

## **THE EVOLUTION OF THE CONCEPT OF ORIGINALITY AND ITS IMPACT ON THE CINEMATOGRAPH INDUSTRY**

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### **Abstract**

The research paper dwells upon the Concept of originality under copyright law and explains how this concept affects the claims under Copyright law. It discusses in detail about the evolution of concept of originality under Copyright Law in UK and USA through a series of case laws. It also discusses India's stand in copyright cases. The paper puts a light on inconsistency of Court's judgment in cases of copyright infringement and the variation in remedies awarded for similar set of cases which acts as a barrier for the authors to rely on court proceedings to enforce their copyright claims as the cost involved in court proceedings is usually very high. The researchers finally provides with an alternative model to provide remedies in cases of copyright infringement which takes into account the originality of the work produced by dividing it into the category of doctrine of inequivalents, added value doctrine and sameness rule thus considering the efforts and labor employed by the authors in creating the work and provide them remedy accordingly

**Key words:** Modicum of creativity; Sweat of the brow test; Remedy in copyright infringement; Original author

### **Introduction**

Copyright Act is deployed to protect the creative work of authors in various fields including but not limited to artistic works, cinematograph work, musical works, literary and dramatic works. To avail of Copyright protection, the prerequisite of 'Originality' in the work produced has to be fulfilled. The definition of 'Originality' is not defined in clear words anywhere in the act which leads to ambiguity as to whether a work is original or 'copy' / 'infringement' of other artist's work. This ambiguity has been addressed by various judgments and the courts have employed various tests to determine what constitutes infringement or copy under Copyright Act, however, there is no straightjacket formula that can be employed and hence there are conflicting opinions by many jurists and scholars. This aspect of original content has a wide-reaching impact on small authors who are denied copyright protection stating the reason for originality. Hence in this paper, the author will try to establish as to what should be constituted as an 'original work' and what should be viewed as 'infringed work' and how the remedies could be altered as according to the level of creativity employed by the author so that both the parties could reach a middle ground and attain a win-win situation.

### **Significance of Research:**

This research is conducted keeping the **Rights of original authors** under the Copyright Act in mind. To create/produce any content involves years of not only hard work but also creativity, persistent effort, and determination to come up with the final product. A small part of a work like even **Title** requires creativity and effort and as it can be seen in many case laws many such small efforts of the author goes in vain and no protection is given to them under copyright act which gives an impression that Copyright Act is becoming a tool of corporate to utilize the creativity of small entity and not giving requisite credit for the same. Due to the instability or obscurity in the copyright law, it has been noticed by detailed research that inspite of substantial changes made in copyright law, it did not affect movies production which implies minimal effect on copyright act on movie production which shows lack of trust on copyright law.(Ivan Paak Liang and WANG, 2016) This paper will also try to draw a line between copyright and plagiarism and the change in the liability of the producer in accordance with the level of infringement found in the subsequent work with a proposed solution for remedial framework.

### **Literature Review:**

For this research article, the author has referred through various other published papers and articles from various journals, a few of them being “Originality and Creativity in Copyright Law” by Howard B. Abrams which discusses in detail the various jurisprudences governing the concept of originality under the Copyright law and speaks about the judgement which modifies the concept of originality from “Sweat of the brow” test to “Modicum of creativity doctrine”. The Second paper which the author referred was “Originality” by Gideon Parchomovsky and Alex Stein where the authors incorporate the different mechanism of remedies available to authors depending in the originality of the content produced by them, the paper talks about three standards of originality which are titled as “Doctrine of inequivalents” which are super original works; “The Added Value Doctrine” for moderately original works and “The sameness rule” for the work which is very less creative/original and the change in the remedies as according to the amount of creativity used by the author. The next paper which the author referred for this article was “Plagiarism and Copyright Infringement: The Costs of Confusion” by Laura J. Murra which beautifully incorporates the delicate difference between infringement of copyright and plagiarism and the need of identifying such difference to benefit the authors and scholars to develop to new work and also protect the existing work of other authors. The other paper which the author referred was “Copyright law and the supply of creative work: Evidence from the movies” (Liang & Wang, 2016) where the authors conducted primary research as to how the changes in the copyright law and the changes in European Rental Directive affected the production of Movies, music, and books where they concluded that the amendments in these laws like an extension of the copyright term and uniform European Rental directive did not have a major impact on cinema industry which is assumed to be most benefitted by these changes, thus proving that the copyright law does not pose a major impact on the output of creativity and the needs to strengthen the same for better creative results.

### **Research Objectives:**

1. To conduct a comparative and detailed analysis as to what constitutes ‘originality’ under the Copyright Act through various countries substantive laws, case laws, and jurist's opinions.
2. To analyze how the factor of originality and creativity has a substantial effect on granting copyright protection to various authors.
3. To conduct a study on the interpretation of the term ‘Copy’ and ‘Originality’ by Courts in various instances.
4. To study the extent of application of copyright laws in the cinema industry and the encroachment of ‘ideas’ among various creation.

### **Research Questions**

1. Whether there are conflicting decisions with regard to copyright infringement due to various understanding of originality concept of copyright.
2. Whether there is inconsistency in awarding damages in copyright infringement cases with similar stature of infringement.
3. What is the threshold set by court while determining the originality and Copyrightability of a particular work?
4. What would be an ideal way to formulate remedial structure in case of copyright infringement claims?

### **Evolution of the Concept of Originality Under Copyright Act:**

A distinguishing character of copyright law is public good, the cost of producing an original work is generally high, whereas just reproducing the already existing work in different copies is generally inexpensive, thus the original author under the doctrine of public good should be granted copyright over the work produced by them which would encourage more original works in future.(William Landes, 1989)As wisely quoted in the case of *Wheaton vs. Peters*, the concept of originality, the limit standard of capability for copyright protection, is at the center of copyright(Wheaton vs. Peters , 1834).The term originality in layman terms means some idea which is fresh and unexplored by other people but it is a fact that the majority of the work produced is generated from a common idea procured by the author from various sources. Though the idea may not be completely original the author in most cases employs his artistic skills and knowledge in the subject matter to produce a different outcome of the idea altogether.The presentation of the already existing ideas makes the work worthwhile and thus it is an established rule that the term 'Originality' is not interpreted strictly as it would in the total lead to the destruction of producing new extended works on already existing ideas.(Howard Abrams, 1992) The pioneer of the tests employed by UK courts in the early 1900s was known as '**Sweat of the brow**' test which states that an author must be rendered copyright protection if he can showcase that he has employed his skill and labor for the work produced and the concept of '**creativity**' was sidelined in this Doctrine. This doctrine was used in some early UK cases wherecopyright subsist even if it is a verbatim copy of a speech as the author has employed his skill and labor in the process of production of the work.(Walter v. Lane , 1900) In the another Supreme Court judgment the test of "originality" was explained "sweat of the brow" test. In this case, the court explicitly stated that the term originality does not mean that the ideas expressed must be completely the authors thought, It need not be completely novel, however, such work should not be copied from other author's work and there must be authors labor involved in producing the work and the court furthermore held that work cannot be denied copyright protection merely because other authors have produced works on same ideas. The US courts in the nascent stage of development of copyright regime were also not concrete in the terms of what constitutes to originality as there has been a change in the opinions from the early 1900s till the pronouncement of the landmark judgment in the matter of 'originality'. In the USA the evolution of 'Originality' can be traced in a series of judgment where initially the Supreme Court in a case while interpreting the meaning of originality, Justice Holmes held that the issue of Copyrightability should focus on the contribution of the author for the copyrightable work rather than the purpose of the work it was created for.(Bleistein v. Donaldson Lithographing Co., 1903). The 'Sweat and Brow' test was also applied by US courts in the subsequent cases where the court held that mere compilation of the facts shall be treated as copyrightable work as the author has used his labour in producing the product.(Jeweler's Circular publishing company v. Keystone publishing co. , 1974) However, US courts started taking different approaches on thisconcept n later period wherein the court held that mere compilations of fact won't let the content to be protected under the copyright law, thus declining the 'Sweat of the Brow' test and held that in works like telephone directories to be protected under Copyright Act must display originality in the form of 'selection, creativity, and judgment in choosing'(Financial Information, Inc. v. Moody's Investors Service , 1986) In the year 1991, the Supreme Court of USA in thejudgment of annulled the Doctrine of 'Sweat of the Brow' and applied 'Modicum of Creativity' principal where work to be eligible for copyright must reflect author's creativity in the production of the work, thus a compilation of mere facts won't entitle the author to be protected under copyright law. The court explicitly stated that compiling 1000 already existing facts does not lead to original work. Though the proposition laid down in the Feist case still holds good and gives a brief explanation of 'Originality' and 'Creativity' and gave a better Doctrine of 'Modicum of Creativity' however failed to explain what exactly would constitute creativity and where is the line to be drawn for a work to be adjudged as either infringed or original, though this test is being applied still there remains ambiguity which leads to conflict and one such conflict was seen in an 11th circuit case of the USA wherein the court despite employing Feist theory came with a different output owing to the ambiguity in the minimum requirement that would qualify as creativity as in this case the yellow pages of telephone directory were given copyright protection just because of the fact it was arranged in a different way.(BellSouth Advertising & Publishing Corp. v. Donnelly Information Publishing , 1991)This ambiguity left in the Feist case has led to similar conflicting opinions while determining the level of creativity. Below we will look into some important case laws in the field of Cinematograph films which has dealt with the concept of originality by applying

various theories of originality and how the outcome of the cases have differed due to the ambiguity in the law following which the author would render a suitable way to weigh the creativity in the production and grant of copyright protection accordingly.(Balganesh, 2017)

### **The Conflict between Originality and Common Idea in Cinematograph Industry**

The concept of Originality plays a very important role in the cinematograph industry to protect the content from the claim of infringement and also to protect the copyright of the film being exploited by other parties. It is a very niche area that needs to be addressed as there arises a lot of conflicts among various authors claiming the content to be infringed by their original work. The primary cause of this conflict remains that most of the films are based on a **common idea** or common theme which in most cases have been already explored in some form or the other like a short story in a magazine or a short independent film, thus while a filmmaker explores such area, there arises a lot of frivolous claims against the film claiming it to be infringed by their original work. So, the primary question is what shall constitute as original work and what is infringed work if the idea is already explored in some other form. Does a work on similar idea impose a bar in creation of content similar to the ideas or the author can portray the ideas in a different angle and form? This conflict between the common ideas and originality has been a matter of debate from a long time and jurists have pronounced their opinions in various judgments, some of the cases which provide insight to the conflict between originality and common ideas are as follows:

#### **Edwards & Deutsch Lithographing Co. V. Boorman**

The court in this stated that even though the materials, concepts or ideas used in the film is old and available in the public domain but the fact to be considered is the innovation put by the producer to make the old idea look novel and if the selection, arrangement, and output of the work is novel and new, then such work must be entitled to copyright privileges and must be treated as original content only. (Edwards & Deutsch Lithographing Co. v. Boorman , 1926)

#### **Daly v. Webster**

The court in this case vividly explains how the effort employed for the creation of a particular content should be precedence than the idea behind the creation. The court states that "The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story that is quite as intelligible to the spectator as if it had been presented to him in a written narrative. There must be a series of events, dramatically represented, in a certain sequence or order.." (Daly v. Webster, , 1896) Thus the creation of art must be given more importance than the idea behind it.

#### **Chappell & Co. v. Fields**

In this case, the court held that if a scene is reproduced in another film with a little amount of change to hide the plagiarism but is perceived to be the reproduction by reasonable man, then such minimal change may not amount to originality and the producer will be liable for infringement.(Chappell & Co. v. Fields , 1959) Thus it can be inferred that it is the intention, effort, and creativity which is to be calculated to determine whether the said scene is a copy of previous works or is the original work of the author himself.

#### **Curwood v. Affiliated Distributors**

The judge in this case while rendering his opinion in a dispute whether an idea taken from a book and converted into a cinematograph film by adding many additional components would be liable for infringement or not, the reasonable man's test must be applied and if the spectator is not able to correlate both the work then the film shall be free from the claim of infringement despite having the similar idea. (Curwood v. Affiliated Distributors , 1922)

### **Indian Judgments on Copy and Originality**

The concept of copyright has evolved only recently in India but ever since there has been a series of claim relating to the originality of a film or artistic work. To address the concept of originality in Indian context, The Supreme Court for the first time in a landmark judgment laid down various principles regarding what amounts to infringement and what are the tests that should be employed to determine whether a particular work is original or infringed work. The court, in this case, laid down 7 crucial points and test to determine whether the work is a result of infringement or not. This case acts as a guide to Indian courts to determine the originality of the content. (R.G Anand vs deluxe films &Ors, 1978)

In another Bombay High Court Judgment the court held that a film is held to be copied from another's work only if the subsequent author duplicates the film by any means and if the subsequent producer by any means makes changes in the work though resembling the original work shall not be charged for copying under the copyright act. (Star India Private Limited v. Leo Burnett (India) Pvt. Ltd , 2002)

A conflicting opinion was rendered by Kolkata High Court in another which comprised of similar set of facts, the court gave a diametrically opposite view on the interpretation of copy and originality under Indian Copyright Act where the court stated that the producer of a film shall be entitled to copyright in the work produced only and only if the outcome of the product is completely novel and innovative and not similar to any of the work already produced. (Shree Venkatesh Films Pvt. Ltd. v. Vipul Amrutlal Shah &Ors. 2009)

Thus, it can be noted that there has been various conflicting decisions by court pertaining to formulate the definition of copy and originality under the copyright act and the court has not formulated any straightjacket formula to determine what amounts to infringement of copyright and the threshold of creativity required in order to qualify as an original content.

### **Analyzing the Remedies in Copyright Infringement Cases**

There has been no fixed formula to calculate the remedy to be paid to the copyright holder in case there is an infringement by any other party. In past there have been many instances in which the court has either awarded exorbitant fine in a case where the infringement is minimal and vice versa. Below are few of the cases in which the difference and discretion in awarding the remedy can be noticed

#### **Sid & Marty Krofft Television Productions Inc. v. McDonald's Corp**

In this judgment of ninth Circuit court, the realities of which are as per the following, were offended party have a place with the fifth era of a group of puppeteers who had been effectively putting on manikin shows around the nation. McDonald's had reached them to work together for shooting a progression of advertisements for McDonald, in any case, the arrangement was not concluded, and later on, McDonald shot a progression of plugs utilizing the characters from the offended party's show. The District Court held that the business made by McDonald were encroaching the copyright held by the offended party organization with the assistance of jury and granted an entirety of \$50,000 for which an intrigue was favored by both the gatherings. The apex court applying the extraneous and inherent test and held that the lower court chose the harms regarding every advancement thing as an encroachment and granted less harms and the court felt that a fruitful offended party ought to be qualified in any event for the more noteworthy of the harms or benefits and for the situation and in the event that if benefits couldn't be resolved precisely, the offended party ought to be qualified for "in lieu" harms. This yielded an absolute honor to the Kroffts of \$1,044,000 as it was according to the inexact income earned by Mc Donalds utilizing the plugs.

#### **Universal Pictures v. Harold Lloyd Corporation**

The Harold Lloyd Corporation recorded its objection against Universal Pictures Co., Inc. for the activity emerging out of supposed encroachments upon the copyright of the film photoplay named "Film Crazy". The preliminary court held the respondents obligated for encroaching the copyright and granted judgment to the offended party and against litigants for harms in the whole of \$40,000, \$10,000 for lawyer charges. Both the parties appealed in the superior court, wherein the court acknowledged the direct infringement of plaintiff's copyright which had costed him substantial amount of loss, however rejected the plaintiff's claim to increase the damages stating that "The Court further finds that plaintiff's rights to reissue and remake said motion picture photoplay entitled 'Movie Crazy' were substantially damaged and impaired because of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of \$40,000.00.".

#### **Suntrust Bank v. Houghton Mifflin Co**

In this case, SunTrust Bank filed suit and a preliminary injunction against the publication of a book that was authored by Houghton Mifflin Co titled 'The wind done gone' and was a critique/ adoption of the plaintiff's book titled 'Gone with the Wind' published in the year 1936. In spite of the fact that there were unarguably numerous references to the offended party's work, the respondents battled the 'Fair use' Doctrine which empowers general society to communicate his/her perspectives utilizing a previously distributed work to support others. The court, for this situation, applied the Doctrine of Dichotomy which expresses an individual's copyright just reaches out to the articulation. In this way, general society may uninhibitedly examine a thought however through their unique articulation. Accordingly, eleventh circuit court, for this situation, held that crafted by the respondent however propelled by the offended party yet has unique substance and isn't a duplicate of the offended party's work and consequently no damages were granted to the offended party and the case was governed in the kindness of the litigants.

#### **Accuff Rose vs. Jostens**

The applicant Acuff-Rose, a music distributing organization, possesses the copyright to a blue grass music melody, "You've Got to Stand for Something or you'll fall for anything". The litigant Jostens, propelled a cross country promoting effort for its school class rings. The mission noticeably included the trademark "If you don't stand for something, you'll fall for anything." The case moved on to District Court where it was held that the phrase is not original and thus cannot be copyrighted and the case was decided in the favor of the defendant and later in appeal, the Court affirmed the district court verdict and held that since the phrase was generic and had been used several times before, the plaintiff does not hold any sort of copyright and hence no damages was granted in this case also.

#### **Twentieth Century Fox Film vs Zee Telefilms Ltd. &Ors**

In this case, the plaintiff had produced a TV series titled '24' which was highly acclaimed. The defendant came up with a series title 'Time Bomb' which had similar concept and storyline to that used in 24, however, the defendant claimed it to be a sequel to their previous show titled 'Pradhan Mantri'. There were a series of similarities shown between both the series in the storyline and the form of portrayal along with few minimal changes in both the work. The Court in this case, held that the form of portraying maybe the same in both the series but such narration and has no Copyrightability per se and even the similarities in the idea are not copyrightable and since there were enough changes made in the defendant's show, there was **no relief** granted to the plaintiff in this case as dissimilarities outweighed the similarity.

#### **An Alternate Suggestion:**

As we have seen above in the first two cases though the offense committed is more or less of the same magnitude and the court findings in both the cases are more or less similar but still, there has been a huge difference in the damages awarded to the parties in both the cases and in next 3 cases though there has been striking comparability between the applicant and non-applicant work, the plaintiff was not awarded any sum just

because plaintiff's work was not original and thus the defendant was permitted to use the said work without paying any license fee or royalties. Procuring an adequate remedy is the major incentive to file a suit in copyright cases and the sum must not be burdensome on the defendant and must not result in a loss of IP for the plaintiff, thus to strike a balance between both the interest is indeed a tough task, however, the author here using the suggestions made in the paper titled 'Originality' (Stein, 2009) by Gideon Parchomovsky and Alex Stein would propose a slightly different model using similar concepts as suggested by them. Work can be divided into three categories for the level of originality displayed in the work and the three categories can be divided as:

1. '**Doctrine of inequivalents**' which can be used for the work which is completely original
2. '**Added Value Doctrine**' for the work which exhibits medium creativity
3. '**Sameness rule**' The work which is a copy of other works or lacks any sort of originality

Hence, in our model, the court before deciding any case must closely examine the output of both the works and should determine either using an expert or by applying reasonable man test as to how original/creative both the content at dispute are. In this model the court has to weigh originality and creativity employed in both the works produced by applicant and the non-applicant. For instance in the above discussed matter of Suntrust Bank v. Houghton Mifflin Co, though the court applied Fair use doctrine, in this case, it was apparent that the defendant developed the content in her book only by using the plaintiff's idea which was completely original and hence if not for plaintiff's creation, the defendant would not have come up with his work and hence must be granted royalty for the work. Moving on to the first and second illustrations(case laws) where the court found that there was infringement by the defendants but the remedy provided was excessively high in the first case and very low in the second case. The remedy should not be decided as to the amount of profits that the defendants would have earned by copying the plaintiff's work but it must be accorded considering the creativity used by the plaintiff and the estimate value of IP of the defendant's work which depends on the creativity and originality of the applicant's work. Thus, the remedy to an infringement must be based on the creativity and originality employed by the producers of the work. In the last case/illustration the court held that the dissimilarities outweigh the similarities in both the series thus rendering no remedy to the plaintiff inspite of acknowledging similarities between both the works. This kind of inconsistent decisions by court in past have reduced the confidence among the producers to rely on court for battling infringement as in most of the cases the cost of filing a suit outweighs the probable benefit derivable from it.(Dorell, 2013)

### **The Concept in a Nutshell**

To explain the whole model of how the Court should determine the sum of the remedy to be awarded, the author shall be illustrating 9 scenarios in the form of the table below. The below table is based on the assumption that the court has found similarity of idea/concept in the work of plaintiff and defendant and the sum of money shall be varied according to the estimated value of the IPs of the work of defendant and the plaintiff which shall vary from case to case basis. The doctrine of inequivalents for the plaintiff would refer to the works whose idea is completely original and not available in public domain before whereas for the defendant the same would mean the end product produced cannot be tracked down due to the novel expression/addition, except of the fact that the original idea was of plaintiff's work, whereas added value doctrine for both plaintiff and defendant shall mean that though the idea of the product was available in public domain the parties have altered and produced a relatively fresh product using the same idea whereas the sameness rule shall mean that the parties have totally used someone else's idea and the work produced is more or less a copy of already existing work. The category of doctrine of inequivalents where the plaintiff's work is under the sameness rule would mean that the defendant has used the idea readily available and used but has produced some exceptionally high quality product using his expertise in other fields and thus making the work a cinematic marvel and thus will be included in the category of doctrine of inequivalents.

Plaintiff's work	Defendant's work	Remedy
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Doctrine of inequivalents	Doctrine of inequivalents	Moderate sum of money
Doctrine of inequivalents	Added Value doctrine	High sum of money
Doctrine of inequivalents	Sameness rule	Exorbitant sum of money

Plaintiff's work	Defendant's work	Remedy
Added Value doctrine	Doctrine of inequivalents	Less sum of money/credits for the plaintiff work
Added Value doctrine	Added Value doctrine	Moderate sum
Added Value doctrine	Sameness rule	High sum of money

Plaintiff's work	Defendant's work	Remedy
Sameness rule	Doctrine of inequivalents	No remedy in such case
Sameness rule	Added Value doctrine	Less sum of money/credits for the plaintiff work
Sameness rule	Sameness rule	Moderate sum of money

### **Contribution on the importance of originality concept for the authors**

An author while producing work at times devote himself to the project for years to produce something which shall be remembered forever by his name. Such is the devotion of the artist and copyright is their only means of protection. It is to be noted that any artistic work as meager as selecting a suitable title for a film/book requires a lot of creativity and research. Private makers have a motivation to put resources into advancement in particular in the event that they get a proper return. Regardless of whether makers will have the right motivators relies upon their capacity to proper probably a portion of the worth that clients place on those works. On the off chance that potential trend-setters are restricted in their capacity to catch this worth, they might not have enough motivation to put a socially ideal sum in imaginative movement.(Stanley Besen, 1991). To substantiate this pointresearchers would like to use the example of how titles of movies made under small banner are not protected by copyright whereas some blockbuster film's title is given title protection. In the case of Kanungo Media, where an award-winning film titled 'Nisshabd' was not given title protection whereas another film titled Nisshabd was permitted to release with the same title as the former has not made any 'Commercial use' out of the title, thus it can be seen that various doctrines and principles govern the copyright law which is mostly used as a tool to provide undue advantage to corporate houses, hence every small work of an artist are categorically ignored under copyright law which reduces the zeal of the author to produce original and creative works.

### **Conclusion**

It has been noticed that due to uncertainty in copyright laws and involvement of huge costs in litigation, many authors are not able to avail their copyright which has been exploited by big corporate houses who many times don't pay any royalty to the original author and instead sabotage their works by not even acknowledging the same. Though it is not possible to formulate a straightjacket formula to be used in the cases of copyright infringement, however, there must be a standard procedure or test which should be laid down so that equal

justice is provided in every case and the discretionary power of the court is curbed to an extent where every author can rely on the court to claim his credit wherever due. The purpose of copyright act to promote art and to protect the artist from his work being exploited by other persons. Thus, it is the need of the hour to strengthen our copyright laws to support authors and encourage and protect more original works

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