECTURAL WORKS

As noted above that it was at the Berlin Revision of Berne Convention in 1908 that copyright protection to architectural works was guaranteed and parties to the convention were held to be bound to grant protection. The Committee appointed by the British Government, in the year 1909, to consider what alterations in the English law were necessary in order that England should

⁷⁰ 8 Pet. 591 (U.S. 1834).

come into line with the other countries who were parties to the Revised Berne Convention, only by a majority reported in favour of the inclusion of works of architecture amongst the subjects of copyright. Further opposition to the claims of architecture was met during the passage of the Copyright Bill. The architects, however, triumphed to this extent, that "architectural works of art", were included amongst the works to be protected under the Copyright Act of 1911, although the remedies for the infringement of the copyright. in those works were considerably less drastic than those inserted in the Bill as originally laid before Parliament.

The Act of 1911, therefore, not only preserved the right of the architect to copyright in his plans, which had existed under the old law, but created a new right by including "architectural work of art" amongst artistic works capable of enjoying copyright protection. It was unsuccessfully contended in the case of *Meikle V. Maufe*⁷¹ that there could not be a separate copyright in building, as distinct from a copyright in the plans on which the building is based, and in fact there seems no reason to doubt that the Act of 1911 created a new and distinct right.⁷²

Then came in the U.K. Copyright Act 1956 which governed the copyright law till recently. The 1956 legislation had confirmed the position of architects by including, in the definition of "artistic work",

"work of architecture, being either buildings or models for buildings."⁷³ So far as plans and sketches are concerned it was little curious that under the Act of 1911. plans were protected as "literary works", and sketches as "artistic works". This resulted from the definition of "literary works" contained in that Act, which included amongst literary works, "maps, charts, plans, tables, and compilations", whereas an "artistic work" included "drawings". The Act of 1956, however, while continuing to include "drawings" in the definition of "artistic work" then proceeds to define "drawing" as including any diagram, map, chart or plan. Consequently, under the 1956 law, all of an architect's work is included in the definition of "artistic work, whether consisting of sketches, plans, elevations, diagrams or other two dimensional representations, or whether it consists of actual building or models for buildings. Though the Acts of 1956 employed a simpler definition and protects original works of architecture, being either buildings

⁷¹ (1941)3 ALL.E.R. 144

⁷² COPINGER AND SKONE ON COPYRIGHT, Supra note 15, at p.244

⁷³ U.K. Copyright Act 1956, Section 3(1) (b)

or models for buildings, "building" being defined as including any structure. It is thought, however, that the simpler definition has not produced any substantial alteration in the law. While drawings and plans are protected "irrespective of artistic quality", these words are omitted in relation to works of architecture. Thus, the position under the Act of 1911 under which architectural works were required to have "an artistic character or design" is in effect, maintained.

An architectural creation is, thus, capable of protection at three stages; (a) as a two dimensional technical writing, that is, as a plan, drawing or design; (b) as a two dimensional artistic representation of the projected structure- or as a three dimensional model of the said structure and (c) as a completed structure. All the three stages are protected in most of the countries of the world including United Kingdom and India. Unhappily for the American architect, such is not the case in the United States. Architectural plans, drawings, and designs have been the subject of statutory protection in United States only since the passage of the Copyright Act of 1909.⁷⁴ It is not yet clear, to what extent, if any, this statute protects the contemplated structure itself. This uncertainty stems from the language of the Act. In addition to the basic right "to print, reprint, publish, copy and read the copyrighted work",⁷⁵ the statute grants a collateral right "to complete, execute and finish it (the copyrighted work) if it be model or design for a work of art. However, there is no express provision in the law, as there is in the U.K. Act, which affords copyright protection to an architectural work such as a building or other structure."

The creator of a copyrighted model or design for a work of art has the exclusive right to execute and complete the contemplated structure or object. Architecture is one of the arts. The copyright office has long accepted models or designs of architectural works such as dwelling places, mansoleums, and other structures for registration as models or designs for works of art. It would appear that an architect may obtain the exclusive right to build the structure he has designed if he registers a claim to copyright in his model or design - as opposed to merely copyright in his plans. Indeed, a leading writer on copyright has observed.⁷⁶:

.... no good reason seems to exist under this section

⁷⁴ Act of March 4, 1909, 35 Stat 1075 (1909).

⁷⁵ U.S. Copyright Act 1909, Section 1(a).

⁷⁶ WEIL, AMERICAN COPYRIGHT LAW 83,84 (1971). 83, 84 (1971).

[1 (b)], why adequate protection may not be obtained by architects if they copyright their model or designs.

The right under section 1(b) is apparently limited to completing the contemplated work only. Thus, if an architect designed a civic monument and copyrighted his design or model, he had the exclusive right "to complete, execute and finish it". But having once constructed the monument, others could now freely copy it - provided they did not thereby copy those technical writings which the architect may have also copyrighted.

To the architect who designs "one of a kind" structures, such as bridges, sky-scrapers, and luxuriously -built houses, the protection afforded by Section 1(b) is adequate. This would not be the case where the architect was engaged in designing private dwellings for small rental units. Here repetition, with limited variations, of the basic model or design is the means whereby the architect collects the bulk of his fees. Section 1(b), under the above interpretation, would protect him only in the completion of the first structure. Therefore, such protection as was available would have to come from the copyrighting of his technical writings: his plans, drawings, and designs. Section 1(a), which grants to the copyright proprietor the exclusive right "to print, reprint, publish, copy and vend the copyrighted work" extends its protection to architectural plans, drawings, and designs. No other section of the copyright law is applicable to these technical writings. The section is designed solely to prevent the protected work from being "copied" that is, there may be no unauthorized printing, reprinting, publishing, copying or vending of the work. Any use of the intellectual production which does not constitute a copying is not an infringement of Section 1(a).

The creators of such intellectual production as books, periodicals and maps are adequately protected under Section 1 (a). The moment, a book, periodical or map is published, it can be fully exploited, culturally as well as commercially. These works need merely be sold to be of value of their creators, and to be read, to be of value to the user. Nothing more must be done. The prevention of copying gives the authors of these works all the protection they need.

However, there are many intellectual productions which are neither economically nor intellectually complete when rendered solely as published copies. Music is not fully exploited merely by the printing of notes on paper. It springs into life only when these notes are played, A

lecture may be enjoyed when published as book, nevertheless, to be fully exploited, it is necessary that it be delivered before an audience.

Dramatic works (and these include motion picture) may be read and disseminated as plays and scripts. However, they are of limited value unless they are performed. A representation of a contemplated piece of sculpture will not impart the true nature of the work until the representation is executed. By the same token, an architect's plans, drawings, and designs are of little practical value until their information is turned into a structure. Clearly, something additional must be done with certain works to make them more valuable to the creator and the public.

Section 1(a) is concerned solely with the "copyright". It is incapable of adequately protecting works which are primarily intended to be played, delivered, performed or executed. Architectural plans, drawings, and designs are no more an end in themselves than is a piece of sheet music. They are primarily intended to be executed, to be turned into structures. The publishing and vending of copies is purely incidental. Nevertheless, under the law as discussed above, in the United States, the architect doesn't have the exclusive right to build the structure embodied in his technical writings. He is limited to such protection as is afforded to him by his "copyright" in these writings" Under the Copyright Act of 1976, architectural and engineering drawings also fall within the subject matter of copyright" since it is the custom of the profession that architects retain ownership of plans unless an express agreement to the contrary exists.^ Support for the holding that congress intended copyright protection to continue to extend to architectural drawings and plans is also found in the definitional Section of the Copyright Act of 1976⁷⁷ which includes "technical drawings, diagrams and models" in the definition of pictorial, graphic, and sculptural works." In some cases the copyrightability of architectural plans has been assumed. Thus where a developer paid an architectural firm for architectural plans for an apartment project and then used such plans for the construction of another apartment complex on an adjoining place without further payment to the architectural firm, the developer and contractor employed by it were held jointly and severally liable for copyright infringement.⁷⁸

⁷⁷ Meltzer V. Zoller (DC NT) 520 F Supp 874.

⁷⁸ See Aitken, Hazen. Hoffman, Miller, P.C. V. Empire Constr. Co. (DC Neb) 542 F Supp. 252

In United States the protection afforded, in economic terms, to the copyright owner of architectural plans, seems quite questionable in view of that the courts have stated that while copyright protects an architects' drawings, it does not grant him the exclusive right to use the idea or concept contained in the drawings and does not cloth their author with the exclusive right to construct the structure depicted in the drawings.⁷⁹ Under the prior law, the unauthorized construction of a building based upon copyrighted plans was held not to constitute copyright infringement of the plans,⁸⁰ since, even if an architect's plans and drawings were protected by copyright, copyrightability did not necessarily extend to the structures themselves since the latter were considered "useful articles" and as such, had an intrinsic utilitarian function which is not copyrightable. Thus, under the 1976 Act, purely nonfunctional or monumental structures are subject to copyright protection as are artistic sculptures or decorative ornamentations or embellishments added to a structure." Where the only elements of shape in an architectural design are conceptually inseparable from the utilization aspects of the structure, copyright protection will not be available."

As far as the position of the architects under Indian copyright law is concerned, it is found that the copyright protection to architects under the Indian Copyright Act 1957 is similar to one under the British Act of 1956. As India is also a signatory to the Paris Revision (1971) of Berne Convention, all the rights which are guaranteed by the convention are also available to foreign architects. Under the Indian Act of 1957, "architectural work of art" means any building or structure having an artistic character or design, or any model for such building or structure.⁸¹ The definition of the British Act of 1956 is somewhat broader in the sense it does not require "artistic character or design".

The definition of "artistic work" given under the Act also includes "an architectural work of art". It thus provides "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) an architectural work of art; and

⁷⁹ Supra note 59.

⁸⁰ Imperial Homes Corp. V. Lament, 173 USPQ5 19; ScholzHomes. Inc. V. Maddox, 154 USPQ 197

⁸¹ Indian Copyright Act 1957, Section 2 (b).

(iii) any other work of artistic craftsmanship; It is interesting to note that here the requirement of "artistic quality" has been abandoned and thus the restrictive definition of "architectural work of art" which emphasized "artistic character" is somewhat broadened.

The Act clearly lays down that the copyright under the Act subsists throughout India in original artistic works". Then in the case of architectural work of art, the work must be located in India." The copyright protection of an architectural work of art shall subsist only in artistic character and design and is not available to processes or methods of construction.

3.4 OWNERSHIP OF COPYRIGHT IN ARCHITECTURAL PLANS

The law as to the ownership of copyright in architectural designs is almost similar in both United Kingdom and India. There is no custom or any general binding usage to the effect that the plans belong to the architect and not to his employer.⁸² While the position of the plans presents little difficulty, it may not be easy to decide the ownership of the very large number of miscellaneous documents and correspondence which normally come into existence during the course of the architect's administration of a building contract. It is suggested that the test is whether a document comes into existence or is obtained by the architect as a part of the discharge of his function as an agent of the employer for which he is paid. So far as copyright is concerned, in the absence of express provision in the contract of employment, the copyright in all plans and drawings remains with the architect.⁸³

Independently of this copyright, the architect has a copyright in the artistic character or design of the building itself (but not of any process or method of construction), so that, for example, if the employer commissions an extension internal layout of an existing building, there will be a breach of the copyright in the building owned by its original architect even if his plans are long lost and not used for extension or addition. This does not, however, mean that the original architect has any right to be employed on later work, or that his damages for breach of copyright have any connection with the project he would have earned had he been engaged on the later project.

⁸² Gibbon V. Pease (1905) 1 K.B. 810; Inala industries Pty. Ltd. V. Associated Enterprises Pty. Ltd. (1960) Qd.R. 562

⁸³ HUDSON'S BUILDING AND ENGINEERING CONTRACTS, (10th ed.), by I.N. DUNCAN, P. 140.

As noticed above that copyright law doesn't alter the rule as to the prima facie ownership of an architect's plans, namely, that these generally become the property of the client. But that does not mean that copyright passes to the client. This would only be so if the architect assigned the copyright in writing", or he were under a contract of service with his client.⁸⁴ However, an architect, by an agreement in writing made before the plan or building is created, can confer on the client the future copyright in the work so that, when the work comes into existence, the client will be the owner of the copyright therein. But unless the client has acquired the copyright in the plans, he may not copy them, nor may he reproduce the building in which copyright subsists as a work of architecture. It was held, under the Act of 1911, that a client for whom an architect had designed an existing building could not reproduce the plans or the building, even for the purposes of making extensions to that building This appears still to be the law, though it is provided in the Act of 1956 that where copyright subsists in a building as a work of architecture, the copyright is not infringed by any reconstruction of that building. Then, no copyright is violated where the architect has parted with the copyright if he reproduces part of his work in a subsequent work by use of sketches, plans, models or studies made for the purposes of earlier work provided he does not repeat the main design of the earlier work.⁸⁵

CHAPTER-4

COPYRIGHT LAW AND PERFORMERS RIGHTS

The law on performers' rights is in its formative stage, and there is still no consensus on what the terms performance, performer and performers' rights mean. A clear understanding of these terms is essential to meaningfully engage with the legal questions confronting the protection of performers' rights.

A layman's understanding of a performance would include within its ambit anything from a

⁸⁴ U.K. Copyright, Designs & Patents Act 1988, Section 11 (2); Indian copyright Act 1957, Section 17 (c); U.S. Copyright Act 1976, Section 101

⁸⁵ U.K. Copyright Act 1956, Section 9 (9)

classroom lecture to a theatre performance. Hence, at the outset this paper restricts the scope of this term by understanding a ‘performance’ to be a transitory activity of a human individual that can be performed without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, ritual or education.⁸⁶

More specifically, this article engages with performances that have come before courts in the context of the protection of performers’ rights, which may be classified into four categories. First, performances may be unfixed and unscripted. This would include acts in fairs and carnivals, where the work is live, and entirely created and directed by the performer.⁸⁷ Secondly, performances may be unfixed and scripted. This refers to performances of dramatic works, live dance performances, etc as distinct from the underlying scripts or work.⁸⁸ Thirdly, performances may be fixed and unscripted. These performances are usually fixed in some tangible medium, but not scripted. Improvisational music, like Indian classical music, is an example of such a performance.⁸⁹ And lastly, performances can be scripted and fixed, which the most common type of performance is. This includes a performance in a song, film, or advertisement where the performer is given a role, script or instruction to perform.⁹⁰

Secondly, while national laws and international treaties offer some guidance on the question of who can be called a ‘performer’, existing definitions are open-ended and there is large

⁸⁶ Arnold R, *Performers’ Rights* (Sweet and Maxwell, London), 2004, p. 2

⁸⁷ One of the seminal cases dealing with performers rights in America - *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562 (1977) – had a fact situation of this nature. Here, the plaintiff was the performer of a human cannon ball act at a fair – unscripted and unfixed. This was recorded and broadcasted by a TV station, and the performer went to court for infringement of his rights. The Court stated that while dissemination of information was allowed by the First Amendment, it did not warrant a reproduction of the entire act. *Zacchini* clearly had publicity rights in the act, which could not be appropriated

⁸⁸ Section 13(1)a of the Indian Copyright Act states that copyright protection will be extended to dramatic works. But this does not cover any of the performances that flow out of the work

⁸⁹ The cases that have come before courts in this category usually involve sports persons and notable sporting performances – like *Ettore v Philco Television Broadcasting Corp* 229 F.2d 481 and *Baltimore Orioles Inc v Major League Baseball Players Association* 805 F.2d 663. In the former case, a previously televised boxing match was replayed on television, after some editing. The editing omitted some of the best fighting scenes of Ettore. He argued that this was defamatory, and it was unauthorised reproduction. While the Court recognized his property right in his performance, it said that he had given this right away when he agreed to the first television. In the *Baltimore Orioles* case, players were agitating for their rights in their sporting performance. It was held that these rights were held by the broadcasting companies and that the publicity rights claim was pre-empted by copyright law.

⁹⁰ Examples of cases where rights have been sought in scripted fixed works include *Booth v Palmolive* 362 F.Supp. 343, where a singer sought rights in a previously televised song separately from the person who owned the copyright in the song; *Davis v Transworld Airlines* 297 F.Supp. 1145, where the defendants imitated the plaintiff’s recorded performance in a song in a commercial; *Presley v Russen* 513 F.Supp. 1339, where action was based on the defendant’s using the image and likeness of the deceased singer and names associated with him while rendering his own musical services

scope for interpretation and debate.⁹¹ Defining a ‘performer’ is an important policy question and requires treading a fine line between the equities of major and minor performers. While identifying a performer on the basis of commonly used criteria of quality or quantity, a legislator runs the risk of ignoring smaller performers, or granting them rights that potentially vitiate the rights of major performers.⁹² This paper avoids this debate, and defines a performer in the widest sense possible, as anyone who takes part in a performance, and would therefore allow legal protection to any individual who has been a part of a performance, regardless of the importance, duration or distinctiveness of the performance.

Finally, the phrase ‘performers’ rights’ comprises all the rights that may accrue to a performer by virtue of his performance. They are hence, a bundling of three distinct types of legal rights: Economic rights, moral rights and non-tangible rights. Economic rights include property rights of reproduction, adaptation, distribution, rental, lending, remuneration and communication.⁹³ Moral rights are the rights of attribution and integrity over the work performed.⁹⁴ Non-tangible rights are the most difficult to define. They include the right over the persona of the performer,⁹⁵ the right against use of likeness or name of the performer,⁹⁶ rights over the performer’s creativity in execution of the performance, over his unique and distinct expression and style.⁹⁷ This three-pronged understanding of performers’ rights ensures

⁹¹ Performers are defined in the following ways – Article 2 (a), 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. Article 3(a) of the Rome Convention, 1961 – ‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works; Section 2(qq) of the Indian Copyright Act – A performer includes an actors, singers, musicians, dance, acrobat juggler, consumer, snake charmer, a person delivering a lecture or anyone else making a performance.

⁹² Taubman Antony, Nobility if interpretation: Equity, retrospectivity and collectivity in implementing new norms for performers’ rights, *Journal of Intellectual Property Law*, 12 (2005) 351-425

⁹³ The economic rights mentioned here may be found in the Indian Copyright Act, as well as the WPPT and TRIPS. For a broader discussion on the economic rights that performers want to enjoy, Hays T, *Intellectual Property Law in Practice* (W Green Publishers ,United Kingdom), 2004, p. 204

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⁹⁵ *Onassis v Christian Dior*, 122 Misc.2d 603. Here, the case was based on the defendant employing a ‘look alike’ of the plaintiff who encapsulated the persona of the plaintiff

⁹⁶ *Presley v Russen* 513 F.Supp. 1339, where action was based on the defendant’s using the image and likeness of the deceased singer and names associated with him while rendering his own musical services. The court here decided in favour of the estate of Presley, who had brought the suit about

⁹⁷ *Booth v Palmolive* 362 F.Supp. 343, and *Sinatra v Goodyear Tires*, 435 F.2d 711. In the latter case, the defendant’s commercial contained a singer who sang the same song as the one the plaintiff was famous for – ‘These Boots Are Made for

that the complete value of the performance is protected; its commercial worth through economic rights, its moral worth through moral rights and its creative worth through non-tangible rights.

4.1 Performers' Rights in India – Scope and Lacunae

An examination of the Indian legal system in the context of this matrix of performer jurisprudence makes it clear that performers' rights are only protected under Sections 38 and 39 of the Indian Copyright Act.

While a right in the performance accrues to the performer when he engages in a performance, as per the basis of performer protection in Indian law, once performances of any kind, visual or vocal, are recorded, broadcasted or communicated with the permission of the performer, his rights over the performance cease to exist. All rights vest in the owner/author/director of the recording, broadcast or communication. No performance can however be recorded, broadcasted or communicated without the performer's consent.⁹⁸ A performance recording cannot be reproduced if it was recorded without the consent of the performer, or if it reproduced for different purposes than those for which the performer gave his consent. These rights last for fifty years, but if a performer agrees to make his performance part of a film, these protections are not available to him.

A summary reading of these provisions evidences the sparse protection afforded to performers' rights in India. The economic rights of performers in their performances are protected in India, only until the performance is fixed. Once fixed, performer has no right in the performance independent of the owner of the copyright in the fixed performance. Performers in scripted fixed works have no rights over their performances,⁹⁹ nor do actors in scripted unfixed works, or in unscripted fixed works.

There has also been a dearth of litigation on this point, thus preventing the judiciary from

Walkin'. She also imitated the unique voice and style of the plaintiff while singing. Similarly, in *Waits v Frito Lay* 978 F.2d 1093, action lay for appropriation of unique style. The Court defined style to be - Style is *how* a song is sung, how the music is delivered, how the words of a song are expressed. Style includes mood, phrasing, and timing, whether a selection is performed loudly or quietly, whether the song is expressed in singing, talking, or a combination of the two. And then stated that the same could not be protected

⁹⁸ Section 38(3), Indian Copyright Act, 1957

⁹⁹ This means if another performer sings in the distinctive style of an existing singer, or imitates an actor's distinctive mannerisms; the original performers have no recourse in law to protect their rights even though all these styles, persona, mannerisms and acting techniques are their creative product and labour

filling the lacunae. The earliest case on performers' rights in Indian courts was in 1979, when Sections 38 and 39 were not a part of the Copyright Act. In *so and so case*, the Supreme Court pronounced that an actor had no claim over his performance in a film as this performance did not fall within the five categories of artistic work contained in the Copyright Act. After the inclusion of Sections 38 and 39, in 2003, *Super Cassettes Industries v Bathla Cassette Industries* was decided by the Delhi High Court.¹⁰⁰ It established that performers' rights were essentially different from copyright, and held that re-recording of a song without permission from the original performer constituted an infringement of performers' rights, thus taking a large step forward in creating performer protection jurisprudence in India. No other cases of note have been decided by the higher judiciary in India.

The fundamental failure of the Indian performer protection regime is that it looks to copyright law to protect performers' rights, a system that is conceptually incapable of protecting all performers' rights. Copyright law protects creative and original expression of ideas, and leaves the ideas themselves freely accessible in the public domain, thus balancing the competing interests of ensuring incentivization and encouraging creativity.¹⁰¹ Copyright law also necessarily requires that these expressions be 'fixed' on tangible media, and fall within the category of 'work'.¹⁹

While the economic rights of performers' may be protected by copyright, it is difficult to categorize the persona, identity, style or celebrity status of a performer as his/her copyrightable 'work', and performer cannot be called 'author' of this work. These elements are simply ideas, and are excluded by definition from the scope of copyright protection. Critics also emphasize the insufficiency of copyright law because often performers seek rights in performances that are inherently not copyrightable - sports persons who seek rights over their performances in a game, or stage actors who seek their rights in their stage performances are examples of this trend. A system of copyright will, therefore, never be capable of effectively protecting performers' rights, as performers' rights fall outside the scope of copyright law.

Recently, there has been an attempt to amend provisions of the Copyright Act and extend the

¹⁰⁰ 107 (2003) DLT 91

¹⁰¹ Baird Douglas G, Human Cannonballs and the First Amendment, *Stanford Law Review*, 30 (6) (1998)1185-1209.

protection given to performers. This includes measures to grant performers clear moral rights over their work, irrespective of prior assignment so they can ‘claim damages in respect of any distortion, mutilation or other modification’ of the performance. However, while this has its benefits, it does not protect the intangible rights performers have over their performances.

While the law governing performers’ rights in India is under developed, equivalent legal regimes in the UK and the USA are older and more elaborate. Moreover, many international treaties today govern performer protection. It is therefore useful to examine these laws – both, to study their approach to protection, and to learn lessons from any shortcomings.

4.2 Lessons from the Protection of Performer Rights in the UK

England has the oldest tradition of performer protection, beginning from the Performer Protection Act, which was passed in 1925. This act has been repealed and replaced many times, each successive act keeping the scheme of performer protection abreast with changing technology. In *Rickless v United Artists*,¹⁰² the Queen’s Bench deliberated on the nature of performers’ rights in the context of whether these rights impacted a film maker’s copyright. A mildly confused conclusion resulted. Hobhouse J declared on one hand, that performers rights are of the same genus as copyright, as both sought to protect the economic concerns of the performer. On the other hand, he ruled that performers’ rights do not impact the right of any film maker, as the right asserted by the performer was not in the nature of copyright.

While this case was decided under the Performer Protection Act 1958, the understanding of the nature of performers’ rights in England is similar today.¹⁰³ Today performer protection is a part of the Copyright, Designs and Patent Act, 1988. Part II of this act specifically deals with rights in performances, granting economic rights to performers, specifically over nonconsensual recordings and exploitation of their performances, which is similar to the Indian system. Performers are granted economic rights in England, and inadequacy in the English system is primarily with respect to unprotected moral rights and non-tangible rights. As in the Indian system, this is primarily because England uses a system of copyright to protect performer interests.

4.3 Lessons from the Protection of Performer Rights in the USA

¹⁰² *Rickless v United Artists*, [1987] 2 W.L.R. 945.

¹⁰³ *Experience Hendrix LLC v Purple Haze Records Ltd* [2007] F.S.R. 31

The USA has no specific legislation governing protection of performers' rights. While USA's copyright laws protect the economic rights of performers in a manner similar to Indian copyright laws, their principal mechanism for the protection of performers' rights is the law of torts. Unfair competition, unjust enrichment and defamation are oft-used arguments. However, performers' rights in USA are predominantly protected by the right of publicity, a tortious doctrine evolved by American courts in direct response to claims of infringement of performers' rights. This makes the American system distinctly different from the English and Indian regimes, and warrants a closer look at American performer protection law and policy.

The right of publicity is defined as a person's right to own, protect, and profit from the commercial value of his or her name, likeness, activities, and identity'.¹⁰⁴ It is premised on the idea that persons have some commercial value attached to their name, likeness and persona, and if this property is put to commercial use by others, then the owner must have the right to control the same.¹⁰⁵

Initially, the right of publicity was a narrowly defined tort, only protecting the name and likeness of celebrities and performers. However, over time, courts have begun to read publicity rights more widely and in many states in America today the test is *identification*, irrespective of the means used to identify the individual. The identification of a performer by some distinctive trait in any subsequent work – be it by name, likeness, voice or mannerism – would result in an infringement of his right of publicity. The right of publicity, therefore, protects performers against persons who use any aspect of their personality for commercial advantage. It has its foundations in the same philosophy that underlies economic torts, its purpose being protection of commercial and economic interests, not ideas and expression.

Certain performers' rights fall squarely within the rubric of publicity rights. When the likeness, persona or identity of a performer is used by another for some commercial purpose, the performer is entitled to enforce his publicity rights. For example, in *Midler v Ford Motor Co*¹⁰⁶

¹⁰⁴ Wohl L, The Right of publicity and vocal larceny, *Fordham Law Review*, 57 (1998) 445.

¹⁰⁵ Kaplan B, Performers' rights and copyright, *Harvard Law Review*, 69 (1956) 409; *Uhlaender v Henricksen*, 316 F. Supp. 1277.

¹⁰⁶ 849 F.2d 460. The defendant here asked actress and singer

Bette Midler to re-record her song 'Do You Wanna Dance' for musical accompaniment to its commercial. When she refused, the defendant instructed a Midler sound-alike to mimic her performance of the song. The court here agreed that this compromised Midler's publicity right and awarded her compensation.

and *Lahr v Adell Chem Co*, performers were protected against imitations of their voices, which had copied their distinctive styles of singing and intonations, as the defendants in both cases were using the imitations to sell particular products. Courts in many other cases have granted protection in cases where persona, identity and likenesses have been appropriated.

The legal regime in the USA is clearly superior to the Indian system - both the economic rights of performers (through copyright laws) and some non- tangible rights of performers (through the right of publicity) are protected – thus providing protection to scripted fixed performances, scripted unfixed performances, unscripted fixed performance and unscripted unfixed performances. There is, however, little protection offered to the moral rights of performers, and non-tangible rights remain subject to two important limitations. First, because of the emphasis on identification of the performer in the right of publicity, unique and distinctive styles are not protected if the original performer cannot be identified in an imitation. Second, the cause of action in any publicity rights claim must involve the commercial exploitation of identity. Therefore, performer protection will always be limited to the infringement of rights that lie at the intersection of the performers' personality interests and commercial interests

The absence of clear policy has led to the *ad hoc* development of laws protecting performers' rights, creating many roadblocks and hurdles to their further evolution. The primary problem is that the current system makes a conflict between publicity rights and copyright law inevitable. Courts have clearly held that publicity rights are rights that are not covered by copyright protection, thus avoiding confusion that exists in the English system. A claim for publicity rights cannot be pre-empted by a copyright granted over the same work. Therefore, people with copyright licenses to reproduce works or sell merchandise or make sequels and spin-offs of artistic works may now be prevented from doing so simply because it violates a performer's publicity right. An associated concern is the scholarly opposition to publicity rights, as they are almost entirely judicial creations, and equivalent rights are protected under copyright statutes. Some scholars argue that copyright laws in America have expressly said that some things cannot be copyrighted and must hence remain in the public domain.¹⁰⁷ Others,

¹⁰⁷ Goldman Lee, *Elvis is alive, But he shouldn't be: The right of publicity revisited*, *BYU Law Review*, 138 (1992) 597

who see inherent value in publicity rights, argue that publicity rights today are too wide in scope and must be restricted.¹⁰⁸

The American experience, thus, simultaneously instructs a fledgling performer protection regime about the importance of clearly stated policy, and warns against a mechanism designed to protect economic interests entering the realm of protection ideas like persona and identity. However, while the right of publicity is a useful judicial innovation, its applicability is limited in a country like India, where the judicial system has not developed a jurisprudence of publicity rights.

4.4 International Regime for Protecting Performers Rights

While no one treaty completely encapsulates international protection for performers, the regime governing performers' rights internationally may be found through a harmonized reading of specific provisions contained in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), the WIPO Performances and Phonograms Treaty (WPPT) and the TRIPS. While not concerned with the details and modalities of performer protection, they lay down the foundation on which individual countries have later built their laws. These instruments are significant for having negotiated some knotty policy questions which have hindered the development of performer protection in most countries. Notably, they have attempted to solve the quandaries of overlapping rights and differential treatment and are thus pillared on the principles of copyright priority, independence of similar rights and national treatment.

The problem of overlapping rights stems from different right holders laying claim over different aspects of the same performance. For example, copyrights exist in literary and artistic works, which comprise most performances. The principle of copyright priority mandates that no performer's right may be exercised to the detriment of copyright holders. Similarly, economic and moral rights over the performance may be owned by different persons. The independence of related rights is important while negotiating these different rights stipulates that all must be recognized as original and not derived from one another. Secondly, while these treaties grant great leeway to national legislatures to frame the modalities of performer

¹⁰⁸ Robinson R, Preemption, the right of publicity, and a New Federal Statute, *Cardozo Arts & Entertainment Law Journal*, 16 (1998) 183.

protection laws, they embody the principle of national treatment, which ensures that no performer is discriminated against by virtue of his nationality.

Economic rights are granted to performers by Article 7 of the Rome Convention, chapter II of the WPPT and Article 14 (1) of the TRIPS Agreement. These provisions provide performers the right to fix their unfixed performances, rights against the unauthorized broadcasting of their performance by wireless means, rights to the communication to the public of their live performance, and the rights of reproduction, distribution, rental and making available fixed performances.¹⁰⁹ The WPPT, in Article 5, also gives performers the moral right of attribution over their performance. What is conspicuously absent, however, is any protection for the non-tangible rights of performers, against imitations of distinctive styles, or the use of persona and identity.

Despite this lacuna, the international landscape of performer protection has its strength. Primarily, the regime is strengthened by its foundation in the principles of copyright priority, independence of similar rights, and national treatment. This initial consensus on policy has helped develop a regime which is both, coherent and consistent. Given these advantages, developing performer protection regimes, like India, would do well to emulate policy firmness of international model.

4.5 Justifications for Protecting Performers' Rights

Before offering alternatives to the performer protection regime in India, this article dwells on the importance of protecting performers' rights. While developing a performer protection regime, experience shows that it pays to be jurisprudentially firm and ensure that newly created rights and entitlements are justified in law and policy. Performers' rights aim to give the performer complete control over his performance - not merely the words, costumes, song, music, lyrics and other elements ancillary to the performance, but over the cohesive unit that is the input of performer. Any law protecting performers' rights has justifications in both, the utilitarian arguments that justify all intellectual property rights, and the natural justice

¹⁰⁹ Articles 8 and 9 of the Convention also protect performers' rights. Article 8 states that any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance. Similarly, article 9 states that Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works

discourse, which sees an individual's performance as being a part of his body.¹¹⁰

It is important at the outset to note that the jurisprudential basis for the protection of performers' rights is different from the rationale that underlies

similar protective regimes like copyright law, unfair competition and the right to publicity. Performers' rights, in addition to protecting economic and moral rights of the performer, protect the unauthorized use of his persona, identity and style. These are abstract ideas, not the expressions of an idea, and copyright law protects only the latter. Similarly, performers' rights are not based in arguments of commerce and economics, and must protect a performer's interest regardless of any monetary or commercial loss caused to the performer. The laws dealing with unfair competition and the right to publicity, however, are premised on a cause of action arising out of some economic detriment to the individual concerned.

Utilitarians justify the protection of performers' rights by demonstrating the greater public good that results from protecting these rights, and not leaving this material in the public domain.¹¹¹ Proponents of this school argue that greater protection leads to greater economic gains, which leads to greater incentivisation for performers, greater development of the arts and thus, greater public good. In case of India, it would be hypocritical for a legal system that appreciated this argument in the context of patents and copyrights, to ignore it in the context of performer protection. Some theorists would consider this internal consistency within the legal system as being an absolute good in itself, hence automatically supporting performer protection.

A second jurisprudential basis is the argument based in natural justice and equity. A performance is seen as an extension of the performer's personality and a part of his property, the control over these rights being natural right of humans. Equitable reasoning is inextricably linked with technology as the need to grant performers' rights grows proportionally with the increased development of technology. From a time when tickets to a performance gave performers all the control they needed, today technology has created problems like technological employment and bootlegging. The former refers to performers' losing revenue by virtue of technology – while earlier everyone who wanted to see circus acts would have to

¹¹⁰ Bently L, *et al*, *Intellectual Property Rights* (Oxford University Press, London), 2004, p. 33

¹¹¹ Nimmer D, *Copyright's Millennium Turn* (Mathew Bender, New York), 1999, p.1-22.

go to the circus and watch a live act, today they can simply watch a recording. The latter refers to the inability of performers to capture the complete market benefits of their performance. The demands for legal protection have grown correspondingly. In many countries, this natural justice approach is formalized and constitutionally guaranteed rights over life and property is seen as the basis for performers' rights.¹¹² In India also these arguments may be used, as the right to property is a constitutionally guaranteed right, and the right to life is a fundamental right.

More specifically, in the context of India, performer protection has the added dimension of protecting folklore and large entertainment exports. A large aspect of community art and culture in India today is unprotected as it does not fall under the ambit of existing intellectual property laws. This is susceptible to imitations and commercial exploitation, leaving the developers of local art forms with no legal recourse.⁴¹ Entertainment exports, like Bollywood, are also on a steady rise due to which there is, both, an increased international scrutiny of the Indian intellectual property regime, and an increased susceptibility to imitations of performances.⁴² This has added to the need for better protection.

There has been some legal opposition to the recognition of performers' rights. It is argued that public interest will be better served by leaving performances in the public domain, given their intrinsically amorphous and indefinable nature. The strongest opposition to recognizing performers' rights, however, has come from the film and recording industry, which sees its monopoly over performances threatened. With the recognition of performers' rights, production houses and broadcasting agents will no longer have full control over any performance that they have filmed or broadcasted. For production houses especially, performer protection will not bode well as it will fetter their independence using their copyrighted material in revenue earning activities - like creating sequels to movies and publicity material like theme parks, dolls and games. These arguments however, are only aimed at protecting the economic interests of these industries, as well as their monopoly over performances, and do nothing to diminish the legal basis of performer protection.

4.6 *Sui Generis* Protection for Performers Rights in India

¹¹² M Gruenberger, A duty to protect the rights of performers? Constitutional Foundations of an intellectual property right, *Cardozo Arts & Entertainment Law Review*, 24 (2) (2006- 2007) 617

The need for performer protection in India having been established, the challenge of fashioning a legal regime capable of accommodating these concerns remains. Existing models, employing the mechanisms of copyright protection and tortious liability have proved insufficient. This article proposes that performer protection will be best ensured by recognizing performers' rights as an independent category of intellectual property, and granting performers *sui generis* protection.

Such protection implies that performances hitherto in the public domain are now protected against their free and unrestricted exploitation. Such a creation of new rights has traditionally required a demonstration of clear benefits that accrue from limiting the access of public to these materials,²⁰ and this article has argued in favour of the benefits, legal justifications and practical necessity of the protection of performers' rights in detail. To recapitulate, performer protection forms a coherent and integral part of any legal system that recognizes individual's rights over life and property. Practical justifications for the recognition of performers' rights can be found in the benefits that accrue from greater performer protection, given the threat of easy imitations due to technological advances today and the quantum of unprotected folklore in India.

Providing *sui generis* protection also requires delineating the boundaries of new rights. Drawing from the lessons learnt through the analysis of existing performer protection systems both, in the international arena and in other countries, this article endeavors' to propose a scheme for performer protection in India.

Economic rights already exist in India, and the system of moral rights as given in the WPPT may be adopted with ease. The challenge lies in the protection of intangible rights, and rights in unscripted and unscripted performances.

Both, the American system and international treaties, evidence the importance of a clear underlying policy stipulating the extent to which performers must be given rights. At the outset, copyright protection must be de-linked from performer protection, and performers' rights must be treated as independent intellectual property rights.

As the basis for performer protection is the right of the performer over parts of his person and property, no performers' right can infringe on the creative property of another person. Performers must only have right over that part of the performance in which they alone have uniquely and distinctively contributed something- their voice and intonation, method of

dialogue delivery, etc. This may be tested by investigating whether the subject matter would have been tangibly different if another performer had performed the same performance. Hence, performers can have no rights over scripts, directions, costumes, music arrangements, et al. These materials are the creative property of other artists, but moreover would not have tangibly changed if the performer in question had not performed them. This will contribute in reducing the overlap between copyright and performers' rights.

A shortcoming of the American system is that performers' rights are linked to economic detriment, and the extent to which the performer can be identified. However, in the Indian context, where the protection of folklore is an important concern, these tests prove insufficient – folk artists are rarely individually identified, and often do not gain economically. Performers' rights must protect not just economic considerations, but also the interest the performer has in the work being part of his person. Hence, protection must exist irrespective of economic or commercial disadvantage, and clarity in identification. Similarly, performers' rights must exist independent of the fixation or mode of fixation of the performance. It is appreciated that the enforcement of such a right would be difficult, but a solution to that problem would be the stipulation of sufficient evidentiary requirements. The right must also be assignable, thus preventing pragmatic objections. Contracts for hire with performers can contain a clause that assigns performers rights as well, if the performer wishes to.

This regime has two obvious advantages. It immediately prevents confusion between the sphere of copyright and performers' rights, and allows for the protection of non-tangible rights. More importantly, it pre-empts debate on the question of how much protection minor performers and extras should get. Since a performance rarely differs with the identity of minor performers and extras, as per the test laid down, such performers would rarely have rights over the performance.

Hence, a performer protection regime in India may be premised on the following three-pronged model:

- Performers' rights are given *sui generis* protection, and all economic, moral and non-tangible rights are protected;
- These rights protect even the non-commercial, community interests of performers, hence ensuring that folk culture is preserved;

- Performers rights are granted over only that part of the performance in which a performer has uniquely and distinctively contributed
- something, thus preventing any conflict with copyright laws.

The legal landscape in India has proven inadequate in protecting the myriad rights performers have in their performances. Today, rapid technological change, inter connected entertainment markets, and the quantum of unprotected folklore in India have made the need for this protection more imminent. This article has argued, through a detailed analysis of four existing performer right regimes, that providing *sui generis* protection is preferable to the alternatives of protecting performers' rights through copyright and tort laws. While the modalities and details in this scheme warrant deliberation, accepting both need for reform and policy of *sui generis* protection, is the first step forward towards giving performers in India their due. a stronger and more all-encompassing performer protection regime.

CHAPTER-5

COPYRIGHT INFRINGEMENT AND REMEDIES

In dealing with copyright, we should bear in the mind that copyright does not protect novelty but only originality. Copyright protects only the expression and not the idea. Therefore, if it is the only method of expressing the work, it cannot be protected. Best example would be the Telephone Directory wherein the Name, Address, Phone No. are given and also given in alphabetical order. There can be no other way of expressing the same. Therefore, this would not amount to copyright infringement. This is popularly referred to as Idea-Expression Dichotomy.

5.1 KEY FACTOR REQUIRED FOR INITIATION OF ANY INFRINGEMENT

- Prove ownership of Copyright
- Infringer has copied (Substantially Similar)

Once the rights of the owner have been established, the next step is to prove that there is an actual infringement. If the defendant makes copies of a copyrighted work and commercially exploits such copies or any blatant infringement, nothing further needs to be proved to establish infringement apart from what has been discussed above. However, more complicated questions arise when the defendant the alleged infringing work involved relates to something, which is similar, but not identical with the plaintiff's work. In such cases, in order to prove infringement, the plaintiff must show the following:¹¹³

- a. The defendant *copied* directly from the plaintiff's work, and
- b. The elements copied, when taken together, amounts to an **improper appropriation**.

Realizing that direct evidence of copying will be rarely available, courts have universally allowed copyright owners to prove copying on the basis of circumstantial evidence, specifically through inferences from the defendant's **access** to the plaintiff's work and from any similarities between two works¹¹⁴.

¹¹³ *Arnstein v. Porter*, 154 F.2d 464

¹¹⁴ Paul Goldstein's *Goldstein on Copyright*, Vol. II 3rd edn., Aspen Publishers, p.no. 9.6. *Urmi Juvekar v. CNN-IBN*

In the case of *Super Cassette Industries Vs Nodules Co. Ltd .*, the defendant played cassette in Hotel amounts to copyright infringement. This was clearly held to be act of infringement of author's right over copyright.

Copying can, therefore, be proved by **inference**. It can be inferred that the defendant has in fact copied the plaintiff's work from the fact that the defendant had access to the plaintiff's work and from the similarities between his work and that of the plaintiff's. The rationale behind this is that given the sufficient opportunity that the defendant had to copy the plaintiff's work in addition to the striking similarity between the two works, the evidence in hand is indicative of copyright infringement.

In the case of *Roma Mitra Vs State of Bihar*¹¹⁵, the Plaintiff, a student gave the work to the guide. The guide published the work as her own. The published article was substantially similar and therefore, amounted to copyright infringement.

In the case of *Ty Ink Vs GMA Accessories*¹¹⁶, it was held that Similarity between works is highly unlikely to have been in accident of independent creation. This is an evidence of access.

Therefore, there is a reciprocal relationship between *proof of access* and *similarity* and this relationship is subject to two important limitations¹¹⁷:

In the case of *S.K. Dutt vs Law Book Co. And Ors.*¹¹⁸, the court determined the amount of substantiality should be more than half of the total work. It has also held that where the half of the work is copied and the remaining being original work, it does not constitute infringement.

1. "If there are no similarities, no amount of evidence of access will suffice to prove copying.
2. "If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and the defendant arrived at the same result.

Therefore, to summaries the Condition to prove infringement can be summarized as follows:

- a. Closely Similarity
- b. Unlawful

¹¹⁵ Criminal Miscellaneous no. 31757 OF 2000

¹¹⁶ 959 F.Supp. 936 (1997), 132 F.3d 1167 (7th Cir. 1997)

¹¹⁷ *Arnstein v. Porter*, 154 F.2d 464

¹¹⁸ AIR 1954 All 570

- c. Some connection
- d. Access to original work

5.2 CONTRIBUTORY INFRINGEMENT

Contributory infringement is where the copyrighted work is duplicated by another person without the consent of the owner or existence of any lawful excuse by another with the aid of another. This may be simply put as abetment to an offence. For example, a person has a Rs.1000 note and takes a color Xerox in a shop. The person is an infringer and the Xerox shop is abettor or the person who commits contributory infringement.

Similarly, where a book or compact disc is copyrighted which can be easily ascertained, any person who helps in the offence of infringement like making duplicate copies, translation, adaptation, communication to public etc, would amount to contributory infringement.

In the *A&M Records, Inc. v. Napster, Inc.*¹¹⁹, the Defendant maintained a central unit which enabled two or more remote computers to share all the music files in other systems. The defendant was held vicariously liable and for contributing to the infringement.

In the case of *Sony Corp. of America v. Universal City Studios, Inc.*¹²⁰, the Supreme Court of the United States which ruled that the making of individual copies of complete television shows for purposes of time shifting does not constitute copyright infringement though the lower courts considered it to be a contributory infringement, but it is only a fair use.

5.3 ACTS WHICH MAY NOT AMOUNT TO INFRINGEMENT

The act copying by defendant may not always amount to infringement. Some examples of acts which do not constitute Infringement under the Copyright Act are as follows:

- Fair dealing such as criticisms, personal use, newspaper report, review etc.
- Adaptation of Computer Program
- Judicial Proceedings
- Exclusive work of member of House of Legislature
- Non-Corporate matter for institution purpose
- Question Papers

¹¹⁹ 239 F.3d 1004 (2001)

¹²⁰ 464 U.S. 417 (1984)

- With Consent
- Non-paying Audience
- Issue being Current Topic such as economic, social, political Etc.
- Made less than 3 copies
- Research or Private study
- Available in Official Gazette.
- Report of committee or Commission
- After the expiry of Copyright.

5.4 FAIR USE

For the purpose of deciding fair use of the work, the following factors has to be taken into consideration before determining it to be an copyright Infringement.

- a. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- b. the nature of the copyrighted work;
- c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d. the effect of the use upon the potential market for or value of the copyrighted work.

At the outset, it should be mentioned that the -Fair Usell of the work depends upon facts and circumstances of each case. In a copyright infringement case dealing with fair use, the duty of the court is to first determine whether the defendant has used the copyrighted information in a natural or justifiable manner or has taken advantage of already existing work of the plaintiff. In deciding that, the court has to deal with the above-mentioned factors before coming to any conclusion.

The purpose and character of the use plays a major role in determining the copyright infringement. If the defendant has used it for a purpose which is justifiable or excusable under the Copyright Act, it may not constitute infringement. It is important that each fact is weighted properly in deciding fair use.

For example, if a person writes a book on topic -Mother's carell and gets his book copyrighted and subsequently, another person with title -Mother's carell writes a article on mother's care on child. Under ordinary circumstances, it may be an infringement, but here it is just an article on

care of mother towards the child to a non-paying audience with no commercial element involved in it. Therefore, it would be come under fair use not amounting to infringement.

In the case of *Harper & Row v. Nation Enterprises*¹²¹, Former President Gerald Ford had written a memoir including an account of his decision to pardon Richard Nixon. Ford had licensed his publication rights to Harper & Row, which had contracted for excerpts of the memoir to be printed in *Time*. Instead, *The Nation* magazine published 300 to 400 words of verbatim quotes from the 500-page book without the permission of Ford, Harper & Row, or *Time* magazine. *The Nation* asserted as a defense that Ford was a public figure, and his reasons for pardoning Nixon were of vital interest, and that appropriation in such circumstances should qualify as a fair use. The court ruled that fair use is not a defense to the appropriation of work by a famous political figure simply because of the public interest in learning of that political figure's account of an historic event.

As stated before, the concept of fair use come into play once the act of the defendant is justifiable or is excusable under the law. In the case of *Eastern Book Company Vs D.B.Modak*¹²², the plaintiff reported the judgments of the courts along with a head notes giving synopsis of the judgment. Question arose as to whether judgment can be given copyright to an individual who reported the judgment. The court held negatively and held that head notes alone were eligible for copyright and not the judgment.

Secondly, the nature of use by the defendant is very crucial in determining the liability of the defendant. If the defendant uses the subject matter of the copyright that exploitative of the plaintiff work, it would be infringement. Also, if the defendant uses the copyrighted work in a manner that defame or derogates the author or his work, it would amount to infringement.

In *Phoolan Devi v. Shekhar Kapoor*¹²³, (1995-PTC Del), the plaintiff claimed that the basis of the film, being a novel dictated by the illiterate plaintiff herself had been considerably mutilated by the film producer. The plaintiff sought a restraint order against the defendant, from exhibiting publicly or privately, selling, entering into film festivals, promoting, advertising, producing in any format or medium, wholly or partially, the film -Bandit Queen in India or else where.

¹²¹ 471 U.S. 539 (1985)

¹²² AIR 2008 SC 809

¹²³ 57 (1995) DLT 154, 1995 (32) DRJ 142

Granting an injunction, held that –the defendant had no right to exhibit the film as produced violating the privacy of plaintiff’s body and person. The balance of convenience is also in favour of restraining the defendants from exhibiting the film any further as it would cause further injury to the plaintiff. No amount of money can compensate the indignities, torture, and feeling of guilt and shame which has been ascribed to the plaintiff in the film. Therefore, the defendants were refrained from exhibiting the film in its censored version till the final decision of the suit.¶

In *Smt. Mannu Bhandari, Appellant v. Kala Vikas Pictures Pvt. Ltd. and another*¹²⁴, AIR 1987 Delhi 13, the court observed that –section 57 lifts the author’s status beyond the material gains of copyright and gives it a special status. An author’s right to restrain distortion etc. of his work is not limited to a case of literary reproduction of his work. The restraint order in the nature of injunction under section 57 can be passed even in cases where a film is produced based on the author’s novel. The language of section 57 is of the widest amplitude and cannot be restricted to ‘literary’ expression only. Visual and audio manifestations are directly covered. The court observed that by reading the contract with section 57, it is obvious that modifications, which are permissible, are such modifications, which do not convert the film into an entirely new version from the original novel. The modifications should also not distort or mutilate the original novel. The fact that Mannu Bhandari is the author of the story will be published in all the credits. This is for giving due recognition to the author’s reputation.¶ The court therefore, directed certain modifications and deletions to the film before screening it.

In cases of factual matters, there cannot be much of infringement except where they are literally copied as the facts per se cannot be copyrighted and copying the same is justifiable act. For example, News cannot be said to have been copied by another. The case is also applicable to factual matter or scheme or the scene of an individual. One must bear in mind that copyright does not protect idea but only the expression. For example, a person writes a story and another person copies the story with same number of persons, their characters, situation etc. but in his own words. This would not amount to infringement as the expression is not copied here.

The Supreme Court’s decision in *R.G.Anand v. Delux Films*¹²⁵ would show that infringement in India is normally established through comparison of the two works from a holistic perspective. Although the said decision does specifically state, for instance, that ideas *per se* are not

¹²⁴ AIR 1987 Delhi 13, ILR 1986 Delhi 191

¹²⁵ 1978 AIR 1613, 1979 SCR (1) 218

protectable, the similarity in the ideas between the two works involved in that case seems to have been a factor that the Court considered. Therefore, the law in India prescribes more of a total **-look and feel** or the **-Lay Observer Test** of the work involved, as seen from the perspective of a layman.

Again, if the subject matter is copied by the defendant making substantial changes to the original work or modifies the original work to suit the targeted audience, it may not be an act of infringement. For example, the book *'Five point someone'* was transformed into a Hindi movie named *'Three Idiots'*. Again the same was translated to Tamil by the name *'Nanban'*. All of these does not constitute infringement as some changes were made to suit the interest of the targeted audience by the copier and therefore, this work becomes a original work.

If the author creates any fictional stories and it is copied by the defendant, it may be a blatant copying of the author's work leading to infringement. But, if the copying is of the kind that may naturally occur in the course, it may not be an infringement. For example, hero or heroine of the film introduced with the song cannot be copyrighted. This is called as scenes affair Doctrine.

Also, it is of utmost important that the act of the defend causes some effect upon the author. If the act of the defendant deteriorates the reputation of the author or the defendant by copying the authors work becomes the competitor of the author covering the targeted audience or by any other way affects the rights available under the Copyright Act, the act of the defendant would constitute infringement under the Copyright Act. Some of the defenses available for the defendant are as follows:

- Not Copyrightable
- Consent
- Public Interest
- Permitted acts
- Fair Dealings
- Education
- Libraries and Archieves
- Computer programs
- Adaptation

- Statutory License etc.

In the case of *Hubbard v. Vosper*¹²⁶, the court held as under

“It is impossible to define what is „fair dealing.” It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions.... Other considerations may come to mind also. After all is said and done, it must be a matter of impression....”

Therefore, there cannot be straight line jacket in determining infringement or fair use by the defendant. It must be decided on case to case basis only based on facts and circumstances of each cases before the court.

5.5 COMPUTER PROGRAMS

In India, the Intellectual Property Rights (IPR) on computer software is also covered under the Copyright Law unlike US where the computer programs are given patent protection. Accordingly, the copyright of computer software is protected under the provisions of Indian Copyright Act 1957. Major changes to Indian Copyright Law were introduced in 1994 and came into effect from 10 May 1995. These changes or amendments made the Indian Copyright law one of the toughest in the world.

The amendments to the Copyright Act introduced in June 1994 were, in themselves, a landmark in the India's copyright arena. For the first time in India, the Copyright Law clearly explained:

- The rights of a copyright holder
- Position on rentals of software
- The rights of the user to make backup copies

Since most software is easy to duplicate, and the copy is usually as good as original, the Copyright Act was required. Some of the key aspects are as follows:

- a. According to section 14 of this Act, it is illegal to make or distribute copies of copyrighted software without proper or specific authorization.

¹²⁶(1971) 1 All E.R. 1023

- b. The violator can be tried under both civil and criminal law.
- c. A civil and criminal action may be instituted for injunction, actual damages (including violator's profits) or statutory damages per infringement etc.
- d. Heavy punishment and fines for infringement of software copyright.
- e. Section 63 B stipulates a minimum jail term of 7 days, which can be extended up to 3 years

In the case of *Whelan Associates Inc. v. Jaslow Dental Laboratory, Inc.*¹²⁷, the plaintiff and the defendant had the same output but through different process. This was done through different programming language. The court considered it as an infringement and protected the Structure, Sequence and Organization (SSO)

In certain cases, just by running the program, the person in the field would be able to under the ingredient and the programs in it commonly referred to as Black Box Test.

Subsequently in the case of *Computer Associates International, Inc. v. Altai, Inc.*¹²⁸, the court overruled Vellan's Case and came up with three tier test to be applied for determining the software copyright infringement

- Abstraction
- Filtration
- comparison

From the above ruling, the court must first break down the program alleged to be infringing into its constituent structural parts, thus segregating the ideas from the expressions through *abstraction*. Then, by examining each of these expressions for exceptions such as the Merger Doctrine, accounting for an expression that is necessarily incidental to those ideas, and other expressions which are public knowledge and are openly available in the public domain, a court would thereafter be able to *filter* out all non-protectable material. Left with the kernel(s) of creative expression after following this process of elimination, the court's last step would be to *compare* this material, protected by copyright, with the allegedly infringing program. This would involve something similar to the test of '*substantial similarity*' discussed above. On the whole,

¹²⁷ 97 F.2d 1222, 230 USPQ 481

¹²⁸ 982 F.2d 693 (2d Cir. 1992)

one may clearly see the similarities between the test laid down in the Altai case and the original tests followed in the context of other works.

Recently, the government of India has come with an idea of protecting Computer Aided Software (CAD) under the patent laws. Here the government wishes to protect the software not with copyright law but with Patent laws so as to encourage the innovation on software development. As reiterated in previous paragraphs, the copyright protects only the expression and many concepts such as Structure, Sequence and Organization crops up. But this does not in any way protect the creator's inventive or innovative thought. Also under the Patents Act, a Computer Program *per se* cannot be patented. Therefore, the software *per se* is not given the patent rights but software that is made specifically in relation to a hardware would be protected under the Patents Act.

This law is under the developmental stage and has not yet seen the light of the day. We may wait for the law to come and the trial and error method would be the best method for the any laws of these kinds. From the outline, it seems to put an end to the highly controversial topic of providing software with copyright or patent protection.

5.6 REMEDIES

5.6.1 Civil Remedies:

The most importance civil remedy is the grant of interlocutory injunction since most actions start with an application for some interlocutory relief and in most cases the matter never goes beyond the interlocutory stage. The other civil remedies include damages - actual and conversion; attorney's fees, rendition of accounts of profits and delivery up.

The principles on which interlocutory injunctions should be granted were discussed in detail in the English case of *American Cyanamid v Ethicon Lt*¹²⁹. [1975] AC 368 (HL(E)]. After this case, it was believed that the classic requirements for the grant of interim injunction are:

- Prima facie case
- Balance of Convenience; and

¹²⁹ [1975] AC 396]

- Irreparable injury

In the case of *Series 5 Software Ltd. v Philip Clarke & Others*¹³⁰, Laddie J re-examined the principles and took a fresh look at what Cyanamid had actually decided. The learned judge held :

- The grant of an interlocutory injunction was a matter of discretion and depended on all the facts of the case;
- there were no fixed rules;
- the court should rarely attempt to resolve complex issues of disputed fact or law;

□ major factors the court should bear in mind were (i) the extent to which damages were likely to be an adequate remedy and the ability of the other party to pay (ii) the balance of convenience (iii) the maintenance of the status quo, and (iv) any clear view the court may reach as to the relative strength of the parties' case.

Thus, this case places emphasis on the merits and the effect may well be to obtain a non-binding view by a judge on the merits. This may lengthen the hearing of application for interlocutory injunction as parties may lead evidence on the merits but it may have the overall effect of putting an early end to the main action

5.6.2 Pecuniary Remedies

Under the Copyright laws of some countries like the United Kingdom, it is essential for the plaintiff to elect between damages and an account of profits although in the two recent cases namely *Baldock v Addison [1994] FSR 665* and *Island Records v Tring International Plc [1995] FSR 560*, the Court held that there could be a split trial and a procedure could be adopted by which the trial could be divided so that once liability has been established, thereafter the plaintiff would be able to seek discovery in order for him to make an informed decision on which of the two of the remedies to elect, namely damages or account of profits. In *Cala Homes (South) Ltd. v Alfred McAlpine Homes East Ltd [1995] FSR 818*, Laddie J held that additional statutory damages could be granted even where the plaintiff elected for account of profits.

Under Sections 55 and 58 of the Indian Copyright Act, 1957, the plaintiff can seek the following three remedies, namely

- account of profits

¹³⁰ [1996] FSR 273

- compensatory damages and
- conversion damages which are assessed on the basis of value of the article converted.

5.6.3 Anton Pillor Order

The Anton Pillor Order derives its name from a Court of Appeal decision *in Anton Piller AG vs Manufacturing Processes*¹³¹. An Anton Piller Order has the following elements:

- An injunction restraining the defendant from dealing in the infringing goods or destroying, them;
- An order that the plaintiffs solicitors be permitted to enter the premises of the defendants, search the same and take goods in their safe custody; and
- An order that defendant be directed to disclose the names and addresses of suppliers and customers and also to file an affidavit within a specified time giving this information.

5.6.4 Mareva Injunction

Mareva Injunction is an order which temporarily freezes assets of a defendant thus preventing the defendant from frustrating the judgment by disposal of such assets.

NORWICH PHARMACAL ORDERS

These orders are made to ascertain information from third parties to enable the plaintiff or the Defendant to produce evidence before the courts of law.

5.7 CRIMINAL REMEDIES

Criminal remedy includes imprisonment of the infringer and the infringing copies seized. Besides one can get ANTON PILLER order from court, which means that court grants an ex-parte order if it feels that the case is balanced in favour of copyright holder. The owner can claim damages from the infringer. The author can get an order for search of defendant's premises, if there is clear evidence to show the presence of infringing copies in the premises of infringer. The infringer is liable for imprisonment ranging 6 months to 3 years and/or fine of Rs.50,000/- to Rs. 2 lakhs. For the first time, the punishment would be for a period of 6 months to 3 years and/or Rs.25,000 to 2 lakhs and for the second Time it would be for 1 to 3 years and/or Rs.50,000

¹³¹ [1976] Ch 55

to 2 lakhs. And for infringement on computer Program, the punishment may vary from 7 days up to 3 years and/or Rs.50,000 – 2 lakhs.

5.8 ADMINISTRATIVE REMEDIES

An application can be made by the owner of copyright in any work or by his duly authorized agent, to the Registrar of Copyrights to ban the import of infringing copies into India and the delivery of infringing copies of copyrighted article which were earlier confiscated from infringer to the owner of the copyright.

5.8.1 Copyright Board

There are no special courts for the purpose of dealing with copyright cases. The regular courts try these cases which basically lack knowledge and expertise in the field of copyright. There is a Copyright Board to adjudicate certain cases pertaining to copyright. The government has set up a Copyright Enforcement Advisory Council (CEAC) to adjudicate certain matters relating to copyright.

5.9 COMPARISON WITH U.S.A IN TERM OF FAIR USE

Copyright gives a bundle of exclusive rights to the author of a copyrighted work with respect to the reproduction of the work, and other specified acts, to enable the author to receive financial benefits by exercising such rights and thereby encourage innovation. If a person without due permission exercises any of the rights within this bundle, then such an act is an infringement upon the author's copyright in the work. Copyright infringement is statutorily defined in both India and the US. Like other legal rights, copyright too is not absolute but is subject to limits and exceptions. The legal framework of copyright does not absolutely prohibit the use of a copyrighted work, but, in fact, allows a person to use a copyrighted work under certain exceptions. One such exception is -fair use.¶ The term fair use, although undefined under both US and Indian copyright law, has its spirit captured in legislation, with the judicially derived factors being listed under 17 USC § 107, and § 52 of the Copyright Act of 1957, rendering -[c]ertain acts not amounting to infringement.¶

Before we delve deeper into the discussion of fair use and jurisdictional differences, it is essential to understand the fundamentals of fair use. Fair use is an exception to the rights of the author which allows limited use of copyrighted material without the author's permission. For instance, fair use does not allow reproduction of a whole work or a substantial part of such work, but, rather, extracts or quotations from the work are permitted, such that they do not appear to snatch the first author's expression of his or her idea. If, in a statutory construction, there is no notion of fair use then any use by an unlicensed person, however miniscule, is an infringement on the rights of the author. To be clear, any unauthorized use of a copyrighted work is normally an infringement and fair use acts as a defense thereof — the defense of fair use does not necessarily mandate a non-infringing action. The unlicensed user admits that he has used the work, which would normally constitute copyright infringement, but justifies his use as covered within the fair use exception.

There is a minor difference in terminology with regard to the concept of fair use in the US and India. US law uses the term –fair use, while British and Indian law uses the term –fair dealing. The earliest discussion of fair dealing can be traced to *Gyles v. Wilcox*, a decision from the Court of Chancery in England in which Lord Chancellor Hardwicke introduced the notion of –fair abridgment. In the US, Justice Joseph Story laid the foundation for the notion of fair use and abridgment in *Folsom v. Marsh* with a four-factor test. Today, it stands as the basis for the fair use doctrine now codified under US law. However, from the *Folsom* decision in 1841 until the enactment of the Copyright Statute, 17 USC § 107, in 1976 that incorporated the four-factor test, fair use in US law was only a common law doctrine. One of the earliest Indian cases to discuss unfair use within the domain of copyright was *Macmillan and Company v. K. and J. Cooper*, which was decided based on the India's earlier Copyright Act of 1914.

The statutory framework for fair dealing in India follows the common law and, as noted earlier, does not define fair dealing *per se*. The legal provision for fair dealing provides that:

The following acts shall not constitute an infringement of copyright, namely:

- (a) a fair dealing with a literary, dramatic, musical or artistic work for the purposes of —

- (i) research or private study;
- (ii) criticism or review, whether of that work or of any other work;

(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events —

- (i) in a newspaper, magazine or similar periodical or
- (ii) by broadcast or in a cinematograph film or by means of photographs.

The publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of this clause. Thus, Indian law allows fair dealing as a defense for specific acts that would not be deemed as infringement for the four specified categories of copyrighted works (*viz.* literary, dramatic, musical and artistic works).

US law, in contrast to Indian law, does not specify acts which would be considered fair use; rather it gives a four factor test that must be considered to assess whether an action of exploitation by the person falls within the ambit of fair use. The statutory language provides that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The US statute provides a –test‖ for assessing whether a particular use lies in the ambit of fair use, as against an exhaustive list of activities that constitute exceptions to copyright. The test appears to be applicable across the board, irrespective of the nature of the work protected by copyright.

In a quick comparison of the legislative structures and the interpretations thereof, one may be tempted to argue that the US route gives judges more freedom to assess –fair use‖ and possibly extend these factors to ever new areas of technology and copyright content. On the other hand, the Indian boundaries defined for –fair dealing‖ appear to be more societal and friendly to the common man. This being said, however, it appears that the US test may tend to ignore the commercial implications that fair dealing might have upon such use of a work. The balancing act, at least for the Indian legislation, appears to have been found in the conjoint application of the two. Indian courts have now, incorporated vide reference, the *Folsom v. Marsh* test, while adjudging, if fair dealing was in fact –fair‖ to the real commercial implications that the author suffers. This is treading a fine line, whereby, the exception enumerated in the legislation needs to be satisfied, before the quantitative estimations of the impact of the fair dealing upon the qualitative exercise of the author’s right can be analyzed. It appears that, just as the Berne Convention made copyright a sort of universal right, the developing jurisprudence surrounding fair use and fair dealing is bringing about parity in the stance that nations take towards protecting rights of intellectual property owners — thus leading to possible uniformity in the manner courts across different jurisdictions are likely to adjudicate disputes.

CONCLUSION

It rises out of the examination that copyright assurance just started to develop with the creation of printing, which made it feasible for artistic attempts to copied by mechanical procedures. The investigation draws out the applied contrasts between the Anglo - United States frameworks from one perspective and Civil Law frameworks on the other. While the Common Law nations (U.S.A. and India) treat copyright, in actuality, as a type of property and lay accentuation on the financial privileges of creators, the Civil law nations (eminently France) notwithstanding monetary rights, likewise stress excellent opportunities of the creators and treat crafted by a creator as a declaration of his character. Be that as it may, with the ongoing changes in the United Kingdom and Indian Copyright laws, moral privileges of creators have discovered an unmistakable spot in the customary law nations also.

Concerning the 'topic of copyright,' the examination uncovers that there is generous similitude in the laws of the two nations concentrated here. In these two, there is a general understanding that the quality or value of work are matters of taste and don't go into the topic of what is work. Nor is there a recommended level of innovation, capacity or measure of expertise and information essential to do the work, or a proportion of assets used to deliver it. Not like for a patent, where curiosity is necessary, there is no such necessity for copyright. It implies close to the maker can honestly say - 'This is all my work.' With regards to the classifications of the works which are given copyright insurance, the examination has uncovered that some national enactments (the U.S.A. and India) contain meaning of the works ensured, others don't (for example Italy). Comprehensively, there are two classifications of works. The first is the one which notices works named in the Berne Convention 1886: 'literary and artistic works' which include 'dramatic, musical and dramatic-musical works.' The second is a classification of cinematograph films, sound recordings, communicates, or broadcast. The principal classification works are secured as copyright in the Common Law nations while term utilized for the second class in the Civil Law locales is neighboring rights.

With regards to the copyright in 'literary, dramatic and musical works.' the investigation has discovered generous likeness in the laws of the three nations concentrated here. A considerable assortment of works, for example, compilations, choices, abbreviated versions, headnotes of law reports, advertisements, assessment papers, and

so on, are ensured as 'scholarly works.' are ensured as 'literary works.' The ambit of dramatic works has additionally broadened; however, on-screen characters' chokes are not secured. On the issue of melodic works, the investigation found that U.S. law is far less uncertain when contrasted with India as it stretches out copyright insurance to 'going with words' too. For the topic of copyright insurance to 'architectural designs,' the investigation had discovered that the assurance allowed to planners under the United States law before 1976 was exceptionally deficient when contrasted with the security delighted in by its partner India. The insurance to modelers in India has further widened by the 1994 Amendment, which supplanted the term structural masterpiece by work of engineering.

With regards to the encroachment of copyright and kinds of infringement, for , essential and optional, the examination discovered momentous similitude in the copyright laws of the nations contemplated. Concerning the encroachment regarding PC programs, the investigation has uncovered that Indian copyright law is contaminating superior to its partner in the United States. On the topic of Criminal cures, absolutely the American law is substantially more stringent when contrasted with the U.K. furthermore, India. All in all, subsequently, it tends to be securely said that Indian law as on the Statute book doesn't sound such youthful and is nearly at standard with that of U.K., U.S.A. also, International measures yet it has so far not put to any good use.

SUGGESTIONS AND RECOMMENDATIONS

- (1) The Copyright Act ought to accommodate photocopying when all is said in done terms subject to confinements and conditions to be recommended by managerial guidelines. The regulatory direction is liked to administrative alterations as the previous can stay up with the mechanical improvements in a superior and quicker manner instead of the last mentioned. Also, Administrative specialists can, without much of a stretch, come in direct contact with fabricates of a photocopy machine, administrators, clients and can ceaselessly screen the favorable circumstances and drawbacks of photocopying.
- (2) In the field of copyright, there can be two different ways of encroachment of copyright. First, the people who are replicating the first works of the creators without knowing whether this is the situation of copyright encroachment or not. Second, people who are deliberately infringing the copyright of the creators by duplicating it without taking consent

from the creators. In India, if there should be an occurrence of abstract and creative work, the encroachment by method for first-class is higher than the instance of the second classification; however, in other pieces of the globe, the proportion is converse. The top rating of encroachment can be limited mostly by directing mindfulness and instruction program regarding copyright. The administrative offices and non-legislative associations should meet up to battle with this hazard to ensure the IPR by and large and copyright specifically. Fake items were thriving because there was a prepared market in the nation for such modest, resemble the other the same issues. The acknowledgment of false things by purchasers comes in the method for the execution of laws, which is the consequence of the absence of mindfulness, training, and data. The underneath referenced classification of people ought to uniquely give mindfulness and instruction to cause them to comprehend the fundamental of copyright and to provide them with the information about the encroachment of copyrights, copyrighted items, and its monetary and social significance. They ought to likewise be made cognizant to comprehend the qualification between the copyright notices of 'C' not 'P' and so on. They ought to know and taught for fighting the copyright encroachment in India: *General: An open mindfulness program ought to create to explain the overall population, of the dangers of utilizing the Internet and different, intends to acquire encroaching duplicates of the copyrighted works. The attention to the copyright system is inadequate with regards to a lot and in outcome reducing the dread of the law. The scanner, who may not know a,b,c, of language, is probably going to know the a,b,c, of law. Copyright law in India has, however, navigated a lot of administrative ways yet has not secured a similar excursion on the mindfulness front. The law may effortlessly hold an individual at risk for encroachment even it was done honestly in numbness of law. Just the quantum of harms might be alleviated. Be that as it may, as an individual from traditional society, we must spread the message and make individuals mindful of the dos and don'ts of copyright law. The more the individuals become mindful less the instances of encroachment of copyright will be there.

- (3) Introduction of Copyright or IPR Court: A devoted concentrated Fast Track, IP court like purchaser court alongside uncommonly qualified copyright law implementation faculty to handle encroachment and theft cases, would be built up. At present Indian courts are as of now overburdened with genuine common and criminal cases with them, and IP cases are

additionally brought to a similar court, so copyright cases are not dealt with appropriately. Setting up of specific quick track IP courts can likewise assist with getting around the gigantic accumulation of stock and criminal cases pending in the Indian Courts framework. The bombing that, head of all the high courts ought to choose uncommon appointed authorities to attempt copyright encroachment criminal and common cases, forcing cutoff times for settling them at last. These courts, in any event, are answerable for finishing a set number of 'model' cases with hindrance punishments to convey a message to the Indian open about encroachment, which has never been expressed. Hence, the need is for having more assets to be designated to help courts and getting appropriate law authorization to take positive note of copyrights encroachment. The degree of harms could even have potential prison terms like the US alongside string statutory financial damages. So, the Indian courts should be given some direction as to how to manage copyright encroachment cases.

- (4) Importance of Dynamism in Copyright Act: The Copyright Act ought not to be given an implying that is solidified in time, yet ought to be deciphered so that, it can consider the innovative progressions, furnished that the understanding is reliable with its motivation. The unapproved circumvention of locking gadgets ought to be explicitly made significant at the occurrence of copyright proprietors and their elite licensees. The utilization of devices which empowers the unapproved usage of PC program ought to be prohibited. The Copyright Act, 1957 is, along these lines, required to be altered to give that copyright proprietors and their restrictive licensees may reserve the privilege to forestall the business produce, stockpiling, dissemination and ownership for business reasons for gadgets which are intended to encourage the unapproved circumvention of locks or different gadgets applied to shield PC programs from unapproved replicating.
- (5) Term of Copyright Should be Shortened: It is said that shorter duration is the better method for insurance in the field of security, it has additionally been proposed that the copyright-terms ought to be abbreviated, along these lines expanding the size of the 'open space' accessible for innovative control. Copyright proprietors' position to control the arrangement of 'subordinate works' ought to be diminished for a similar explanation. In this way, if the work will be ensured for the lesser time, the instance of the encroachment will be smaller like Patent.

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