

COPYRIGHT AND THE FREEDOM OF EXPRESSION

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ABSTRACT

The growing influence of social media and easy accessibility of art and literature in the public domain has changed the scenario of creator's right or royalty and protection of the originality of their work. Intellectual property laws are a matter of great concern to protect intellectual property across the globe. These laws not only ensures the wider scope of making the art piece original but also being in the public domain welcomes the feedback and criticism by providing the concept of fair dealing and reviews making this area of work a more democratic one. By invoking such concepts law creates an opportunity for young creators to express their ideas and opinion through the expression of work representing their personality as ensured by the Constitution of India, The Law of the land. This article deals with such issues of originality of work, freedom of expression and fair dealing under copyright. In a democratic country, all the including fundamental are ensured with some limitation and fundamental right allows the individual to express themselves through art, literature, movies, writing, religion, language and broadcasting and propagate their beliefs and ideas along with respecting someone's sentiments attached with such ideas and beliefs.

INTRODUCTION

“Artwork of an artist is a form of his or her self-expression¹”

The Constitution of India has ensured various fundamental rights to its citizens under part III. And the right to speech and expression is one of them². Novels, movies, newspaper, daily bulletins and all other broadcasting are the modern media of expression one's creation to make it available to masses at large and they play very effective and influential information of public opinion. Article 19 (1) (a) of the Constitution of India says that every citizen of India shall have the right to freedom of speech and expression³ but these rights are subject to certainly reasonable restriction. This article empowers every individual with the right to express one's idea or opinion

¹ Philosophy of art, Art as Expression, Britannica, <https://www.britannica.com/topic/philosophy-of-art/Art-as-expression>

² Constitution of India, Art. 19, cl.1, sub. Cl. a

³ Ibid

freely by words of mouth, writing, and printing or by picture mode or by any communicable or visible representation i.e. gesture, signs, etc.⁴. It not only includes the creation of ideas but publication and propagation of those ideas also are an integral part of it. In the case of ROMESH THAPPAR V. STATE OF MADRAS⁵ Court observed that ‘ Freedom of speech and the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of the popular government is possible.’ The Human Rights Act also declares the freedom of expression (to hold, receive and impart) ideas and opinions without interference of public authority but also permits licensing of broadcasting them. Exercise of these rights of freedom brings responsibility and duties which are subject to certain formalities, restrictions and penalties which should carefully tackle.

Right to information is a necessary element of the fundamental Right principle to assure obligation on the public authorities to ensure the accessibility of information and ideas to every citizen to bring transparency, promote openness and accountability in the administration of public authorities. Fundamental Rights principle means people’s right to know. The special interest of society in freedom of speech and expression creates accountability and influence on the approach of the government. The government of India should be more cautious while levying taxes on the matters concerning the newspaper industry than while levying taxes on other matters⁶. And the commercial advertisement doesn’t come within the purview of Freedom of Expression because the prime objective is to earn profit not to promote social, economic, political, literature or the idea of humanity. Such expressions are commercial and are not protected under Article 19(1) (a).

HISTORICAL BACKGROUND

With the invention of the Printing Press in 1436, the European market was flooded with a huge amount of printed publications reaching the masses. It not only made the reading materials

⁴ Dr. J.N. Pandey, Constitutional Law of India 211(56th ed. Central Law Agency 2019)

⁵ Thappar V. State of Romesh Madras, AIR 1950 SC 124

⁶ Indian Express Newspaper v. Union of India,(1985) 1 SCC 641; Reliance Petro-chemical Ltd. v. Indian Newspaper (Bombay) Pvt. Ltd., AIR 1989 SC 190

accessible to all but also increased the incidents of cheating, fraud and unjust claims over the other's creation. Intending to protect the right of owners over their creation (intellectual property) world's first copyright law was the Statute of Anne, enacted in England in 1710 which added the provisions of works to be deposited at specific copyright libraries, and registered at Stationers' Hall. No automatic mechanism was present in copyright laws for the protection of unpublished works. All over the world fragmentation has been seen in cases of intellectual property laws. Some countries offer the laws proper registration system of unpublished works and some don't show such requirements. One of the most important changes implemented by the adoption of the Berne Convention was to widen the purview of copyright protection to unpublished works and make the process easier for registration⁷. In countries of the Berne Convention it is applicable to suggest that an individual (or the organization they work for) owns the copyright of any work they produce as soon as it is recorded in the same manner, be it by writing it down, drawing, filming, etc.⁸

9” Intellectual property is a property it could own by an individual or jointly by a group of individual of which

WHAT IS INTELLECTUAL PROPERTY AND COPYRIGHT

World Intellectual Property Organization defines “Any property which resulted from the intellect of an individual (human intelligence) or creation of one's mind including copyright, patent, trademark, etc. is known as intellectual property over which they have exclusive right to sell, mortgage, exchange, and get licensed as prescribed by the national government by statutory provisions. These rights assigned to the owner (individual or organisation) are for their exclusive use and in case of infringement of these rights they may approach the court to get an absolute claim over it. WTO's TRIPs Agreement categorises intellectual property rights into the following forms¹⁰ -:

a) Copyright and related rights

⁷ IPRO, Brief History Of Copyright, Intellectual Property Rights Office(2006), https://www.iprightoffice.org/copyright_history/

⁸ Ibid.

⁹ WIPO, What is intellectual property, WIPO, (2019) <https://www.wipo.int/publications/en/details.jsp?id=4528>

¹⁰ Tojo Jose, what is intellectual property right (IPRS), Indian Economy.NET ECONOMY AND FINANCE, (May 4, 2016) <https://www.indianeconomy.net/splclassroom/what-is-intellectual-property-rights-iprs/>

- b) Trademarks, including service marks
- c) Geographical indications
- d) Industrial designs
- e) Patents
- f) Layout- designs (topographies) of integrated circuits
- g) Undisclosed information, including trade secrets
- h) Control of Anti-Competitive Practices in Contractual Licenses.

COPYRIGHT

Copyright is a legal term to describe exclusive rights granted to creators, authors, artists, and composers for their ‘original’ creative work or to performers, artists, and broadcasters for the related rights¹¹. These exclusive rights over their creation being monopolistic guarantees the creator exclusive right to sell, publish and reproduce, any literary, musical, dramatic, artistic or architectural work created by the author. Commonly copyright across the world includes¹² -:

1. Literary work i.e. novels, plays, poems, newspaper articles, etc.
2. Computer programmes, databases
3. Films, musical composition and choreography
4. Artists work
5. Architecture
6. Advertisements, maps and technical drawings

The Berne Convention held in the year 1886 recognized copyrights as legal rights for the signatory countries. It also emphasized that copyrights for the creative works do not have to be asserted or declared (i.e. registered)¹³. The copyrights are automatically in force at the creation of the work in the name of the author, who may or may not register his/her work¹⁴. The author automatically gets entitled to all or any copyrights in the derivative works unless and until the author explicitly disclaims them, or until the copyright expires¹⁵. The purview of Copyright

¹¹ WIPO, Frequently Asked Questions: Copyright Basics , WIPO, [https://www.wipo.int/copyright/en/faq_copyright.html#:~:text=Copyright%20\(or%20author's%20right\)%20is,%20C%20maps%20and%20technical%20drawings](https://www.wipo.int/copyright/en/faq_copyright.html#:~:text=Copyright%20(or%20author's%20right)%20is,%20C%20maps%20and%20technical%20drawings)

¹² Ibid.

¹³ IPRO, supra note 7.

¹⁴ IPRO, supra note 7.

¹⁵ IPRO, supra note 6.

protection is only to the expression of ideas not the procedures, or methods of operation or mathematical concepts. For example - a story has been created by a writer he has the exclusive right to publish or narrate it or displays it by any mode of his choice.

The Copyright Act, 1957 ensures the creators two kinds of exclusive over their creation or property: 1) Economic rights which include the right to have monetary benefits over the creation 2) Moral rights which include all non-economic¹⁶.

CONCEPT OF MORAL RIGHTS AND FREEDOM OF EXPRESSION

The concept of moral rights was derived from “**Personhood theory**” which postulates that the art or intellectual property is an extension of the author’s personality and describes the author’s personality as intricately threaded into the fabric of their artwork¹⁷. It creates a nexus between the art and artist which determines the value of the intellectual property. Scholars such as **Spence** describe moral rights as part of free speech because it provides speakers with the opportunity and autonomy to participate in public debates and express their ideas, opinions protect their ideas from being distorted or manipulated. Famous Scholar **Netanel** says that copyright ensures that the authors are adequately incentivised for their work by providing them autonomy which encourages new creation of art and inventions on the other hand enables a robust democracy¹⁸. Any modification, alteration or distortion made to the original piece of artwork will ultimately hamper the author’s right to self-expression. And The Copyright Act, 1957 was enacted with the view to protect the property created by human intellect.

Section 57¹⁹ by article 6bis of Brene convention ensures morals rights to the creator’s or author’s exclusive right which includes the right to paternity and right to integrity. Right to Paternity is one of the specific rights which entitles the author to claim authorship of his work which must be attributed to him whereas the Right to integrity permits the author to restrain any distortion, damage, or modification made to original work without his or her consent and claim damages in

¹⁶ WIPO, supra note 10.

¹⁷ Shivani Kundle, India: Moral Rights And The Conflict With Freedom Of Expression, mondaq connecting knowledge & people(December 23,2020), <https://www.mondaq.com/india/copyright/1019084/moral-rights-and-the-conflict-with-freedom-ofexpression#:~:text=Another%20limitation%20introduced%20on%20the,opposed%20to%20from%20outside%20sources.>

¹⁸ Ibid.

¹⁹ The Copyright Act, 1957 sec 57

case of such incidents²⁰. In the case of AMARNATH SEHGAL V. UNION OF INDIA²¹ which was filed before the Delhi High Court under section 57 of the Copyright Act, 1957, Court held that despite the transfer or sale of a copyrighted work from the creator to another person has been done creator still have moral rights that can be enforced whenever needed. A recent example of such misrepresentation has occurred in the Mirzapur 2 series where creators of the show came under a siege for using a book titled 'Dhabba' as prop along with voiceover in a scene. The author of the book surrender Mohan Pathak alleged misrepresentation of his work. Another famous case of moral rights infringement is of 2017 "The charging Bull" against the Fearless Girl" artist of the "Charging Bull" has taken objection against the alteration of the content of his work as he intended to show the resilience of the American economy not to promote gender-based oppression.

THE CONFLICT

Moral rights and Freedom of Expression play a pertinent role in determining each other. It not only (especially the right to integrity) protects the originality of artwork or creation but also entitles the creators to protect their self-expression and free speech from further damage²².

But on a strict interpretation of the right to integrity, it has been seen that the Right along with the claim of protection brings a threat to democratic values of copyright if its scope of autonomy and exclusive control is left unchecked and without limits or boundaries. In a democratic country like India where fundamental rights not only allows you to express your ideas and opinion but also permits critical analysis of such ideas which latter accompanied by the concept of fair dealing²³ and fair use of artistic work as provided under section 52 of the Act²⁴ makes the work more democratic creating new opportunities. **The doctrine of fair dealing** is a legal limitation on the right exclusive right of ownership over their creation permitting the limited usage of such work along with maintaining the originality and sanctity of work to protect the moral right of the creator. There no such well-defined definition of this doctrine of fair dealing, Courts in India

²⁰ Senthil Kumar, India: Moral Rights Under Copyright Law, mondaq connecting knowledge & people(October 20,2016), <https://www.mondaq.com/india/copyright/537094/moral-rights-under-copyright-law>

²¹ AMARNATH SEHGAL V. UNION OF INDIA, AIR 2005(30)PTC253(Del)

²² Shivani Kundle, supra note 14.

²³ Copyright Amendment Act, 2012 sec 52

²⁴ The Copyright Act, 1957, sec 52

have applied the justice, equity and good) conscience (depending on the amount of work used, purpose and the nature of use and its effect on the original one) to deal with such cases and resolved issue raised in those cases by applying common sense depending on the circumstances and facts of the cases. In the English case of **Gyles vs Wilcox**²⁵ doctrine of fair dealing was established and lord **Hartwick** in the same case categorised such kind of activities in two into: 1) **True abridgements** which include the creation of work in the truest and purest form without making any copyright infringement 2) **Coloured shortenings** which includes colouring or making certain adjustments to the original work. Recently a YouTube channel named **triggered insaan** has made a roasting video on Dinachak Pooja of her video song, she claimed copyright infringement over that video. It was later explained by the creator of the roasting video to YouTube India that the video was only for fun purpose and no infringement has been from his side. And many more examples can be seen in the case of video, songs, movie reviews, etc. Such review or criticism of any work shall not be regarded as an infringement of copyright where the criticism has been done in while:-

1. Of fair dealing
2. Private or personal use including research
3. Criticism or review
4. Reporting of current events and affairs including reporting of a lecture delivered in public.

PARODY

Intimation or mimicry of someone else's work is another exception to copyright infringement which allows the young and critics to express their views and present the same subject matter or idea in their expression and no copyright infringement can be entertained in such cases until the expression of such idea is similar. To avoid the misuse of concepts of fair dealing and parody Court in the case of **M/s. Blackwood and Sons Ltd. and Others vs. A.N. Parasuraman and others**²⁶ has laid down certain to decide the extent of the defence of fair use in case of parodies:- 1) the quantum and value of subject matter taken about criticism 2) the purpose of use 3) similarity of competition between the two works. Another important principle that has been

²⁵ Gyles vs Wilcox ,(1740) 3 Atk 143;26ER 489

²⁶ M/s. Blackwood and Sons Ltd. and Others vs. A.N. Parasuraman and others, AIR 1959 Mad 410

established in this case was the intention and motive of the parodist to commercially exploit or to get benefit out of the goodwill over the original work to derive profit shall constitute copyright infringement. In the case of **Civic Chandra vs AmminiAmma**²⁷ the court held that parody of any form of critical work of the original creation did not constitute an infringement of copyright as long as it is not misused or misrepresented. Another issue related to this defence of violation of the Trademark Act was raised in the case of **TATA Sons Ltd vs. Greenpeace International & Anr**²⁸ regarding the negative depiction of Tata's port construction in an online game named Tata Vs Turtles (portraying them by escaping Tata logo by Greenpeace). Greenpeace in this case wasn't liable for the violation of trademark norms because:

- parody is within the purview of freedom of speech and expression
- parody of registered trademark is allowed for reasonable comments
- Trademarks were used to increase awareness among people and cannot be considered defamatory.

And the autonomy and exclusive right over the creation creates a bar in the procedure of development of art and literature and other aspects of copyright and preventing further modifications or amendments which may be beneficial for the welfare of democratic values of society in further development and evolution of various aspects of copyright.

CONCLUSION

It can be concluded from the above discussion that the originality of self-expression should be maintained along with the protection of modifiers free speech. **Lesile Kim Treiger-Bar-Am** argues that the Right to integrity shouldn't be used to stifle excessive criticism and the limitation introduced on it is that original work allowed be in the public forum for critical appreciation and modifications to create a balance between the creators' freedom of self-expression along with its originality and modifiers free speech²⁹. It brings transparency and encourages fair use of copyright which make work accessible to the public at large. Contemporary Indian codes don't provide an adequate defence to parodist to space from their liability in case of any exploitation or infringement. Such loopholes are an open invitation to frauds violating the moral rights and

²⁷ Civic Chandra vs Ammini Amma ,AIR 1996 16 PTC 329(Kerala)

²⁸ TATA Sons Ltd vs. Green peace International & Anr. 178 (2011) DLT 705

²⁹ Shivani Kundle, supra note 14.

privacy of original work as well. To bring harmony and proper functioning democratic principles of copyright there is a need for strict surveillance over the original work and restricted usage of work and draw a clear distinction for easier approach and accessibility to the public.