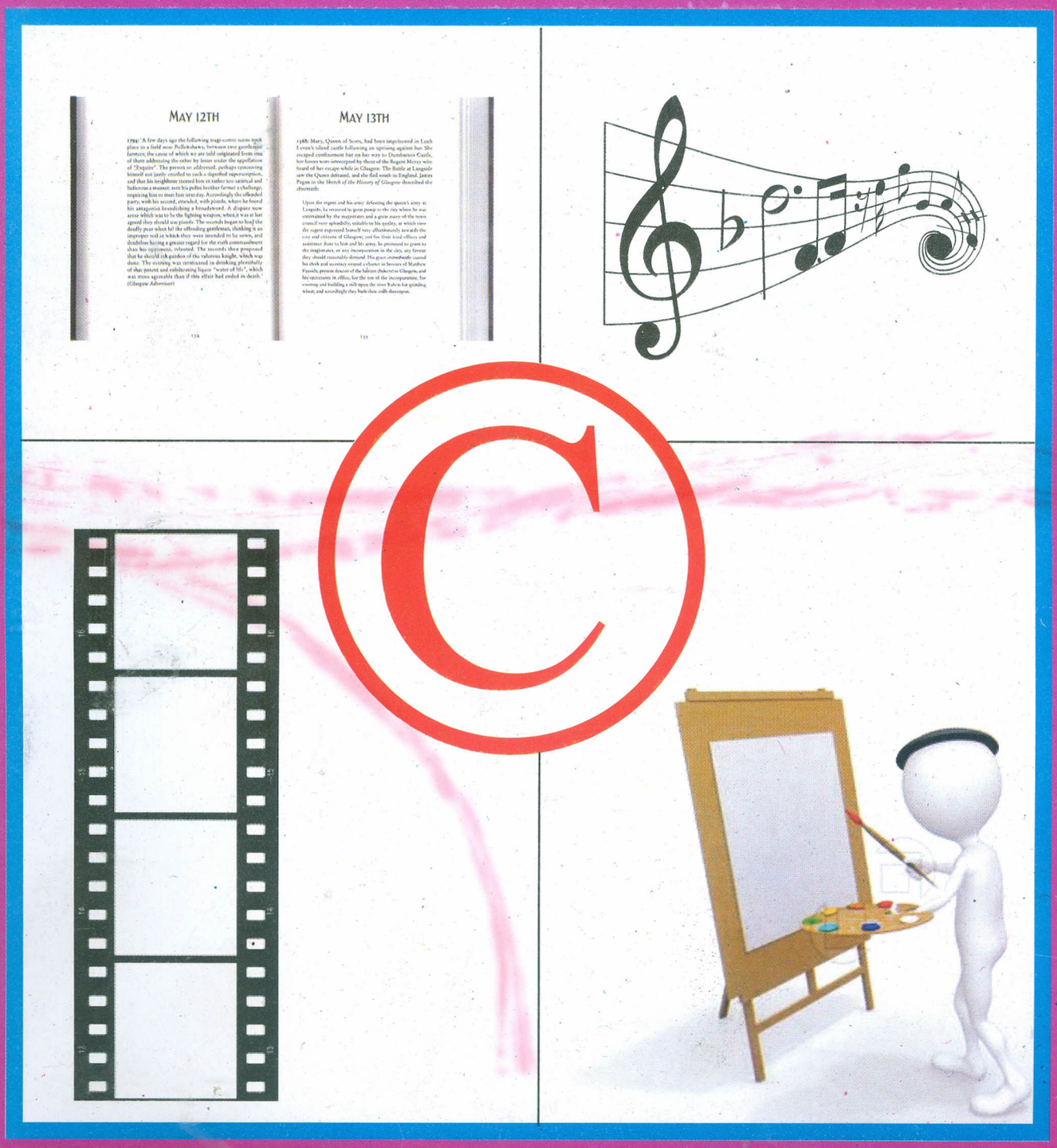
Indira Gandhi National Open University
School of Law

MIP-105
COPYRIGHT AND RELATED RIGHTS



Basics of Copyright

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"शिक्षा मानव को बन्धनों से मुक्त करती है और आज के युग में तो लोकतंत्र की भावना का आधार भी है । जन्म तथा अन्य कारणों से उत्पन्न जाति एवं वर्गगत विषमताओं को दूर करते हुए मनुष्य को इन सबसे ऊपर उठाती है ।"

- इन्दिरा गाँधी

"Education is a liberating force, and in our age it is also a democratising force, cutting across the barriers of caste and class, smoothing out inequalities imposed by birth and other circumstances."

- Indira Gandhi

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THE PEOPLE'S
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School of Law

MIP-105
Copyright and Related Rights

Block

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Expert Committee

Dr. D.P.S Parmar
Technical Member,
Intellectual Property Appellate Board,
Ministry of Commerce & Industry

Prof. S.K. Verma
Director, ISIL
New Delhi

Prof. Salim Akhtar
Professor of Law,
Aligarh Muslim University
Aligarh, Uttar Pradesh

Dr. Ekbal Hussain
Associate Professor
Jamia Milia Islamia University
New Delhi

Mr. T.C. James
Director,
National Intellectual Property Organisation
New Delhi

Prof. K. Elumalai
Director, School of Law
IGNOU

Dr. Suneet Kashyap Srivastava
Assistant Professor
School of Law, IGNOU

Dr. Gurmeet Kaur
Assistant Professor
School of Law, IGNOU

Mr. Anand Gupta
Assistant Professor
School of Law, IGNOU

Ms. Mansi Sharma
Assistant Professor
School of Law, IGNOU

Programme Coordinator: Dr. Suneet Kashyap Srivastava, SOL, IGNOU

Block Preparation Team

Unit Writer
Mr. T.C. James
Head, National Institute of
Intellectual Property Organization (NIPO)
New Delhi

Content Editor:

Dr. Suneet Kashyap Srivastava
SOL, IGNOU, New Delhi

Formate & Language Editor

Dr. Suneet Kashyap Srivastava
SOL, IGNOU, New Delhi

PRINT PRODUCTION TEAM

Sh. S. Burman, D.R.(P)
MPDD-IGNOU, Maidan Garhi
Delhi-110068

Sh. Tilak Raj
A.R.(P) MPDD-IGNOU,
Maidan Garhi Delhi-110068

Sh. Yashpal
S.O.(P) MPDD-IGNOU,
Maidan Garhi Delhi-110068

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MIP-105 COPYRIGHT AND RELATED RIGHTS

Copyright is one of the main branches of Intellectual Property (IP). The word "Intellectual Property" refers to the 'creations of human mind' (hence the word intellectual") and the protection that is granted to the creations or originators of such creations, in the form of exclusive rights (hence the word 'property'. Examples of Intellectual Property subject matter are: books, paintings, poems, novels, sculptures (all known as "literacy and artistic works" and protected under "Copyright Law" design, trademarks, inventions etc.

Copyright constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends to a large extent on the level of protection afforded to literary and artistic works. The better the protection, the greater the number of productions in literature and the arts, in the book, record and entertainment industries; the greater number of a country's intellectual creations, the higher it's renown. In the final analysis, encouragement of intellectual creation is one of the basic prerequisites for social, economic and cultural development.

This Course consists of four blocks. Block I to Block IV of this course extensively deals with Copyright.

Block 1 of this course is completely devoted to basics of copyright. In this course students will learn about the scope of copyright, different rights attached with Copyrights, ownership rights, duration of rights, and the exceptions and limitations of these rights.

In Block 2 of this Course students will me acquainted with the administration of Copyrights. Topics like registration of Copyrights, assignments, licenses and revocations, copyright societies, Copyright Board etc are dealt with.

Block 3 of this Course deals with Copyright privacy. In this Course issues like infringement of copyright and the remedies thereof are explained. Also issues like commercial proceedings and border measures are dealt with.

Block 4 of this course deals with related rights and international protection of copyright. In the course certain major issues like rights of sound recording producers, rights of broadcasting organisation, performers rights and international protection of copyrights are discussed and explained.

This Course consists of 4 credits.

1 credit = 30 hrs of study

4 credit = 30x4hrs of study = 120 hrs of study

Good luck and happy reading.

BLOCK 1 BASICS OF COPYRIGHT

Copyright as we are aware is an intellectual property right. Like other intellectual property rights such as patents and trademarks, it is a creation of law. This Block on Basics of Copyright consists of four Units.

Unit 1 of this Block explains different issues on copyright like the nature of copyright, history of copyright, work that can be protected under the Copyright Act, originality in Copyright etc.

Unit 2 of this Block discusses topics like different right pertaining to copyright, which include the authors special rights and economic rights, other rights related to it are also explained in this unit, like rights in literacy, dramatic and musical works, rights in an artistic work, rights in a cinematograph film, rights in a sound recording, resale share rights etc. This Unit also discusses case laws relating to the Copyright and related rights thereto.

Unit 3 of this Block deals with ownership and duration, i.e. term of copyright, and ownership issues.

Unit 4 of this Block deals with exceptions and limitations of the Copyright Act. This Unit also deals with case laws related to the topic.

UNIT 1 SCOPE OF COPYRIGHT

Structure

1.1 Introduction

1.2 Objectives

1.3 Works

- 1.3.1 Statute
- 1.3.2 Works in which Copyright Subsists
- 1.3.3 Case Law

1.4 Originality in Copyright

1.5 Summary

1.6 Terminal Questions

1.7 Answers and Hints

1.8 References and Suggested Readings

1.1 INTRODUCTION

In this section we will look into the ideology and historical evolution of copyright.

Rationale of Copyright

Copyright is an intellectual property right. Like other intellectual property rights such as patents and trademarks, it is a creation of law. It is provided to the creators of literary, dramatic, musical and artistic works. The objective of copyright protection is to ensure that creators of original works which contribute to the advancement of learning and culture gain from their intellectual productivity. There are many arguments justifying extension of rights to authors for their creativity. S.M. Stewart, in his book ***International Copyright and Neighbouring Rights*** proposes the following four major arguments in support of a statutory copyright protection regime:

i) ***The principle of natural justice*:** Since an author is the creator of a work he/she has the natural right to decide who should use it. The creator is also entitled to get economic returns for his/her efforts.

ii) ***The economic argument*:** Creation of many works, e.g. a cinema, requires considerable investment. Even literary works require considerable investment if they are to be published and distributed. In order to attract investments, it is necessary to guarantee the investors from poaching on the works they publish by others.

iii) ***The cultural argument*:** Creative works are assets to national culture. Encouragement and rewarding of creation of works, contributes to the national culture.

iv) ***The social argument*:** Dissemination of works contributes to advancement of society and in creating links between different classes, and groups. Such dissemination without undermining the interests of the creators is possible through copyright protection.

The ***Universal Declaration of Human Rights,*** in Article 27, advances the following justification for intellectual property right protection:

1) Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits

2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This sets out the need for extending statutory protection to creators for their efforts as well as the right of the community to enjoy the fruits of creativity.

The Statement of Objects of the Copyright (Amendment) Act 1994 states, "effective copyright protection promotes and rewards human creativity and is, in modern society, an indispensable support for intellectual, cultural and economic activity." It further states, "Copyright law promotes the creation of literary, artistic, dramatic and musical works, cinematograph films and sound recordings by providing certain exclusive rights to their authors and creators."

History of Copyright

It can be rightly said that copyright laws are legal responses to technological developments. While, from ancient times, society had recognised the moral rights of authors from being divested of their authorship or from changes in their works which are disparaging and the monarchs used to reward economically those writers, musicians and artists who have earned their favour, the issue of a statutory protection system emerged after the invention of the printing press with movable typefaces in the fifteenth century. Gutenberg's invention of printing press in 1436 changed the publishing industry wholly. With the emergence of printing technology with movable typefaces, it has become much easier to come out with large number of copies of a book. This gave rise to a new problem. If a book has turned out to be a market success, then other publishers also printed copies of the same and fixed competitive price for the same which made the first publisher who took the risk a loser. An Act of Henry VIII in 1529 established a system of privileges for the printing of books. These privileges were trading licences which were a kind of monopoly for the owner of the licence to print and publish a book. These privileges were granted by the crown but exercised through the Stationers' Company. In 1556, a Royal Charter was granted to the Stationers' Company with the objective of controlling certain types of religious literature. An Order of the House of Commons in 1642 provided that the Stationers' Company should ensure that nothing was printed without the name and consent of the author. The Licensing Act of 1662 prohibited the printing of any book which was not registered with the Stationer's Company. Finally, in 1709, the Act of Queen Anne provided the authors of the books then printed the sole right of printing them for a term of twenty-one years and of the books not then printed the sole right of printing for 14 years from the date of publication which would again return to them if they are living at the end of the 14 years. This Act of Queen Anne is considered the first modern copyright law and is hailed as the mother of all copyright laws. Since then the scope of copyright was broadened much and also the period of protection got extended. The Imperial Copyright Act, 1911 consolidated the provisions of many scattered legislations into a comprehensive copyright law.

It is not only Britain which provided for copyright protection. From the eighteenth century onwards, other countries also enacted specific legislations to extend protection for literary and artistic works. Following are the years of introduction of copyright law in some European and American countries:

USA	1790
France	1793
Italy	1865
Germany	1871
Spain	1879
Russia	1925

India also has a long history in the matter of copyright legislation extending to more than a century and a half, of course thanks to the British rule. It was in the British India that legislation for protection of copyright, like patent, that was made. In India, the first Copyright legislation is the Act of 1847 (Act XX of 1847) which was on the lines of the British Copyright Act of 1842. This was enacted during the East India Company regime. It was enacted by the Governor General in council on 15 December 1847 and it affirmed the applicability of the English law to India. Not much is on record as to the enforcement of that Act. Consequent on the enactment of the comprehensive United Kingdom Copyright Act of 1911, its application was extended to the whole of British India with effect from 31 October 1912 through a Government of India proclamation. Later, the Indian Copyright, 1914, incorporating most of the provisions of the 1911 British Act was enacted. This remained in force until the present Copyright Act of 1957 was brought into force on 21st January, 1958.

The present copyright Act of 1957 was the result of a comprehensive review of the situation in independent India. The Bill was introduced in the Parliament in October 1955. The objects and reasons for the new legislation were stated as under:

> *The existing law relating to copyright is contained in the Copyright Act, 1911, of the United Kingdom, as modified by the Indian Copyright Act, 1914. Apart from the fact that the United Kingdom Act does not fit in with changed constitutional status of India, it is necessary to enact an independent, self-contained law on the subject of copyright in the light of growing public consciousness, and the rights and obligations of authors and in the light of experience gained in the working of the existing law during the last 50 years. New and advanced means of communications like broadcasting, lithography, etc. Also call for certain amendments in the existing law. Adequate provision has also to be made for fulfilment of international obligations in the field of copyright which India might expect. A complete revision of the law of copyright, therefore, seemed inevitable.*

The 1957 Act was amended a number of times to meet the challenges of India's international commitments in the area of copyrights and related rights as well as to adapt to the requirements of technological advancements. The Act was amended in 1983, 1984, 1992, 1994, 1999 and 2012. The 2012 amendments were quite major and covered a number of sections.

The Copyright Act, 1957 was followed up by the Copyright Rules, 1958. The Rules were also amended in 1984 and 1995. Presently, a new Copyright Rules, 2012, replacing the Copyright Rules, 1958, are being drafted by the government.

The Copyright Act, 1957 contained detailed provisions regarding the scope of copyright, the works covered, the rights extended to the works, the penalties for infringement of the rights and exemptions and limitations to the rights. It also provided for the establishment of a Copyright Office for registration of copyrights and also for the setting up of a Copyright Board for deciding appeals against the decisions of the Registrar and also for granting compulsory licences as well as deciding certain issues relating to royalties, etc. The 1914 Act had no provision for registration.

The 1983, 1984 and 1992 amendments were special purpose amendments. The 1983 amendment provided for certain exemptions such as compulsory licences for translation and reproduction of foreign works for educational purposes. The 1984 amendments introduced provisions to protect the cinematograph films and sound recordings from increasing piracy through unauthorised video and audio reproductions. The 1992 amendment was for extension of the term of protection of copyright.

The 1994 amendments were very comprehensive and incorporated most of the then anticipated provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) which are applicable to copyrights.

The 1999 amendment extended the scope of exemptions and limitations in regard to computer programmes and also extended the period of protection of performer's rights.

The 2012 amendments incorporated provisions of the WIPO Copyright Treaty, 1996 and WIPO Performances and Phonograms Treaty, 1996. These amendments expanded the scope of related rights for performers.

Nature of Copyright

Intellectual Property Rights are broadly divided into two branches, namely, copyright and neighbouring rights and industrial property rights. Like other intellectual property rights it is a property right, but the right is in intangible property. It is the right of the author in the creations of his mind expressed in a tangible format. For example, in a book of essays, the right of the author is not in the physical copy of the book in which the essays have been printed, but in his creative expressions which are the essays.

Copyright, being a property right, can be transferred or assigned to another person. It can also be inherited by the legal heirs of the author or the assignee. A copyright owner can also licence specific uses, without transferring or assigning his rights. Such licenses are usually for specific purposes and specific periods.

Copyrights are territorial in nature. That means that the rights are recognised and bound by the domestic legislations of the country in which the work is created. However, international treaties like the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention and the TRIPS Agreement ensure protection of copyrights of nationals of one country in the

other member countries. The principle of National Treatment incorporated in these treaties ensures that the nationals of a member country are extended the same treatment in regard to copyrights like the nationals of the home country.

Copyright is for a limited period. After the period of protection is over, a work comes into what is referred to as public domain when every member of society can freely access and use the same. Certain other intellectual property rights such as patents and designs are also similarly limited in time.

Copyright is not one right but a bundle of rights which extend to reproduction, distribution, communication to the public, translation, etc. of a work. These are not monopoly rights but exclusive rights. It is possible, though not very probable, for two authors to create two identical works independently. When both the works are original both can enjoy copyright. The principle of originality in copyright means only that the work should not be copied from another work.

The rights covered by copyrights are negative rights. They prevent the copying of physical material in the field of literature and arts so that the moral and material interests of the author are protected.

Copyright is in the expression and not in the ideas and facts. For example, the facts of history can be expressed by different authors differently and each one will get protection for his expressions which form a work.

Case Law

The dichotomy of idea and expression is significant in copyright. How will one deal with a situation where an idea can be expressed only in one way, such as, "there is only one God." If there is no other way to express that idea then can anybody claim copyright over that? The issue comes up many a time on books pertaining to mathematics. The emergence of cinematograph film as a major form of copyrighted works also this issue acquired significance. One of the cases in India which examined the question is ***R.G Anand v. Deluxe Films*** [AIR 1978 SC 1613]. This case laid down very clear guidelines in the matter:

> *The position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the single but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Julius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance, elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great playwright. In fact, throughout his original thinking, ability and incessant labour*

Shakespeare has converted an old idea into a new one, so that each of the dramas constitutes a master-piece of English literature. It has been rightly said that "every drama of Shakespeare is an extended metaphor". Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and y there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing; or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.

Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

1) *There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work.* (emphasis added)

2) *Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendants work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.*

3) *One of the surest and the safest test to determine whether or not there has been a violation of copyright is to seeing the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.*

4) *Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.*

5) *Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.*

6) *As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.*

7) *Where however the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, a wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.*

Self Assessment Questions **(Spend 3 minutes each)**

1) What are the different arguments justifying copyright?

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2) Discuss the history of copyright in India?

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3) Describe the nature of copyright.

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1.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the rationale for protection of copyright;
- present the historical background of protection of copyrights in India;
- explain the nature of copyright;
- explain the different kinds of works covered by copyright;
- distinguish between what works are protected and what is not protected; and
- analyse the principle of originality in copyright.

1.3 WORKS

1.3.1 Statute

Section 13 of the Copyright Act details the works in which copyright subsists. This section reads as under:

13. Works in which copyright subsists.- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-

a) original literary, dramatic, musical and artistic works;

b) cinematograph films; and

c) sound recordings;

2) *Copyright shall not subsist in any work specified in Sub-section (1), other than a work to which the provisions of Section 40 or Section 41 apply, unless,-*

i) *in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;*

ii) *in the case of an unpublished work other than a work of architecture the author is at the date of the making of the work a citizen of India or domiciled in India; and*

iii) *in the case of work of architecture the work is located in India.*

Explanation.- in the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

3) *Copyright shall not subsist-*

a) *in any cinematograph film a substantial part of the film is an infringement of the copyright in any other work;*

b) *in any sound recording made in respect of a literary, dramatic or musical work, if in making the sound recording, copyright in such work has been infringed.*

4) *The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.*

5) *In the case of a work of architecture copyright shall subsist only in the artistic character and design and shall not extent to processes or methods of construction*

1.3.2 Works in which Copyright Subsists

The products protected under copyright are referred to as 'works' just as products protected under the Patents Act are referred to as 'inventions'. Works are the creative expressions of persons. A work is a meaningful expression of an idea. As already mentioned, there is no copyright in ideas but in the expressions of the ideas. These expressions, however, need to convey something. They ought to be in a tangible form, although in India, oral music is also protected.

They could be any of the following:

i) A literary, dramatic, musical or artistic work;

ii) A cinematograph film; or

iii) A sound recording.

The above list broadly covers almost all forms of recordings of creative expressions.

The Copyright Act uses an inclusive definition of literary work in Section 2(o). It says literary work includes computer programmes, tables and compilations including computer databases. Therefore, the scope of literary work is very broad. It could be said that it includes all written or printed documents, such as stories, novels, poems, songs, screen plays, notes, speeches, essays, theses, dissertations, papers, affidavits, judgements, orders, registers, notices, written replies to communications and so on. It does not require a high literary quality or style, but should be the result of considerable labour or skill. 'Literary' does not refer to any particular form of literature such as prose or poetry, but includes all. Even ordinary private letters which may not have any literary quality and may contain grammatical errors will also qualify as literary works. Similarly, business letters and official letters also fall within the purview of literary works. A book of arithmetic is also a literary work. Even a compilation or catalogue of names of products or medicines or items if it is the result of expending of skill or labour will also come under the category of literary work. Another example is question papers. Answer papers are also literary works. Questionnaire prepared for undertaking a research is also literary work as per the copyright Act. In certain contexts, even meaning becomes irrelevant to qualify such as a telegraph code or shorthand. Of course, the codes should be intelligible to the persons skilled in that area.

The definition further expands the scope of literary work by specifically stating that computer programmes, tables and databases are also literary works. This clarification expends the requirement of writing or printing and recognises digital format which is only machine readable. This clarification is in line with the Agreement on Trade Related Aspects of Intellectual Property Rights which

provides in Article 9 that computer programmes, whether in source or object code, shall be protected as literary works.

Dramatic works include any piece for recitation, choreographic work or even entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise. It, of course, does not include cinematograph films. It would, of course, include plays.

Musical work is defined as meaning a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music, thus clearly excluding from its purview the lyrics.

Artistic work, again, has a wide scope. It includes a painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possesses artistic quality. Drawing includes a diagram, map, chart or plan. It also means a work of architecture and any other work of artistic craftsmanship.

The Copyright Act has put cinematograph films as a separate category of works. The definition of cinematograph film is also very broad. It includes any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and, includes a sound recording accompanying such visual recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films. Video tapes and digital formats fall under the definition of cinematograph films.

Indian Copyright Act also extends copyrights to sound recordings. In many countries, rights over sound recordings fall under the category of related rights and not copyrights. But in India they are treated on par with cinematograph films. Sound Recordings include phonograms, CDs, LPRs and any other device on which sound is recorded except those which come under the ambit of cinematograph films.

Overall, the Indian Act brings within the scope of copyright a vast collection of works stretching from manuscripts to latest electronic devices to record sound or graphics or pictures.

1.3.3 Case Law

The issue of scope of copyrighted works, however, has come under dispute in a number of cases which has resulted in getting clarity on the same. In ***Khemraj Shrikrishandass v. M/s Garg & Co.*** (AIR 1975 Delhi 130), the Delhi High court held that the title of a Panchang, such as ***Vallabh Mani Ram Panchang*** could be an original literary work as per the definition of the Copyright Act. Elaborating on the rationale, it said:

Copinger on Copyright *stated that the titles to books, newspapers, and periodicals, although often coming before the courts on the question of copyright therein, are not generally in themselves the proper subjects of this right, that it is difficult to say that there is any original literary work in the formation of one or two words into a title and that the words or phrase chosen may be original in their application to the subject-matter of the work to which they are applied.*

Further, the learned author proceeds to say that, titles of books, arc, in certain circumstances, protected from imitation by means of a 'passing off' action. The action for 'passing off' lies where the defendant has represented to the public that his goods or business are the goods or business of the plaintiff. A defendant may make himself liable to this action by publishing a work under the same title as the plaintiffs, or by publishing a work where title and 'get up' so resemble that of the plaintiffs to deceive the public into the belief that it is the plaintiff's work. In all these cases the plaintiff has to prove that his publication has been in the market long enough to acquire public reputation and secondly, title used by the defendant is calculated to deceive the public. A reputation or goodwill can be built up by substantial sales within a short period of time. Mere intention to deceive is not sufficient, there must be grounds for apprehending actual deception. But it is not necessary to establish that any one, as a result of the passing off, is induced to deal with the defendant in the mistaken view that he was dealing with the plaintiff. Copinger has on page 133 given a large number of instances, where injunctions in respect of title were granted or refused, e.q. they were granted in "The Wonderful Magazine", "The wonderful Magazine, New Series Improved", "Minne", "Minie Dale", "London Journal", "Daily London Journal", etc. They were refused in the cases of "Magazine of Fiction". "Monthly M.agazine of Fiction", "Post Office Directory of the West Riding of Yorkshire", "The Post Office Bradford Directory", etc.

A reference may also be made to a decision of the Chancery Division in Melder v. Wood, (1878) 8 Chancery Division 606. In this case, the plaintiffs were the publishers of a work "Hemy's Royal Modern Tutor for the Pianoforte", a revised edition of which had been brought out in 1867, and which was well known and had an extensive sale, but was not so registered as to secure copyright. In 1874 the defendant employed Hemy to revise an old work, entitled "Jousse's Royal Standard Pianoforte Tutor'", which had formerly been in high repute, but had entirely fallen into disuse. This revised work the defendant brought out under the title "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor", the word "Hemy's", both on the outside of the book and on the title-page, being printed in much larger and more conspicuous type than any other of the words. The Court of Appeal held that the plaintiff was entitled to an injunction restraining the defendant from offering his work for sale with its present form, title-page, and cover, or any other form, title-page, or cover, calculated to deceive persons into the belief that it was the plaintiff's work. In John Haig & Company Limited v. Forth Blending Company Ltd. and W. R. Paterson Ltd., 1.970 Reports of Patent, Design and Trade Mark Cases 269, the court found that for many years prior to 1952, the petitioners had sold a brand of whisky in distinctively shaped bottles, technically called "Three pinch decanters", but which had come to be known popularly as "Dimple" bottles. This brand was commonly asked for in public houses as "Dimple" Whisky. In 1952, the respondent commenced selling whisky not distilled by the petitioners in bottles of the same shape though the labels were wholly different from those used by the petitioner. The court held that in adopting these bottles, the respondents hoped to obtain some advantage from the connection of "Dimple" bottles with the petitioner's whisky. In these circumstances, the court granted an injunction restraining the respondent from selling the whisky not blended by the petitioners in "Dimple" bottles for consumption in the United Kingdom.

Another case in which the issue of *panchang* as a literary work came up was the *P.R. Viswanatha Iyer v. A. Muthukumaraswami Pillai.* This case although primarily about assignment of copyright delved into the question of the entitlement of copyright for a *Panchang*. The court said:

We do not think that there is any difficulty in coming to the conclusion that the ***Tamil Vakya Panchangam*** *is a literary work for the purpose of the Copyright Act. In dealing with the question of the degree of originality necessary to constitute original literary work for the purpose of the Copyright Act, 1911, the Privy Council in the case of Macmillan & Co., Ltd. v. Cooper (1923) 46 M.L.J. 637 : L.R. 57 I.A. 109 : I.L.R. 48 Bom. 308 (P.C.) observed :*

...it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient 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.

Then again at page 327 quoting the observations of Peterson, J., in University of London Press, Limited v. University Tutorial Press, Limited (1916) 2 Ch. 601 their Lordships approved the following passage in connection with the meaning of the words " original literary work " in Section 1. Sub-section (1) of the Act of 1911:

The word 'original' does not in this connection mean that the work must be the expression of the original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of literary work ' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act 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.

Their Lordships go on to state: What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.

The appellant on this part of the case has relied strongly on the decision of G.A. Cramp & Sons, Ltd. v. Frank Smythson, Ltd. (1944) A.C. 329. That was a case in which copyright was claimed for an ordinary diary containing a calendar and a certain amount of information regarding postal rates, weights and measures, lighting up times and so on. The Lord Chancellor after quoting the observations of Lord Atkinson in the case just cited came to the conclusion that copyright had not been established for the diary in question which was a mere calendar with the addition of a certain amount of miscellaneous information, all accessible in official publications and a feature of all diaries of the kind.

The learned Lord Chancellor observes

There would, indeed, as it seems to me, be considerable difficulty in successfully contending that ordinary tables which can be got from, or checked by, the postal guide or the Nautical Almanac are a subject of copyright as being original literary work. One of the essential qualities of such tables is that they should be accurate, so that there is no question of variation in what is stated. The sun does in fact rise, and the moon set, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is so far no room for taste or judgment. There remains, I agree, the element of choice as to what information should be given, and the respondents contend that the test of originality is satisfied by the choice of the tables inserted; but the bundle of information furnished in the respondents' diary is common place information which is ordinarily useful and is, at any rate, to a large extent, commonly found prefixed to diaries and, looking through the respondent's collection of tables, I have difficulty in seeing how such tables, in the combination in which they appear in the respondents' 1933 Diary, can reasonably claim to be "original work". There was no evidence that any of these tables was composed specially for the respondents' diary. There was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler. It was not suggested that there was any element of originality or skill in the order in which the tables were arranged. My own conclusion is that the selection did not constitute an original literary work.

Having brought in the arguments that would go against calendars, diaries and *panchangs*, the Hon'ble Court stated:

*Now, if the **Tinnevelly Vakya Panchangam** was nothing more than handy extract from published official tables, the reasoning of the Lord Chancellor in the case just cited might well be applicable; but the evidence in this case does show that this panchangam is an original composition worked out by a series of calculations based on a fairly elaborate set of rules in the knowledge of which the first defendant is an admitted specialist. He does not compile his panchangam by copying information from other publications. He has a specialised knowledge of a fairly elaborate system for working out these matters year by year, and it is the result of his own calculations made with reference to the particular locality that enables him to fix not only the dates but the precise hour and minute for the commencement and termination of each particular period, the fixation of which is essential in order to know the proper time for performing a particular ceremony or celebrating a particular festival or for casting the horoscope of a person born on a particular date and hour. We have, therefore, no difficulty in holding that the work in question is an original literary work for the purpose of the Copyright Act, 1911.*

The court has thus brought in the concept of original expressions of new thoughts or facts which are the result of labour or skill as qualifying criterion for copyright protection.

Self Assessment Questions **(Spend 3 minutes each)**

4) Which are the works covered by copyright in India?

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6) Examine under which category of works an MP3 CD falls.

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1.4 ORIGINALITY IN COPYRIGHT

The most fundamental concept in copyright is that of originality. Copyright extends to original works only. Therefore, the first challenge to any work is on its originality since that is the one which makes it eligible for copyright protection. If a work is not original then it is a copy and attracts the charge of infringement.

The Copyright Act neither defines originality nor explains the concept. Therefore, commentators have to rely on various court laws to understand what is covered by originality in copyright. The courts, in India and UK as well as in other countries, of course, have dealt with the issue in detail.

In one of the early cases (***University of London Press Ltd. v. University Tutorial Press Ltd,*** 1916), the court observed that the word 'original' does not mean that the work must be the expression of original or inventive thought. "Copyright Acts are not concerned with the originality of ideas, but with the expression of thought.... The originality which is required relates to the expression of the thought. But the Act 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." Courts in UK, India and other countries consistently followed this principle in regard to originality.

When cases of infringement come before the courts they generally look into whether the impugned work is a result of expending of sufficient skill and labour by the author. Facts, ideas and words come from common sources. For example, a dictionary contains only words which have already been in use and most dictionaries share most of the words. But in this case the originality is in the way the author or compiler explains the meaning and the effort he has taken to collect the words.

Same is the case with most compilations such as telephone directories or catalogues. Courts generally take the view that so long as a work is not the result of substantial copying from another source then it is original. What they say is that it must originate from the author and not from another person.

In a famous case in the United States of America (***Fredrick Limenson v. Chas Davies***) quoted in ***Story's United States Rep***., the same principle is elucidated in the following words:

"First, that any new or original plan, arrangement or compilation of material will entitle the author to copyright therein whether the material themselves be old or new. Second, that whosoever by his own skill, labor and judgment writes a new work may have a copyright therein unless it be directly copied or evasively imitated from another's work. Third, that to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright."

In ***Whale on Copyright*** also the point of originality is discussed in the following words:

"Originality is not to be equated with the creation of something which had not hitherto existed; it is the word used to describe the casual relationship between an author and the material from which a work is embodied. Thus, if a politician makes an impromptu speech and a reporter copies it verbatim, the reporter is the author of an 'original' literary work because the letters which composed it were first rendered down by him. But if the politician had read a scripted speech, he, and not the reporter, would be the 'author'. In any event, originality of subject-matter is not a requirement of copyright. Such 'unoriginal' (in the colloquial sense) works as football pools coupons, lists of football fixtures, instructions for the use of weed killers and examination questions are quite capable of being, in law, original works."

Case Law

In the case ***P.R. Viswanatha Iyer v. A. Muthukumaraswami Pillai*** [AIR 1948 Mad 139], the issue of originality necessary to constitute original literary work for the purpose of the Copyright Act, 1911 was examined in the context of a *Panchang* (***Tinnevely Vakya Panchangam***). The court reiterated to secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient 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.

It further stated that the word 'original' does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act 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.

The court admitted that the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it This depends on the special facts of each case, and very much a question of degree.

In ***V. Errabhadrarao v. B.N. Sarma*** [AIR 1960 AP 415], the issue of originality in the context of a translation done under the guidance and directions of an editorial board came up. This was the case of a Telugu rendering of the book ***"India's Police Action Against Hyderabad"***. The person who wrote the preface observed that although the author has drawn some materials from the original English work (of the appellants), he has added many things from history and other sources. "It would be proper to say that facts have been taken from it as they are and an attempt is made to develop them to make the book more informative and interesting. Many matters which are of interest to public have been added. The efforts made by our friend Mr. B. N. Sarma to render it into a lucid style, devoid of tedium, are praiseworthy."

The court said

We have no hesitation in finding that this book is an original composition of Mr. Sarma written in Telugu, no doubt from the materials gathered partly from the appellants' books, and partly from his own writings and historical facts. By an original composition we do not mean to convey that it is confined to a field which has never been traversed hitherto by any other person or persons, either in respect of ideas or material comprised therein. Indeed such contributions are few, as most works must depend upon the contribution of others, using them as steps in aid of reaching a particular object which may be original In its design and conception.

The court also set the norms for originality in the following words

The originality which is required relates to the expression of thought, and that the work should not be copies from another work, but should be original from the author. Much depends on the skill, labour, knowledge and the capacity to digest and utilise the raw materials contributed by others in imparting to the product the quality and character which those materials did not possess and which differentiates the product from the materials used.

The judge also relied on the arguments used in a celebrated judgment in***Frederick Emerson v. Chas Davies*** (Story's United States Rep. Vol. 3 p. 768) which set out the distinction between the original composition and a piracy of a copyright.

Some of the points decided are stated in the head note to be 'first, that any new and original plan, arrangement or compilation of material will entitle the author to copyright therein whether the materials themselves be old or new. Second, that whosoever by his own skill, labour and judgment writes a new work may have a copyright therein unless it be directly copied or evasively imitated from another's work. Third, that to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright.'

The question of originality in database is a sticky issue. Most databases these days are made through electronic means. How the originality in such a situation will be addressed? The case of ***Burlington Home Shopping Pvt. v. Rajnish Chibber*** [1995 IVAD Delhi 732] throws light on this.

The questions which arise for consideration are whether a database consisting of compilation of mailing addresses of customers can be subject matter of a copyright and whether the defendant can be said to have committed infringement of the plaintiff's copyright.

A few provisions of the Copyright Act 1957, as amended by the Copyright (Amendment) Act, 1994 (Act No. 38 of 1994) may be looked into. Section 2(o) defines 'literary work' to include (among others) computer programmes, tables and compilations including computer databases. Section 2(y) defines 'work' as meaning any of the following works namely: (i) a literary, dramatic, musical or artistic work,(ii) a cinematographic film, (iii) sound recording. Under section 14, literary work is one of the items wherein exclusive rights can be claimed so as to amount to copyright. Under Section 17(c) if a work is made in the course of other's employment under a contract of service or apprenticeship it is the employer who is the first owner of the copyright therein in the absence of any agreement to the contrary.

Laddie, Prescott and Victoria have stated in ***The Modern Law of Copyright*** *(1980 edition) : "Form in which program or data is expressed 2.138 If a program or collection of data is first expressed in the form of invisible magnetic patterns on a tape, and still more if in the form of core storage, it is doubtful whether this constitutes 'writing' within the meaning of the Act. 'Writing' is defined as including 'any form of notation, whether by hand or by printing, typewriting or any similar process'. Although it is arguable that 'notation' should be given a wide meaning, there may be some difficulty in accepting that it includes the magnetisation states of an array of rings on wires; and all the concrete instances given in the definition involve visible symbols appreciable directly by humans. However, if the view be correct that a literary work need not be expressed in writing these difficulties largely disappear, and all the more so if it be accepted that the literary work is the thing which is the product of the author's mind."*

Copinger & Skone James on Copyright (1991 Edn.) deal with law in the context of compilation and state that "compilations" are included in 'literary work'. They further state : "TRADE catalogues are generally compilations, and as such are capable of protection as literary works. On similar principles, a computer database, stored on tape, disk or by other electronic means, would also generally be a compilation and capable of protection as a literary work".

David Bainbridge has in ***Software Copyright Law*** (at p.48) dealt with computer database in the following terms:

"A computer database is a collection of information stored on computer media. The information may be a list of clients and their addresses or it may be the full text of various documents or it may be a set of co-ordinates relating to a three-dimensional building structure. The range of things which may be included in a computer database is enormous. The information contained in the database may, itself, be confidential and protected by the law of breach of confidence but what of the copyright position? The simplest way of looking at a computer database is to consider the work it represents, for example, a printed listing of names and addresses, a printed set of documents or a drawing of a building. Those works are protected by copyright as literary or artistic works. It does not matter if the work is never produced on paper and only ever exists on computer storage media.

Example : Xyz Supplies Ltd has a computer database containing names, addresses, telephone and fax numbers of customers. This database has been developed over a couple of years and it is usual for a new customer's details to be entered directly into the computer by XYZ's telesales' staff without a written record being made. The customer database is protected by copyright as an original literary work (assuming a modicum of skill and judgment is involved in compiling the database, for example, if the telesales staff have to exercise judgment in deciding whether to accept a new customer). Being a compilation, it is a literary work. By storing the information in a database, it has been recorded in 'writing or otherwise' as required by the Act ('Writing 'is defined widely and includes any form of notation or code regardless of the method or medium of storage). Even if the database is never printed out on paper, it will be protected by copyright."

Looking into the issue of trade secret law and copyright law protection for database, the court quoted from the book ***Copyright - Principles Law and Practice***, (Vol-II para 15.11.1.2) of Paul Goldstein:

"Customer lists and other compilations of business data may be copyrightable as fact works. In theory, copyright and trade secret law protect different elements of compiled business data, with copyright protecting the expression in these compilations and trade secret law protecting the underlying data. In fact, copyright and trade secret protection for compilations of business data frequently converge. Copyright protection for business directories often extends to the underlying data, and trade secret protection may extend to particular expressive arrangements of data."

The court further stated that the same author in ***Copyright Vol.1*** (at para 2.16.1.1) states: "Database designers typically arrange the stored data in ways that, though unintelligible to the user, will increase the efficiency of the database by making the stored data most easily accessible. Most if not all of these arrangements probably contain sufficient authorship to satisfy the originality requirements. If the compiler selected the data for the database from a larger mass of data, protection may extend to her particular selection as well."

The court again observed

In footnote 21, below para 2.12.1.1 the same author states : "Protection for the arrangement within the database will give the copyright owner rights only against someone – typically a competitor when directly copies expression embodying that arrangement from the database."

The court also examined a few decided cases

In ***Waterlow Directors Ltd v. Reed Information Service Ltd***, 1992 Fsr (Fleet Street Report) 409, the names and addresses appearing in the plaintiff's directory but not in the defendant's directory were copied on to a word processor which was used to produce letters inviting the prospective clients to appear in the new editions of the defendant's directory. It was held: " It was clear that a person could not copy entries from a directory and use such copies to compile his own directory. Even if it was correct that a person could use the information in a directory to compile another directory provided that reproduction did not take place, that was not the case before the court. The defendant had reproduced the names and addresses from the plaintiff's directory onto a word processor and a computer."

William Hill (Football) Ltd v. Ladbroke (Football) Ltd, 1980 Rpc 539, was a case of compilation of certain lists by the plaintiff which were copied down by the defendant. It was held : " In my judgment the selection of those 16 lists and the writing of them down in the coupon, with headings and notes, is a compilation which is the subject of copyright."

Another case examined was that of ***Govindan v. Gopalakrishna.*** Here also the issue was copyright in compilation. In this case it was held that though in the case of "compilation" the amount of originality will be very small but even that small amount is protected by law and no man is entitled to steal or appropriate for himself the result of another's brain, skill or labour even in such works. On the defense plea of common source it was held : " A person relying on it must show that he went to the common source from which he borrowed, employing his skill, labour and brains and that he did not merely do the work of the copyist, by copying away from another work."

In the case of ***Sham Lal Paharia v. Gaya Prasad*** [Air 1971 Allahabad 182], also it was held that "a compilation derived from a common source falls within ambit of literary work."

"A work of compilation of a nature similar to that of another will not by itself constitute an infringement of the copyright of another person's work written on the same pattern. The question whether an impugned work is colourable imitation of another person's work is always a question of fact. The determining factor is to see whether the impugned work is a slavish imitation and a copy of another person's work or it bears the impress of the author's own labours and exertions."

The learned Judge has during the course of his judgment laid down a few principles based on a review of the case law which are reproduced hereunder so far as relevant for the decision of the case at hand :

1) A compilation which may be derived from a common source falls within the ambit of literary work.
2) A work of compilation of a nature similar to that of another will not by itself constitute an infringement of the copyright of another person's work written on the same pattern.
3) The question whether an impugned work is a colourable imitation of another persons' work is always a question of fact and has to be determined from the circumstances in each case.
4) The determining factor in finding whether another person's copyright has been infringed is to see whether the impugned work is a slavish imitation and copy of another person's work or it bears the impress of the author's own labours and exertions. The aforesaid principles are by no means exhaustive.

From the above statement of the authorities and the trend of judicial opinion it is clear that a compilation of addresses developed by any one by devoting time, money labour and skill though the sources may be commonly situated amounts to a 'literary work' wherein the author has a copyright.

Another case in which the issue of originality was discussed in detail was the ***Eastern Book Co. v. D.B. Modak*** [2008 1 SCC 1], although in the context of reporting of orders of the courts. The judgment examined the various aspects

that are pertinent to be considered for a work to be treated as original literary work. After examining the statutory provisions regarding copyright in judgments of the courts, the Bench observed:

The judicial pronouncements of the Apex Court would be in the public domain and its reproduction or publication would not infringe the copyright. The reproduction or publication of the judgments delivered by the Supreme Court by any number of persons would not be infringement of a copyright of the first owner thereof, namely, the Government, unless it is prohibited. The question, therefore, is whether by introducing certain inputs in a judgment delivered by a court it becomes original copy-edited judgment and the person or authority or company who did so could claim to have embodied the originality in the said judgment and the judgment takes the colour of original judgment having a copyright therein of its publisher.

In many cases, a work is derived from an existing work. Whether in such a derivative work, a new copyright work is created, will depend on various factors, and would one of them be only skill, capital and labour expended upon it to qualify for copyright protection in a derivative literary work created from the pre-existing material in the public domain, and the required exercise of independent skill, labour and capital in its creation by the author would qualify him for the copyright protection in the derivative work. Or would it be the creativity in a derivative work in which the final position will depend upon the amount and value of the corrections and improvements, the independent skill and labour, and the creativity in the end-product is such as to create a new copyright work to make the creator of the derivative work the author of it; and if not, there will be no new copyright work and then the original author will remain the author of the original work and the creator of the derivative work will have been the author of the alterations or the inputs put therein, for their nature will not have been such as to attract the protection under the law of copyright.

The word 'original' does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act 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; and as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation. 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 commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection will not be entitled to copyright. The word original does not demand original or inventive thought, but only that the work should not be copied but should originate from the author. In deciding, therefore, whether a work in the nature of a compilation is original, it is wrong to consider individual parts of it apart from the whole. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original. In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered

original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. In each case, it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim to originality in a compilation.

After examining a number of previous judgments on the issue of originality, the court stated

These decisions are the authority on the proposition that the work that has been originated from an author and is more than a mere copy of the original work would be sufficient to generate copyright. This approach is consistent with the sweat of the brow standards of originality. The creation of the work which has resulted from little bit of skill, labour and capital are sufficient for a copyright in derivative work of an author. Decisions propounded a theory that an author deserves to have his or her efforts in producing a work, rewarded. The work of an author need not be in an original form or novel form, but it should not be copied from another's work, that is, it should originate from the author. The originality requirement in derivative work is that it should originate from the author by application of substantial degree of skill, industry or experience. Precondition to copyright is that work must be produced independently and not copied from another person. Where a compilation is produced from the original work, the compilation is more than simply a re-arranged copyright of original, which is often referred to as skill, judgment and or labour or capital. The copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his skill, labour and investment of capital, maybe it is derivative work. The courts have only to evaluate whether derivative work is not the end-product of skill, labour and capital which is trivial or negligible but substantial. The courts need not go into evaluation of literary merit of derivative work or creativity aspect of the same.

It is submitted by the learned counsel for the respondents that for a derivative work, the originality test as applied in United States Supreme Court should be made applicable whereby the author of a derivative work would satisfy that the work has been produced from his exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized a purely mechanical exercise. The work should be independently created by the author as opposed to copied from the other works and that it possesses at least some minimal degree of creativity. The case law relied upon by the learned counsel for the respondents is considered hereinafter.

In ***Feist Publications Inc. v. Rural Telephone Service Co. Inc.,*** 18 USPQ 2d. 1275, Rural Telephone Service Co. publishes a typical telephone directory consisting of white pages and yellow pages. The white pages list in alphabetical order the names of rural subscribers together with their towns and telephone numbers. The yellow pages list Rurals business subscribers alphabetically by category and feature classified advertisements of various sizes. To obtain white pages listings for its area-wide directory, Feist Publications Inc. approached different telephone companies operating in North West Kansas and offered to pay for the right to use their white pages listings. Of them, only Rural refused. Unable to license Rurals white pages listings, Feist used them without Rurals consent. Rural sued for copyright infringement in the District Court taking the

position that Feist, in compiling its own directory, could not use the information contained in Rurals white pages. Rural asserted that Feist's employees were obliged to travel door to door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The United States Supreme Court held that the sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. The Court further held that no one claim originality as to the facts. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. The Court goes on to hold that the primary objective of copyright is not to reward the labour of authors, but to promote the progress of science and useful arts. To this end, copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by a work. Only the compilers selection and arrangement may be protected; however, the raw facts may be copied at will. The Court rejected the doctrine of the sweat of the brow as this doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement the compilers original contributions to the facts themselves. A subsequent compiler was not entitled to take one word of information previously published, but rather had to independently work out the matter for himself, so as to arrive at the same result from the same common sources of information. Sweat of the brow courts thereby eschewed the most fundamental axiom of copyright law that no one may copyright facts or ideas. The sweat of the brow doctrine flouted basic copyright principles and it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of writings by authors.

The judgment in ***Matthew Bender & Co., Inc. v. West Publishing Co.,*** 158 F.3d 674 (2nd Cir. 1998), is of United States Court of Appeals, Second Circuit, which directly covers the reports of the judgments of the courts. The facts involved in the case are that the West Publishing Co. and West Publishing Corp. (West) obtain the text of judicial opinions directly from courts. It alters these texts into (i) independently composed features, such as syllabus, head notes which summarize the specific points of law recited in each opinion and key numbers

which categorize points of law into different legal topics and sub-topics and (ii) additions of certain factual information to the text of the opinions, including parallel or alternative citations to cases, attorney information, and data on subsequent procedural history. West publishes the case reports in different series of case reporters collectively known as National Reporter System. Two series of case reporters at issue in that case were the Supreme Court Reporter and the Federal Reporter. HyperLaw publishes and markets CD-ROMs which are compilations of the Supreme Court and the United States Court of Appeals that cover approximately the same ground. HyperLaw intends to expand its CD-ROM product taking the material from the West publications. HyperLaw intervened and sought a judgment declaring that the individual West case reports that are left after redaction of the first category of alterations do not contain copyrightable material. It was held by the Court that for copyright protection, the material does not require novelty or invention, but minimal creativity is required. All of West's alterations to judicial opinions involve the addition and arrangement of facts, or the rearrangement of data already included in the opinions, and, therefore, any creativity in these elements of West's case reports lies in West's selection and arrangement of this information. West's choices on selection and arrangement can reasonably be viewed as obvious, typical and lacking even minimal creativity. Copyright protection is unavailable for both derivative works and compilations alike unless, when analysed as a whole, they display sufficient originality so as to amount to an original work of authorship. Originality requires only that the author makes the selection or arrangement independently and that it displays some material with minimal level of creativity. While a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will. To support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium. Creativity in selection and arrangement, therefore, is a function of (i) the total number of options available, (ii) external factors that limit the viability of certain options and render others non-creative, and (iii) prior uses that render certain selections garden variety.

In the case of ***Key Publications, Inc. v. Chinatown Today Publishing Enterprises Inc.***, 945 F.2d.509, Key Publication published an Annual Classified Business Directory for New York City's Chinese-American community. In 1990, Galore Publication published the Galore Directory, a classified directory for the New York Chinese American community. Key brought a suit against Galore Directory charging that Galore Directory infringed Keys copyright in the 1989-90 Key Directory. The United States Court of Appeal held that individual components of compilation are generally within the public domain and thus available for public. There are three requirements for a compilation to qualify for copyright protection : (1) the collection and assembly of pre-existing data; (2) selection, co- ordination or arrangement of the data; and (3) the resulting work that comes into being is original, by virtue of the selection, coordination or arrangement of the data contained in the work. For originality, the work is not required to contain novelty. The doctrine of sweat of the brow, rewarded compilers for their efforts in collecting facts with a de facto copyright to those facts and this doctrine would prevent, preclude the author absolutely from saving time and effort by referring to and relying upon prior published material. It extended copyright protection in compilation beyond selection and arrangement - the compilers original contribution to the facts themselves drawn on sweat of the brow is a copyright

protection to the facts discovered by the compiler. The court discarded sweat of the brow notion of copyright law.

In ***Macmillan and Company v. K. and J. Cooper,*** 1924 Privy Council 75, action was brought by McMillan and Company to restrain the respondent-firm who was carrying on the trade and business of publishers of educational books, from printing, distributing or otherwise disposing of copies of the book published by the appellants. The ground on which the relief was claimed was that the appellants had a copyright in the book entitled **Plutarch's Life of Alexander, Sir Thomas North's Translation** and that the respondent published subsequently a book entitled **Plutarch's Life of Alexander the Great, North's Translation**, as it had infringed the copyright to which the appellants were entitled in the earlier compilation. The Court noted the contents of the book of the appellants as also that of the respondent. As per the Court, the text of the appellant's book consisted of a number of detached passages, selected from Sir Thomas North's translation, words being in some instances introduced to knit the passages together so that the text should as far as possible, present the form of an unbroken narrative. The passages so selected were, in the original translation, by no means contiguous. Considerable printed matter in many instances separated the one from the other. The opinion of the Privy Council was that for the work done by the appellants, great knowledge, sound judgment, literary skill or taste in the inputs brought to bear upon the translation was not required, as the passages of the translation which had been selected are reprinted in their original form, not condensed, expanded, modified or reshaped to any extent whatever. The Court observed that the North's translation of Plutarch's Life of Alexander does not and never did, as the law stands, never can enjoy the protection of copyright; and the questions which arise for decision must be dealt with upon that assumption. The Court said that in all cases where the reprint with the text of it consisted merely of a reprint of passages selected from the work of any author, would never have a copyright. There may be cases where selecting and reprinting the passages would require the appreciation upon what has been laid down or established in the book and labour, accurate scientific knowledge, sound judgment, touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case, the copyright might well be acquired for the print of the selected passages. The Court said that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product, it is necessary that the labour, skill and capital expended should be sufficient 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. The Court approved the principles enunciated in the case of***University of London Press, Ltd. v. University Tutorial Press, Ltd.,*** [1916] 2 Ch. 601, dealing with the meaning of the words 'original' literary work that the original does not mean expression of original or inventive thought. The Copyright Act is not concerned with the original ideas, but with the expression of thought. The originality which is required relates to expression of thought and the Act does not require that the expression must be in original or novel form. The work must not be copied from another work that it should originate from the author.

The Supreme Court of Canada in the matter of ***CCH Canadian Ltd. v. Law Society of Upper Canada,*** 2004 (1 SCR 339 (Canada) has noticed the competing

views on the meaning of 'original' in copyright law wherein some courts have held that a work which has originated from an author and is more than a mere copy of a work, is sufficient to give copyright. This approach is held to be consistent with the sweat of the brow or industriousness standard of originality on the premise that an author deserves to have his or her efforts in producing a work rewarded. Whereas the other courts have held that a work must be creative to be original and thus protected by the copyright Act, which approach is consistent with a natural rights theory of property law; however, it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection and it was suggested in those decisions that the creativity approach to originality helps ensure that copyright protection is extended to the expression of ideas as opposed to the underlying ideas or facts. The Court has also noticed that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, would be a ground for finding of originality. The question for consideration of the copyright has arisen on the following fact foundation. The appellant, Law Society of Upper Canada, has maintained and operated the Great Library at Osgood Hall in Toronto, a reference and research library. The Great Library provides a request- based photocopy service for Law Society members, the judiciary and other authorized researchers. Under the custom photocopy service, legal materials are reproduced and delivered to the requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons. The respondents, CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc. publish law reports and other legal materials. The law book publishers commenced copyright infringement action against the Law Society claiming ownership of copyright in 11 specific works on the ground that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers further sought permanent injunction prohibiting the Law Society from reproducing these 11 works as well as any other works that they published. The Law Society denied liability and submitted that the copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service photocopier for the purpose of research. The Court was called upon to decide the question as to what shall be the originality in the work of compilation. On consideration of various cases it was held that to be original under the Copyright Act the work must originate from an author, not be copied from another work, and must be the product of an authors exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. Creative works by definition are original and are protected by copyright, but creativity is not required in order to render a work original. The original work should be the product of an exercise of skill and judgment and it is a workable yet fair standard. The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner's right, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that

is consistent with the policy of the objectives of the Copyright Act. Thus, the Canadian Supreme Court is of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital.

It is the admitted position that the reports in the Supreme Court Cases (SCC) of the judgments of the Supreme Court is a derivative work in public domain. By virtue of Section 52(1) of the Act, it is expressly provided that certain acts enumerated therein shall not constitute an infringement of copyright. Sub-clause (iv) of clause (q) of Section 52(1) excludes the reproduction or publication of any judgment or order of a Court, Tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the Court, the Tribunal or other judicial authority from copyright. The judicial pronouncements of the Apex Court would be in the public domain and its reproduction or publication would not infringe the copyright. That being the position, the copy-edited judgments would not satisfy the copyright merely by establishing amount of skill, labour and capital put in the inputs of the copy-edited judgments and the original or innovative thoughts for the creativity are completely excluded. Accordingly, original or innovative thoughts are necessary to establish copyright in the authors work. The principle where there is common source the person relying on it must prove that he actually went to the common source from where he borrowed the material, employing his own skill, labour and brain and he did not copy, would not apply to the judgments of the courts because there is no copyright in the judgments of the court, unless so made by the court itself. To secure a copyright for the judgments delivered by the court, it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment printed in SCC some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one. The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Indian Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court. We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there is no copyright in the original text of the judgments. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author.

On this touchstone, we shall take into consideration the inputs put by the appellants in their journal SCC. The appellants have added in the copy-edited version the

cross-citations to the citation(s) already given in the original text; added names of cases and cross-citations where only the citation of the case is given; added citation and cross-citations where only name of the case is given; inserted citation in case history where only the title and year of the impugned/earlier order is given; presented in their own style the cases when they are cited repeated in the judgment; provided precise references to the quoted matter in the judgment by giving exact page and paragraph number as in the original case source/treatise/ reference material; added margin headings to quoted extracts from statutes/rules, etc., when they are missing from the original text of the judgment; added the number of the Section/Rule/Article/paragraph to the extract quoted in the original text; added the names of Judges on whose behalf opinion given by giving expressions such as for himself and Pathak, C.J. etc.; done verification of first word of the quoted extract and supplied emphasis on such verification; added ellipsis to indicate breaks in quoted extract; provided and supplied the matter inadvertently missed in quoted extracts in the original text of the judgment; completed/corrected the incomplete/incorrect case names or citations; renumbered correctly the clauses/sub-clauses in terms of the questions framed which were numbered in terms of answers to questions framed by learned Judge; changed the text as per corrigenda issued, which has been issued upon SCC Editors request and suggestions; done compressing/simplification of information relating to the case history; followed certain norms at SCC for giving case names; omitted the words like Section, Sec., Rule, etc. and given only the number of the Section/ rule at the beginning of the quoted extract; made margin heading and the first clause/sub-section or initial matter of section/rule etc. to run-on instead of being let to start from a fresh line; done compressing of unquoted references and use of *** for parts; replaced the series of dots in the raw text with ellipsis; removed abbreviations such as sec., R., cl. and substituted them with full word, i.e. Section, Rule, clause; added hyphenation after the section/rule numbers which have alphabets suffixed to them; applied indentation of quoted extracts; removed full stops or word No.; and given full forms of abbreviations to enhance readability and clarity. In addition to the above, capitalization and italicization is also made wherever necessary in the raw text; and punctuation, articles, spellings and compound words are also checked and corrected, if required, in the original text.

The aforesaid inputs put by the appellants in the judgments would have had a copyright had we accepted the principle that anyone who by his or her own skill and labour creates an original work of whatever character, shall enjoy an exclusive right to copy that work and no one else would be permitted to reap the crop what the copyright owner had sown. No doubt the appellants have collected the material and improved the readability of the judgment by putting inputs in the original text of the judgment by considerable labour and arranged it in their own style, but that does not give the flavour of minimum requirement of creativity. The exercise of the skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterized as purely a work which has been brought about by putting some amount of labour by the appellants. Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity. Arrangement of the facts or data or the case law is already included in the judgment of the court. Therefore, creativity of SCC would only be addition of certain facts or material already published, case law published in

another law report and its own arrangement and presentation of the judgment of the court in its own style to make it more user-friendly. The selection and arrangement can be viewed as typical and at best result of the labour, skill and investment of capital lacking even minimal creativity. It does not as a whole display sufficient originality so as to amount to an original work of the author. To support copyright, there must be some substantive variation and not merely a trivial variation, not the variation of the type where limited ways/unique of expression available and an author selects one of them which can be said to be a garden variety. Novelty or invention or innovative idea is not the requirement for protection of copyright but it does require minimal degree of creativity. In our view, the aforesaid inputs put by the appellants in the copy-edited judgments do not touch the standard of creativity required for the copyright.

However, the inputs put in the original text by the appellants in (i) segregating the existing paragraphs in the original text by breaking them into separate paragraphs; (ii) adding internal paragraph numbering within a judgment after providing uniform paragraph numbering to the multiple judgments; and (iii) indicating in the judgment the Judges who have dissented or concurred by introducing the phrases like concurring, partly concurring, partly dissenting, dissenting, supplementing, majority expressing no opinion, etc., have to be viewed in a different light. The task of paragraph numbering and internal referencing requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted and how a judgment of a court of law must read. Often legal arguments or conclusions are either clubbed into one paragraph in the original judgment or parts of the same argument are given in separate paragraphs. It requires judgment and the capacity for discernment for determining whether to carve out a separate paragraph from an existing paragraph in the original judgment or to club together separate paragraphs in the original judgment of the court. Setting of paragraphs by the appellants of their own in the judgment entailed the exercise of the brain work, reading and understanding of subject of disputes, different issues involved, statutory provisions applicable and interpretation of the same and then dividing them in different paragraphs so that chain of thoughts and process of statement of facts and the application of law relevant to the topic discussed is not disturbed, would require full understanding of the entire subject of the judgment. Making paragraphs in a judgment could not be called a mechanical process. It requires careful consideration, discernment and choice and thus it can be called as a work of an author. Creation of paragraphs would obviously require extensive reading, careful study of subject and the exercise of judgment to make paragraph which has dealt with particular aspect of the case, and separating intermixing of a different subject. Creation of paragraphs by separating them from the passage would require knowledge, sound judgment and legal skill. In our opinion, this exercise and creation thereof has a flavour of minimum amount of creativity. The said principle would also apply when the editor has put an input whereby different Judges' opinion has been shown to have been dissenting or partly dissenting or concurring, etc. It also requires reading of the whole judgment and understanding the questions involved and thereafter finding out whether the Judges have disagreed or have the dissenting opinion or they are partially disagreeing and partially agreeing to the view on a particular law point or even on facts. In these inputs put in by the appellants in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilise the same.

The above case has thrown much light on the philosophy that should influence decisions on the question of 'originality' in copyright. It also summarizes a large number of Indian and foreign cases on the issue. It also brings out the difficulties in applying the philosophy in particular cases and also the need to take care of the public interest.

The standard of originality required in copyright is very low. At the same time, it is very difficult to lay down any specific standard. There has to be some original skill or effort but not mere mechanical one. When a person makes a selection of works for a compilation, he exercises a judgment which can make him entitled for copyright for that selection. It must be the product of labour, skill and capital of one person. It must originate from the author and not copied from elsewhere.

Self Assessment Questions **(Spend 3 minutes each)**

6) Read the above section once and after five minutes write a short paragraph on what is originality in your own words. Then examine whether it is original or not.

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7) Recall the first 'original' work created by you.

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1.5 SUMMARY

In this Unit we have looked into the various theories for protecting copyright, the origin and development of copyright law in U.K. and in India, the nature of copyright, the works protected by copyright and the principle of originality. We have seen that copyright is there to protect the moral and material interests of the creator and also as an incentive for further creativity which will add to the culture of the society. We have also seen that in U.K., the copyright law emerged as a response to the challenges posed by the emergence of printing technology and that Indian law closely followed the U.K. law till in 1957, we enacted an independent copyright Act, which is still in existence. We have seen that copyright is a bundle of exclusive rights which are of the nature of negative rights. We have also seen that copyright is bound by time and territory. We have seen that copyright extends to all original literary, dramatic, musical and artistic works and also to cinematograph films and sound recordings. The concept of 'originality', we have seen, is fundamental to copyright. It is, however, a very

low level of originality that is required for making a work eligible for copyright protection.

1.6 TERMINAL QUESTIONS

1) What is copyright?
2) Write a paragraph on the evolution of copyright law in India
3) What is the nature of copyright?
4) What are the works covered by copyright?
5) Examine the concept of 'originality' in copyright.

1.7 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 1.1
2) Refer to Section 1.1
3) Refer to Section 1.1
4) Refer to Section 1.3
5) Refer to Section 1.3
6) Refer to Section 1.4
7) Refer to Section 1.4

Terminal Questions

1) Refer to Section 1.2
2) Refer to Section 1.3
3) Refer to Section 1.4
4) Refer to Section 1.5
5) Refer to Section 1.7

1.8 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart, Chapters 1 and 2.
2) Copyright and Industrial Designs by P. Narayanan, Chapters 1-5.
3) Lal's Commentary on Copyright Act, Chapter III Section 13.
4) Iyengar's The Copyright Act,1957, Introduction, Chapter III Section 13.
5) How Copyright Works in Practice by Kala Thairani, Chapters I and III.

UNIT 2 DIFFERENT RIGHTS

Structure

2.1 Introduction

2.2 Objectives

2.3 Rights

- 2.3.1 Statutory Provisions
- 2.3.2 Two Kinds of Rights

2.4 Author's Special Rights

2.5 Economic Rights

2.6 Rights in Literary, Dramatic and Musical Works

- 2.6.1 Right of Distribution
- 2.6.2 Right of Communication to the Pubic
- 2.6.3 Right to Make a Cinematograph Film or a Sound Recording
- 2.6.4 Translation Right
- 2.6.5 Adaptation Right
- 2.6.6 Special Rights for Computer Programmes

2.7 Rights in an Artistic Work

2.8 Rights in a Cinematograph Film

2.9 Rights in a Sound Recording

2.10 Resale Share Rights

2.11 Summary

2.12 Terminal Questions

2.13 Answers and Hints

2.14 References and Suggested Readings

2.1 INTRODUCTION

Copyright is not one single right, but a set of rights. It is these rights which make it an intellectual property. These are statutorily created rights. They are not considered natural rights. There are differences in the rights in different countries. However, the international conventions and agreements such as the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention and the Agreement on Trade Related Aspects of Intellectual Property rights have brought in significant harmony among the rights in different jurisdictions. These conventions provide for certain minimum obligations on the member countries in regard to the rights.

The **Berne Convention** (1886) which is the first copyright convention requires member countries to provide for the following rights:

1) Moral Rights

   a) to claim authorship, and

   b) to object to certain modifications and other derogatory actions.

2) Economic Rights

   a) Right of Reproduction

   b) Translation Rights

   c) Right of Public Performance

   d) Right of Broadcasting and Communication to the Public

   e) Rights of Public Recitation

   f) Rights of Adaptation

   g) Right to an Interest in Resale in Works of Art and Manuscripts

   h) Right to Enforce Protected Rights

The **Universal Copyright Convention** (1952) provides for the following exclusive rights to authors:

1) Right of Reproduction

2) Right of Public Performance

3) Right of Broadcasting

4) Right of Translation

The **TRIPS Agreement** (1994) has referred to the provisions of the Berne Convention and made them obligatory for members of the Agreement. It, however, excluded the article relating to moral rights from the obligations under that Agreement. Countries, who are members of the Berne Convention, however, have to continue to provide for those rights in their domestic legislation.

Member countries of each Convention have to provide at least for the rights prescribed in the Convention concerned. They are, however, free to provide higher level of rights, if they so desire. However, the nature of the Conventions is such that if a country provides higher rights to its own nationals it has to provide the same rights to the nationals of other countries who are members of the Convention concerned. This is known as national treatment in the TRIPS Agreement.

It is the exercise of these rights which guarantee the author moral and economic returns from his work and a powerful incentive for creation. These rights guarantee that someone else cannot claim the fruits of his sweat and labour and that if anyone wants to use his works for commercial gain he must take his permission. While granting the licence the author can insist upon certain conditions such as payment of royalty which guarantees him economic returns.

Self Assessment Questions **(Spend 3 minutes each)**

1) What are the rights stated in the Berne convention?

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2) What are the rights mentioned in the Universal Copyright Convention?

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2.2 OBJECTIVES

After reading this unit, you should be able to:

- present the evolution of copyright in international agreements;
- describe the various rights that form part of copyrights; and
- explain the scope of those rights.

2.3 RIGHTS

2.3.1 Statutory Provisions

S. 14. Meaning of copyright.*-For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-*

a) *in the case of a literary, dramatic or musical work, not being a computer programme,*

   i) *to reproduce the work in any material form including the storing of it in any medium by electronic means;*

   ii) *to issue copies of the work to the public not being copies already in circulation;*

   iii) *to perform the work in public, or communicate it to the public;*

   iv) *to make any cinematograph film or sound recording in respect of the work;*

   v) *to make any translation of the work;*

   vi) *to make any adaptation of the work;*

   vii) *to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);*

b) *in the case of a computer programme,-*

   i) *to do any of the acts specified in clause (a);*

   51A "(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

   Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental."

c) *in the case of an artistic work,-*

i) *to reproduce the work in any material form including-*

A) *the storing of it in any medium by electronic or other means; or*

B) *depiction in three dimensions of a two-dimensional work; or*

C) *depiction in two dimensions of a three-dimensional work;*

ii) *to communicate the work to the public;*

iii) *to issue copies of the work to the public not being copies already in circulation;*

iv) *to include the work in any cinematograph film;*

v) *to make any adaptation of the work;*

vi) *to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);*

d) *In the case of cinematograph film, -*

i) *to make a copy of the film, including-*

A) *a photograph of any image forming part thereof; or*

B) *Storing of it in any medium by electronic or other means;*

ii) *to sell or give on commercial rental, or offer for sale or for such rental, any copy of the film,*

iii) *to communicate the film to the public;*

e) *In the case of sound recording, -*

i) *to make any other sound recording embodying it including the storing of it in any medium by electronic or other means;*

ii) *to sell or give on commercial rental, or offer for sale or for such rental, any copy of the sound recording;*

iii) *to communicate the sound recording to the public.*

Explanation : For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

S. 57. Author's special rights

1) *Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right-*

a) to claim authorship of the work; and

b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:

Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (aa) of Sub-section (1) of Section 52 applies.

Explanation.- Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.

2) *The right conferred upon an author of a work by Sub-section (1) may be exercised by the legal representatives of the author.*

2.3.2 Two Kinds of Rights

As could be seen from the exclusive rights provided in the Berne Convention, there are two kinds of rights which form the copyrights. One set of rights is to protect the personality of the author and are referred generally as moral rights. In India, they are referred to as the author's special rights. The other set of rights is what brings economic return to the author. Therefore, they are referred to as economic rights.

The term 'exclusive rights' is used because the owner of copyright in a protected work may use the work as he wishes and may exclude others from using it without his authorisation.

2.4 AUTHOR'S SPECIAL RIGHTS

Section 57 of the copyright Act provides for the special rights of the author. They are independent of the author's copyright and are not transferable. These rights are:

a) The right to claim authorship of the work; and

b) To restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work of the if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.

This right comes with a caveat that failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the special rights of the author. For example, if you buy a painting of a famous author, but just keep it in the store and does not display in your drawing room or anywhere, it will not be an infringement of the rights of the author. Or you may get a sculptor done by a great sculptor, but on completion just keeps it in the basement of your house. It will not be an infringement of this right, as per this provision.

Self Assessment Questions **(Spend 3 minutes each)**

3) Define Authors special Rights.

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There is also a proviso to the section. The proviso is in regard to computer programmes. The Copyright Act provides certain exemptions to the rights of the author in the case of computer programmes, which *inter alia* include adaptation of a computer programme by the lawful possessor of a copy of such computer programme in order to utilise the computer programme for the purpose for which was supplied or to make back-up copies purely as a temporary protection against loss, destruction or damage. Adaptations made under the above case will not be affected by the special rights of the author.

The Special Rights of the author can be exercised by his legal representative. Authorship right always remains with the author and cannot be transmitted or transferred or assigned. However, if any person wrongly represents the authorship, the legal heir can take action against that person.

The Special Rights of the Author in the Indian Copyright Act is based on Article 6*bis* of the Berne Convention whish reads: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation." The Berne convention also required the Member States to ensure continuance of these rights after the death of the author and at least until the expiry of the copyright and to be exercised by his legal heirs.

There are two significant cases which deal with the author's special rights under the Copyright Act. The first one is the case of ***Manu Bhandari v. Kala Vikas Pictures (P) Ltd.*** [AIR 1987 Del 13]. This case involved the question of artistic liberty with regard to adaptation of a novel or story to cinematograph film. The High Court looked in to the assignment deed between the parties as complementary to Section 57 dealing with special rights of the author. Although, by the time of the judgement the parties had come to an agreement, still the Court considered it appropriate to give its opinion, though otiose. But that helped clarify the meaning and significance of the author's special rights in India to a great extent. We will now read the relevant parts of the judgment.

The hallmark of any culture is excellence of arts and literature. Quality of creative genius of artists and authors determine the maturity and vitality of any culture. Art needs healthy environment and adequate protection. The protection which law offers is thus not the protection of the artist or author alone. Enrichment of culture is of vital interest to each society. Law protects this social interest. Section 57 of the Copyright Act is one such example of legal protection. Section 57 lifts authors' status beyond the material gains of copyright and gives it a special status.

Section 57 falls in Chapter XII of the Act concerning civil remedies. Section 55 provides for certain remedies where there is infringement of copyright. Section 56 provides for protection of separate rights comprising the copyright in any work. Then comes Section 57, providing for authors' special rights, and the remedies for violation of those rights. This is a statutory recognition of the intellectual property of the author and special care with which the intellectual property is protected. Under Section 57 the author shall have a right to claim the authorship of the work. He has also a right to restrain the infringement or to claim damages for the infringement. These rights are independent of author's,

copyright and the remedies open to the author under Section 55. In other words Section 57 confers additional rights on the author of a literary work as compared to the owner of a general copyright. The special protection of the intellectual property is emphasised by the fact that the remedies of a restraint order or damages can be claimed "even after the assignment either wholly or partially of the said copyright". Section 57 thus clearly over-rides the terms of the Contract of assignment of the copyright. To put it differently, the contract of assignment would be read subject to the provisions of Section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by Section 57. The Contract of Assignment will have to be so construed as to be consistent with Section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract which are inconsistent with the provisions of Section 57.

What is the substance of the protection of special rights guaranteed by Section 57? Sub-Clause (a) of Clause (1) of the Section prohibits any distortion of mutilation of the author's work. The words "other modification" appearing in the sub-clause (a) will have to be read *ejusdem generis* with the words "distortion" and "mutilation". The modification should not be so serious that the modified form of the work looks quite different work from the original. "Modification" in the sense of the perversion of the original, may amount to distortion or mutilation. But, there can be. a modification simplicitor such as where 'A' is changed to 'B', both being quite, distinct. Sub-clause (a) thus provides inviolability to an intellectual work. Sub-clause (b) provides for remedies for protection of honour and reputation of the author. The bundle of rights and remedies provided by Section 57 is in tune with the modem development in law relating to protection of intellectual property of the author and the international agreements and treaties in that regard. The learned Judge is not right in saying that because the modifications are permissible under the Contract of Assignment the Plaintiff had failed to prove the breach of Section 57.

As stated earlier, the correct way of construing the contract of assignment dated 31-4-1983 is to 'read the provisions of the said contract as complementary to Section 57 and not inconsistent with it. Clause (b) of The contract states, Shri Sirsir Mishra, the Director of the aforesaid film is writing the screenplay of our Production No. I and that you have agreed to allow him to make certain modifications in your novel for the film version in discussion with you to make it suitable for a successful film. Only "certain modifications" which are necessary for converting the novel Into a film version are allowed. The second object of modifications is to make the film version suitable for a successful film. But the said modifications are to be done after discussion with the author. The contract further states that proper publicity will be given to the Plaintiff as the author of the said story in all credits (commercial and other publicity). Subject to these important caveats, the assignee shall become the exclusive copyright holder of the said novel, to exploit the novel for any reproduction except by way of publication as a novel. 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 said 'certain modifications' should also not distort or mutilate the original novel. The novel will include the main theme, the situations and the main characters of the novel The fact that Manu Bhandari is the author of the story is to be published in all the credits. This is for giving due recognition to the reputation of the author. The word "credits" in the parlance of show business means recognition of credit-

worthy actions of all those who have participated in making the show business a success. As a show business or as a box office collection, a film may be a success, but, it may do not credit to the reputation or the honour of the author. That is why Section 57 insists on the special protection to honour and reputation of the author. The contact requires that 'proper' publicity should be given. The word 'proper' has to be interpreted in contradiction to 'notoriety' or 'bad name', causing harm to the honour and reputation of the author.

Counsel for the respondent has argued that Clause (b) of the Contract permits modifications to be made by the Director. Modifications actually made are made after discussions. with the author and she had agreed to the said modifications. Whether the 'modifications' in the film are within the permissible limits or not will be examined later. Let us first examine the objections of the respondents to issuance of injunction.

Counsel for the respondents submits that the restraint order in the nature of injunction under Section 57 can be passed when there is only literary reproduction, if the said novel is published with impermissible changes the publisher can be restrained but where the film is produced based on the novel, no restraint order can be passed under Section 57. I do not agree. Section 57 is a special provision for the protection of the special rights of the authors. The object of the Section is to put the intellectual property on a higher footing than the normal objects of copyright. The language of Section 57 is of widest amplitude. It cannot be restricted to literary' expression only. Visual and audio manifestations are directly covered.

The second objection of the respondent is that the author received the balance amount of Rs. 10,000 in July, 1984, i.e. after she sent the letter of protest to the Director/ Producer. This submission is also without substance. The suit is not for claiming damages but for a permanent injunction. If she accepts part of the consideration, the same is to be treated as acceptance under protest and without prejudice to her rights. The wording of Section 57, viz. "even after the assignment" will dispel all doubts on this question. Assignment means passing of the title on payment of consideration.

The High Court agreed that some changes are inevitable when a novel is being converted into a motion picture.

Outdoor shooting, choosing of sites for that purpose with aesthetic considerations, situations for the songs (which are a vital part of the Hindi films) are some of the considerations which required changes. So also, selection of situations from the novel for their effective visual presentation, should be the choice of the Director. However, such changes should not mutilate or distort or completely modify the original theme and characters. The Court has, therefore, to balance the artistic treatment of subject by the author and that by the Director. What are the objections of the author to the visual presentation of the theme and the characters (after seeing the film itself) ?

The first objection of the author is to the name of the film, 'Samay Ki Dhara'. From the correspondence between the parties it is prima facie clear that she had agreed to this name in desperation, as the matters were not moving. The title 'Samay Ki Dhara' is so general as to suggest any social problem that face the

Indian society today. For making it more specific a direct reference to 'Bunty' is necessary. The producer should, therefore, so amend the title as to include in the title 'Samay Ki Dhara' and 'Aap Ka Bunty'.

The second objection of the author is to the character of the first husband. In the original story he is shown as a Divisional Manager of some Company. In the film he is depicted as an unscrupulous builder. The story in the film shows that he procures work by supplying women. The character of Prakash has been newly introduced in the film as an Assistant to the first husband. The novel does not give us any particulars about the character of the first husband. According to the author, he is a normal middle-class executive. One cannot find fault with the Director if he partly changes the character in the absence of the specific details in the novel. But, the objection of the author is more serious. She submits that the second wife (who, according to the author, is also a simple middle class housewife) has been depicted as a stereo-typed vamp in Hindi films. Her behaviour and the expression borders on vulgarity.

The author submits that the characters and theme is mutilated through vulgar dialogues. The audio-visual presentation has the object of brash sex to attract box-office. I do not agree. If the director wanted to do so, there was full scope to do it from the sequence in the novel itself. The novel depicts that in the new house (of the second husband) Bunty is not able to sleep. He sees blue light emerging from the bedroom from the half closed door. In curiosity he peeps through the door. He is taken aback by nude figure of the second husband and semi-nude figure of his mother. He is very angry with his mother. But the bare body of man gives new awareness to Bunty of his manhood. He then dreams of several nude bodies and conjures up his place in them. The novel itself provides this episode. If the Director wished to exploit it to show more explicit sex sequences he had the opportunity to do so. This could not have been objected to by the author because it formed part of the novel itself. But the director has, quite sensibly, deleted the whole episode.

This submission raises an important question of an aspect of courts powers under Section 57 of the Act. The Court does not sit as a sentinel of public morals or super censor in exercise of its powers under the said section. It cannot impose its views (prudish or liberated) on sex or its depiction in the works of art. The concern of the Court is to examine how for the new 'avatar' is true and authentic and what changes are necessary due to constraints of a medium.

The above case tells us how to construe the infringement of the moral rights. It also explains how to examine and interpret the rights of an assignee or licensee in the matter of changes that he considers necessary to adapt a work to a different medium or class of work.

Another case that examined the moral rights question is ***Amarnath Sehgal v. Union of India*** [(2005) 30 PTC 253 (Del)]. This case went into the philosophy and justification and implications of author's special rights as expounded in Section 57 in the background of the international treaties and conventions.

Under Article 6bis of the Berne Convention, the moral right of integrity enables the author to seek appropriate legal remedies if the moral right of attribution and integrity in his work is violated. The moral rights set out in the Berne Convention

are significant because they continue to be vested in the author even after he has parted with his economic rights in his work.

The right of the author under Article 6bis of the Berne Convention provides that an author may 'object to any distortion, mutilation or modification' of his work which is deemed to be 'prejudicial to his honour or reputation'.

As formulated in the Berne Convention, vindication of moral rights, being hedged with the precondition of proof of negative impact on the authors reputation, somewhat restricts the span and sweep of the moral right. It is argued by some that where a work is destroyed, since it no longer exists and cannot therefore be viewed by anyone, where is the occasion for prejudice to the authors reputation. *Per contra*, it could be argued as indeed was the submission made by.., learned counsel for the plaintiff, that destruction of a work can prejudice an author's reputation by reducing the volume of his creative corpus. The proponents of the narrow view argue that derogatory treatment of a creative work would mean deletion to, distortion, mutilation or modification to, or use of the work in a setting which is entirely inappropriate. The opponents of the narrow view would argue that deletion or mutilation is after all 'a treatment of a work' and so is 'destruction'. It is the extreme and ultimate form of mutilation. They argue that mutilation is nothing but destruction so as to render the work imperfect.

The mural sculpture decorating Vigyan Bhawan, is the result of plaintiff's creative effort. It has not only enhanced plaintiff's celebrity, but has also attained the status of a modern national treasure of India.

Authorship is a matter of fact. It is history. Knowledge about authorship not only identifies the creator, it also identifies his contribution to national culture. It also makes possible to understand the course of cultural development in a country. Linked to each other, one flowing out from the other, right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of Section 57 does not exclude the right of integrity in relation to cultural heritage. The cultural heritage would include the artist whose creativity and ingenuity is amongst the valuable cultural resources of a nation. Through the telescope of Section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist.

The court approvingly quoted the opinion of Mira T. Sundara Rajan in an article published in the *International Journal of Cultural Property*. Vol.10. No. 1, 2001 pp. 79-94 under the title ***Moral Rights and the Protection of Cultural Heritage***:

"The rights of attribution and integrity are particularly apposite to the cultural domain. Apart from the interests of individual authors in maintaining their standing and reputation, these moral rights are closely linked to a public interest in the maintenance of historical truth and cultural knowledge. Moral rights also promote the development of a social attitude of respect toward individual creativity. While authors must accept the responsibilities which accompany the privileges of creative work, is incumbent upon both the public and the state to acknowledge the value of artists' contributions to cultural heritage."

The Court then looked into the policy approach of the Government towards culture and culture rights as expounded in various official documents such as the Five year Plan document. It also examined various international conventions

on the protection and preservation of cultural patrimony such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of Cultural Property, the Declaration of the Principles of International Cultural Co-operation proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organisation, and the 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. It then interpreted Section 57 in a wide sense, keeping in view these international agreements.

There would therefore be urgent need to interpret Section 57 of the Copyright Act, 1957 in its wider amplitude to include destruction of a work of art, being the extreme form of mutilation, since by reducing the volume of the authors creative corpus it affects his reputation prejudicially as being actionable under said section. Further, in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of the nation.

It is held that the plaintiff has a cause to maintain an action under Section 57 of the Copyright Act, 1957 notwithstanding that the copyright in the mural stands vested in the defendants. It is further held that the defendants have not only violated the plaintiff's moral right of integrity in the mural but have also violated the integrity of the work in relation to the cultural heritage of the nation.

The above two cases tell us how the courts are viewing the moral rights of authors. They perceive them as ways to protect the cultural integrity of the country. They also interpret the section in the context of the international efforts to protect cultural patrimony.

2.5 ECONOMIC RIGHTS

The Copyright Act does not refer to the various rights it provides the author as economic rights. In fact, the rights are provided in the explanation of the meaning of copyright. They differ with category of works. The largest numbers of rights are for literary, dramatic, and musical works.

2.6 RIGHTS IN LITERARY, DRAMATIC AND MUSICAL WORKS

The author of a literary, dramatic or musical work has the following rights:

a) To reproduce

b) To issue copies of the book to the pubic not being copies already in circulation

c) To perform the work in public, or to communicate it to the public

d) To make any cinematograph film or sound recording in respect of he work

e) To make any translation of the work

f) To make any adaptation of the work; and

g) To do in relation to a translation or an adaptation of the work, any of the above acts

The right of reproduction is the basic right which prohibits any other person from copying a work in material form without the permission of the author or owner of the copyright. The most common form of reproduction is printing of copies of a book. The main form of piracy of books is this. Even making manuscript copies is also part of right of reproduction since there is a reproduction of the original in a material form. The Act clarifies that storing of the work in any medium by electronic means is also part of the right of reproduction. This takes care of the digital copies as well as copies being made on the Internet.

2.6.1 Right of Distribution

The Copyright Act gives a separate right of issuing copies of the work to the public. This is the right of distribution. It is, however, made clear in the law that copies already in circulation are not affected by this right. That means the right exhausts on first sale. That is to say, if you have bought a copy of a book, your selling the copy to another person is not restricted by this right.

2.6.2 Right of Communication to the Public

Reproduction and distribution of a work in a material form is only of the means to make access to a work. For example, a drama can be performed on the stage which does not involve any reproduction in any material form or issue of copies of the work to the public. At the same time, the interests of the author are affected. Therefore, the Copyright Act provides a specific right of performance of the work in public. It also specifically states as the right of the author to communicate the work to the public. For example, a book cannot be read over the radio without the permission of the copyright owner, if it is within the copyright regime.

2.6.3 Right to Make a Cinematograph Film or a Sound Recording

In line with the advancement of technology which made possible making of cinemas and sound recording, the Copyright Act provides that the right to make the work into a cinematograph film or record in a sound track is with the author or owner of the copyright. For example, if you have written a story, a producer cannot use that story to make a cinematograph film though it may not exactly being materially copying the work. Similarly, a sound recording of it also cannot be made. The terms cinematograph film and sound recording cover all the electronic means of making video or audio recordings.

2.6.4 Translation Right

The Copyright law gives the right to translate a work into another language also to the author. Therefore, if a work in which copyright subsists is in Hindi, it cannot be translated into English without the permission of the author. Once translated, the translated version also enjoys all the rights which were on the original work. For example, if the aforesaid English translation is to be translated into French, then the person who wants to translate should take the permission of both the original author as well as the translator. Similar is the case, if a cinematograph film is to be made based on the English translation.

2.6.5 Adaptation Right

The scope of the right of adaptation extends to conversion of a dramatic work into a non-dramatic one, conversion of a literary or artistic work into a dramatic work, any abridgement of a literary or dramatic work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical, any arrangement or transcription of a musical work and also any use of a work involving its rearrangement or alteration. It covers the right to make simple adaptations of a book to suit specific needs and requirements. In this case, there is no substantial reproduction of the book, since the adapter or abridger may be using his own language. But he needs the permission of the author. The adapted version also enjoys the same rights, just like the translated version.

2.6.6 Special Rights for Computer Programmes

The author of a computer programme enjoys all the rights that are bestowed on the author of a literary work. In addition, he enjoys the right to sell or give on commercial rental of the computer programme. While literary works can be issued to its members by a lending library, a computer programme cannot be issued without specific permission of the copyright owner. However, the right does not apply in a case where the programme itself is not the essential object of the rental. For example, a car may have many computer programmes in it, but when a person hires a car, he does not require any separate authorisation for using those programmes which are in built in the car, since the programmes are not the essential objects of his hire but the transport vehicle.

Self Assessment Questions **(Spend 3 minutes each)**

4) Explain the Rights of Distribution.

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2.7 RIGHTS IN AN ARTISTIC WORK

The author of an artistic work enjoys almost all the exclusive rights that the author of a literary work except the ones on translation and sound recording. The reproduction right in the case of an artistic work covers the reproduction or depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work. However, the Act at present does not make specific clarification that reproduction in the digital format is within the ambit of this right.

2.8 RIGHTS IN A CINEMATOGRAPH FILM

The reproduction right in a cinematograph film is the right to make a copy of the film. It, however, has a wider scope in that making a photograph of any image

forming part of the film is also within the ambit of that right. As in the case of a computer programme, a cinematograph film also enjoys the commercial rental rights.

2.9 RIGHTS IN A SOUND RECORDING

The rights in a sound recording are by and large similar to the rights in a cinematograph film. In this case, the reproduction right means making any other sound recording embodying the work in the sound recording. It also enjoys the rental rights like a cinematograph film.

2.10 RESALE SHARE RIGHTS

The Copyright Act contains a special provision for original copy of a painting, sculpture or drawing or of the original manuscript of a literary or dramatic or musical work. If such a copy is sold for a price exceeding ten thousand rupees, the author has a right to a share in the resale price of the work or manuscript. This right will exist with the author even after assignment of the copyright in the work to another person. This right is only in the case of works of which as per the provisions of the Act, the author is the first owner. For example if it is a painting drawn for valuable consideration under the instance of another person, the author shall not have any resale share right. This right also will cease to exist on the expiry of the copyright. The share is to be fixed by the Copyright Board, but it shall not exceed ten percent of the resale price.

The Indian Copyright Act follows the international conventions in regard to the rights it grants to copyrighted works. It also takes note of the technological advancements in the areas and has provisions which cover digital copies.

Case Laws

The meaning of 'reproduction' or 'copy' came up in the case of ***Star India (P) Ltd.) v. Leo Burnett (India) (P) Ltd*** [(2003) 27 PTC 81 Bom] though in the context of a cinematograph film. After quoting the definition of 'copy' from the Oxford English Dictionary and the definition of 'infringing copy' in the Copyright Act, the court looked into **Copinger and Skone James on Copyright**, Thirteenth Edition, at paragraph 3.29 and reproduced the following portions from that book:

".....it has been stated that skill labour and judgment merely in the process of copying cannot, confer originality and the mere copyist cannot have protection of his copy. Particularly, therefore, where the reproduction is in the same medium as the original, there must be more than an exact reproduction to secure copyright; there must be some element of material alteration or embellishment which suffices to make the totality of the work an original work. If the original, in the case of a painting, is used merely as a model to give the idea of the new work or, in the case of a photograph, merely as a basis to be worked up by photographic process to something different, then the net work may be entitled to protection; but, if the result is simply a slavish copy, it will not protected."

The same authors in the Fourteenth Edition in paragraph 7.98 have dealt with "Films". The learned Authors have stated as under:

"It is an infringement of the copyright in a film to make a copy of it, or a substantial part of it, whether directly or indirectly and whether transiently or incidental to some other use. This includes making a photograph of the whole or any substantial part of any image forming part of the film. As with a sound recording, it is not expressly stated that copying of a film includes storing it by electronic means but again it is suggested that it does. Again, the copyright in a film is infringed if the recorded moving images are directly or indirectly copied but not if the same or similar images are recorded independently, for example by reshooting the subject matter of the film. Again, however, underlying works such as the screenplay may be infringed by such means."

As pointed earlier contrasting Section 14(d) and (e) on the one hand and Section 14(a),(b) and (c) on the other, in the latter case the owner of the copyright has exclusive right to reproduce the work in 'any material form'. This is absent and excluded insofar as the former case (cinematograph film/sound recording). The exclusive right in the former is to copy the recording of a particular film/sound recording. It is, therefore, clear that production by another person of even the same cinematographic film does not constitute infringement of a copyright in a cinematograph film. It is only when actual copy is made of a film by a process of duplication i.e., by using mechanical contrivance that it falls under Section 14(d)(i). The expression 'to make a copy of the film' would mean to make a physical copy of the film itself and not an another film which merely resembles the film.

The making of another film is not included under Section 14(d)(i) and such other film, even though it resembles completely the copyrighted film, does not fall within the expression 'to make a copy of the film'. Therefore, if the film has been filmed or shot separately by a person and it resembles the earlier film, the subsequent film is not a copy of the first film and, therefore, does not amount to infringement of whole of the copyright of the first film. The position in the case of literary, dramatic or artistic work seems to be different. A narrow copyright protection is accorded to a film/sound recordings than for literary, dramatic or artistic work. The reason perhaps could be that they have to be original to satisfy the test of copyrightability, whereas the requirement of originality is absent for claiming copyright in cinematograph films/sound recordings.

In ***Telmak Teleproducts (Aust.) Pty. Limited v. Bond International***, 1985 (5) IPR 203, the defendants made, an advertisement film for the same products as were contained in the plaintiffs' advertising film and the Court found that the products of the rivals (which were advertised) and the films were also similar. As the defendants, however, had made their own film, though it was similar to the plaintiffs' film, the Court held that the making of the defendants' film was not an act within the categories of exclusive rights conferred on the copyright owner of the plaintiffs' film. The defendants' film had been shot and sound recorded by the defendants own agents. The defendants' film was not copied from the recorded medium of the plaintiffs' film. It was, therefore, held that the defendants had not made a copy of the plaintiffs' film. The defendants had not copied the visuals, images and sounds which together made up the plaintiffs' cinematographic film. The defendants had not caused the plaintiffs' film to be seen in the public, therefore, there was no act of the defendants which fell within the categories of exclusive rights conferred on the plaintiffs by the Act.

In ***Norowzian v. Arks Limited and Ors.,*** 1996 FSR 394, the English Copyright Acts of 1956 and 1988 were considered. In this case. It was the plaintiffs contention that the defendants had made a film purposely resembling the plaintiffs' film and that the defendants' film reproduced the essential features of the plaintiffs' film. On this basis, the plaintiffs alleged that the copyright in their film had been infringed because, according to the plaintiffs, the making of the defendants' film constituted copying of the plaintiffs' film. The defence of the defendants was that they had made their own film and, therefore, there was no copying. The Court after referring to Modern Law of Copyright and Designs by Laddie Presscott and Victoria, and Copinger and Skone James on Copyright held that, for the second film to infringe the copyright in the first film, it had to be an actual copy of the first film, itself, that in respect of a cinematographic film it is the recording that is protected from copying and nothing else, that even if the defendants' film exactly resembles the plaintiffs' film, but if the defendants' film is a re-shoot of the plaintiffs' film, which reproduces the essential features of the plaintiffs' film but does not copy the plaintiffs' film, that is, it is not reproduced from the recorded medium of the plaintiffs' film, the defendants' film does not and cannot infringe the plaintiffs' copyright in the plaintiffs film. This decision follows the decisions of the Australian Courts in *Telemak Teleproducts* (supra) and ***CBS Australia Limited and Ors. v. Telmak Teleproducts (Aust.) Pty. Ltd.***, 1987 (9) IPR 440. It was thus held that unless there has been a copying of the whole or part of the plaintiffs' film itself, in the sense of a copying of the particular recording of that film, there cannot be any infringement of the copyright. The re-shoot of the film cannot be said to be the copy of the film for the purposes of infringement.

In ***Spelling Goldberg Production v. BBC Publishing Limited,*** 1981 RPC 283 The defendants had acquired possession of the plaintiffs' film and had made a physical copy of the plaintiffs' film. It was on these facts that the Court had held that it was a copy of the plaintiffs' film.

Therefore, considering the terminology used in the Act the facts on record and the cases discussed it is clear that the defendants made their own film independently. The film of the defendants therefore is not a copy and, therefore, would not amount to an infringement of the plaintiffs copyright in its film considering the language of Section 14(d) of the Copyright Act.

The issue of the scope of exploitation came up in the case of ***Maganlal Savani & Another vs Rupam Pictures (P) Ltd. & Others*** [AIR 2000 Bom 416, 2000 (4) BomCR 400, (2000) 3 BOMLR 48]. This was in the context of the film *Chupke Chupke*. The court held

What is assigned to the first plaintiff is the exploitation, distribution and exhibition commercially or otherwise of the picture. In this context we have to give a wider meaning of the term "exploitation". Exploitation of a film takes in all the scientific and technological device that may invent in future also and the plaintiff could make use of those inventions. Given such an interpretation of the word "exploitation" the objection raised by first plaintiff in conducting satellite telecasting of the picture "*Chupke Chupke*" will *per se* violative of the provisions of the agreement. The similar view has been taken by this Court in the context of interpreting similar contract in Notice of Motion No. 8663/99 dated 17th August 1999. I need not go into the details of that order because the matter has been taken in appeal before the Division Bench of this Court and Division Bench of this Court

by order dated 10-1-2000 in Appeal No. 1246/99 upheld the order of the learned Single Judge and held that the exploitation is taking of the kind of exploit, including the internet, satellite telecast. It is profitable to quote the observation of the Division Bench.

Self Assessment Questions **(Spend 3 minutes each)**

4) What are the rights stated in the Berne Convention?

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5) What are moral rights?

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2.11 SUMMARY

In this Unit we have seen that there are two different kinds of rights provided by the Indian Copyright Act. One set of rights are referred to as author's special rights. These rights include right to authorship and right to integrity. The other set of rights are what bring economic returns to the author. They include rights or reproduction, distribution, communication to the public, translation, adaptation, resale share and so on. The rights vary according to the category of the works.

2.12 TERMINAL QUESTIONS

1) Discuss author's special rights in India.

2) Elaborate on the right of reproduction in a literary work.

3) What are the rights associated with an original computer programme?

4) What are rental rights? Which categories of works are covered by that?

2.13 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 2.1

2) Refer to Section 2.1

3) Refer to Section 2.4

4) Refer to Section 2.6

Terminal Questions

1) Refer to Section 2.4
2) Refer to Section 2.6
3) Refer to Sub-section 2.5.6
4) Refer to Section 2.10

2.14 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart, Chapters 4,5 and 62.
2) Copyright and Industrial Designs by P. Narayanan, Chapters 1-5.
3) Lal's Commentary on Copyright Act, Chapter III Section 14.
4) Iyengar's The Copyright Act, 1957, Introduction, Chapter III Section 14.
5) How C*opyright Works in Practice* by Kala Thairani, Chapters III, IV and IX.

UNIT 3 OWNERSHIP AND DURATION

Structure

3.1 Introduction

3.2 Objectives

3.3 Ownership

3.4 Term of Copyright

3.5 Summary

3.6 Terminal Questions

3.7 Answers and Hints

3.8 References and Suggested Readings

3.1 INTRODUCTION

Copyright is an intellectual property right, just like patents and industrial designs. The ownership of the right is determined by certain factors. Original creation is the most important criterion. Ordinarily, authorship and ownership of copyright go hand in hand. However, these rights have lot of economic significance. Investment is a major factor in the matter of intellectual property rights. One of the objectives of intellectual property rights is to create a conducive environment for investment in endeavours that help in creation of intellectual property rights. For example, making of a cinematograph film is a cost intensive effort. All the risk in the making of the film is with the producer. His investment needs to be protected. Otherwise, there will not be enough investors. Copyright law, therefore, takes care of interests of both creators as well as the persons who invests in creativity.

There are many industries which are dependent on copyrights. For example, the printing industry is highly dependent on copyrights. Cinematograph film and sound recording industries are also very dependent on copyrights. Another industry which has come into prominence in India recently and which is again dependent on copyrights is the software industry, since software is protected under copyright law. The media, both print and audio-visual, are also dependent on copyrights since the contents which they deal with are protected by copyrights.

The Indian law in certain cases gives the ownership to the producers such as cinematograph and sound recording producers while in the case of most of the literary, dramatic and musical works the first owner is the author himself. Even in these cases also there are certain exceptions such as creation of a work as part of employment conditions.

As stated earlier, copyright, like other intellectual property rights, are restricted by certain factors so that they do not become permanent monopolies which may affect adversely creation of more original works. One of the conditions binding copyright is time. These rights, like patent rights, are for limited duration. The term of protection of copyrights is, however, much longer than the term of protection of patents. This is because of the nature of the two rights.

There are two arguments regarding the term of copyright. One group argues that it should be permanent like the rights in a physical property. The other group argues that it is a personal right and should terminate with the death of the author. The second group argues that the works, being part of the cultural patrimony, should move into the public domain at the earliest so that all can access it freely. The present regime is a compromise between these two view points.

The term of copyright also has an international ramification. While copyright in every country is dictated by the law of the country, in the case of term of a copyright, it is the country of origin, that is, where the work was created matters. If the term of protection as per the country of origin expires, then the term of protection in all other jurisdictions also expire.

3.2 OBJECTIVES

After reading this unit, you should be able to:

- state who is the first owner of copyright in a category of work;
- explain the difference between authorship and ownership; and
- calculate the term of copyright of a work.

Self Assessment Questions **(Spend 3 minutes each)**

1) Reflect on the economic impact of copyrights on India's national economy.

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2) Examine what would happen if copyright is a permanent right.

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3.3 OWNERSHIP

Copyright is ordinarily with the author, that is, the creator. Author in relation to a literary or dramatic work is the person who creates or writes the work. In relation to a musical work, it is the composer and in relation to an artistic work, other than a photograph, it is the artist. The photographer is the author of the photograph he takes. In relation to a cinematograph film or a sound recording, it is the producer who is the author and owner of copyright. In relation to literary, dramatic, musical or artistic work which is computer generated, the person who causes the work to be created is the author.

In the case of collective works like encyclopaedias, anthologies, directories, etc. the copyright for the collection and editing generally vests with the editor. However, inclusion of individual pieces, if sourced from outside, has to be with the permission of the copyright owner in that work. In certain cases, individual authors, while allowing inclusion of their pieces in the anthology may retain their individual copyrights.

A publisher requests an independent author to write a book which he promises to publish. In the absence of any contract to the contrary, the author and not the publisher shall be the first owner of the copyright in the book. This would be the case even if the publisher had promised some monetary payment for writing the book.

If a person writes a drama for a society, but there is no contract regarding the copyright, the author is the copyright owner and not the society.

There are, however, many exemptions to this general rule. For instance, there is special provision in the case of works of journalists. It says, in the case of a literary, dramatic or artistic work made by an author in the course of his employment with a newspaper, magazine or similar periodical, under a contract of service or apprenticeship, for the purpose of publication in the newspaper, magazine or similar periodical, the employer shall, in the absence of any contract to the contrary, be the first owner of the copyright so far as publication in any newspaper, magazine or similar periodical is concerned, but in all other respects, the author shall be the first owner of the copyright. This means the ownership is divided into two categories: the proprietor of the newspaper or periodical gets the right to publish it in a newspaper or periodical and the author has the right to publish it in other places and formats. Of course, a contract can be signed between the proprietor and the employee whereby all rights can be passed on to the proprietor.

Another instance where the creator may not be the first owner is in the case of a photograph taken or a painting or portrait drawn or an engraving or cinematograph film made for valuable consideration at the instance of another person, the person who paid the valuable consideration shall be the first owner. Of course, in this case also, a contract between the artist and the financier can change the ownership.

Similarly, in the case of work made during the course of employment under a contract of service or apprenticeship, the employer shall, in the absence of a contract to the contrary, be the first owner of the copyright in the work.

In the case of government work and work of a public undertaking or international organisation, again, in the absence of any contract to the contrary, the first owner of the copyright is the government, or public undertaking or international organisation, as the case may be.

In the case of any address or speech delivered in public, the person who delivers the address shall be the first owner of the copyright in that speech, provided it is written down speech. However, in case, the speech is delivered by a person on behalf of any other person, then the person on whose behalf the speech was delivered would be the first owner. In the case of speeches, the employee-employer relationship does not come into play.

The ownership can be assigned in writing to another person. Such assignment can be done in respect of copyright not only in existing works but also in future works. Of course, in respect of future work such assignment takes effect only when the work comes into existence. The assignments can also be in respect of all the rights or in respect of specific rights.

Case Law

The issue of ownership and joint authorship came up in the case of ***Najma Heptulla v. Orient Longman Ltd. and Ors.***[AIR 1989 Delhi 63, 1988 (2) ARBLR 302 Delhi]

The first and the important question which arises for consideration in this case is as to who is the author of the book **India Wins Freedom**.

The term 'Author' has been defined, not that the definition is of any assistance, in Section 2 (c) as meaning "in relation to a literary or dramatic work, the author of the work". Section 55(2), however, provides that where in a literary work a name purporting to be that of an author appears on the work as published then the person whose name so appears shall be presumed, unless the contrary is proved, to be the author of the work.

In the present case, the book as published no doubt purports to show Maulana Azad as the author thereof. It is, however, contended by the defendants, that from the preface to the book, written by Prof. Humayun Kabir, as well as from the facts gathered from the preamble of the agreement dated 2nd September, 1958, it can be proved that Maulana Azad is not the sole author. While according to defendant No. 6 Prof. Humayun Kabir is the sole author, the case of Orient Longmans, however, is that Maulana Azad and Prof. Humayun Kabir have, in law, to be regarded as joint authors.

The book having been published after Maulana Azad's death, it has to be shown as to whether Prof. Humayun Kabir had the authority to enter into the agreement dated 2nd September, 1958 with Orient Longmans. This authority had to be derived by Prof. Humayun Kabir from the legal representatives of Maulana Azad, irrespective of the fact whether Maulana Azad was the sole or the joint author of the book. What has, however, to be seriously considered is the contention to the effect that Prof. Humayun Kabir was the sole author.

My attention was drawn to the preface to the said book written by Prof. Humayun Kabir on 15th March, 1958 in which he has referred to the background and the manner in which the said book was written. According to Prof. Kabir, on his persuasion, Maulana Azad agreed to write his autobiography on Prof. Kabir assuring that he would do his best to relieve Maulana Azad of the actual burden of writing. About two years were spent on the writing of the book and Maulana Azad used to describe his experiences and Prof. Kabir used to make copious notes. When sufficient material would be collected for a chapter, a draft in English would be prepared by Prof. Kabir and handed over to Maulana Azad. Maulana Azad then read each chapter and then both Prof. Kabir and Maulana Azad went over the said chapter together. It is at this stage that Maulana Azad is stated to have made many amendments, additions, alterations and omissions. The first draft of the completed book was ready in September, 1957 and, according to Prof. Kabir, Maulana Azad then decided that some 30 pages of the book dealing

with the incidents and reflections mainly of a personal character should not be published for the present. It was Maulana Azad's direction that a copy each of the complete text should be deposited under sealed cover in the National Library and the National Archives. After the text of 30 pages was excluded, a revised draft was prepared and was presented to Maulana Azad towards the end of November, 1957. It is further mentioned by Prof. Kabir, in the preface, that when the final draft was ready Maulana Azad went through the manuscript chapter by chapter and sentence by sentence and made some minor alterations. It has also been stated that there are opinions and judgments in the book with which Prof. Kabir did not agree "but since my (Prof. Kabir's) function was only to record Maulana Azad's findings, it would have been highly improper to let my views colour the narrative." It has further been mentioned that it is difficult for a man to reflect with complete accuracy the views and opinions of another when expressed in a different language. Maulana Azad used to convey his thoughts in Urdu and the same were expressed in English by Prof. Humayun Kabir.

The reading of the agreement dated 2nd September, 1958, however, shows that Prof. Kabir assumed of himself the role of a composer of the book. This is an improvement, if not at variance, with what Prof. Kabir himself wrote in the preface to book on 15th March, 1958. In the agreement, it has been made out that Maulana Azad dictated certain notes to the composer and it is the composer who, out of the materials obtained, composed the book which was approved by Maulana Azad. Another improvement in this agreement is that it has been made out as if one half of the royalty was payable to Prof. Kabir in accordance with the wishes of Maulana Azad.

At this interlocutory stage, in the absence of any other evidence on record, I will proceed on the assumption that the facts, as narrated by Prof. Kabir himself in the preface dated 15th March, 1958 with regard to the manner in which the manuscript of the book was prepared, are correct.

While relying upon what has been stated by Prof. Kabir in the preface, the submission on behalf of defendant No. 6 is that the only conclusion which can be arrived at is that it was Prof. Kabir and not Maulana Azad who was the author of the said book. It was submitted that Maulana Azad merely gave the ideas and the thoughts and conversed with Prof. Kabir in Urdu and it is in fact Prof. Kabir who wrote the manuscript in English.

The court then examined the decision in the case of ***Donoghue v. Allied Newspapers Ltd.***, (1937) 3 All. E.R. 503. That was a case where series of articles entitled "Steve Donoghue's Racing Secrets" were published in a newspaper. Donoghue, who was a well-known jockey, communicated to Mr. Felstead, a freelance journalist, his various adventures. Felstead made notes as the conversations went on and he then wrote the articles. The manuscript was then taken to Donoghue who read it over and when he thought that some alterations were necessary or desirable, they would be noted in the margin by Mr. Felstead and were subsequently, at times, recorded. Articles based on the original series of articles were later published in another publication and entitled "My Racing Secrets" by Steve Donoghue. This publication took place at the instance of Mr. Felstead. The plaintiff then sought an injunction restraining the publication of the aforesaid work alleging that there had been an infringement of his copyright. Justice Farwell held that the plaintiff did not have any copyright.

"In the present case, apart altogether from what one may call merely the embellishments, which were undoubtedly supplied wholly by Mr. Felstead, the ideas of all these stories, and, in fact, the stories themselves, were supplied by the plaintiff; but, in my judgment, upon the evidence, it is plain that the particular form of language by which those stories were conveyed was the language of Mr. Felstead and not that of the plaintiff. Although many of the stories were told in the form of dialogue, and to some extent Mr. Felstead no doubt tried to reproduce the story as it was told to him by the plaintiff, nevertheless the particular form of language in which those adventures of stories were conveyed to the public was the language of Mr. Felstead, and not the language of Mr. Donoghue."

After examining threadbare the logic in the case of Donoghue, the court held:

What is of paramount importance, in order to declare as to who is the author of a work, is to determine in whose language is the work written. In Donoghue's case the entire material which was incorporated in the book was known to and supplied by Donoghue. It is his experiences which were written by Felstead. The Court did not even refer to the case of Levy and, therefore, had no occasion to consider as to whether Donoghue could be regarded as a joint author. If the reasoning in Donoghue's case is correct, it would mean that the material on the basis of which a literary book is written would be of no importance, while deciding as to who is the author of a book. To agree with such a proposition would lead to results which are difficult to accept. For example, it is not unknown that great Scientists may not have the literary capabilities of transcribing their discoveries, theories and thoughts so as to be easily understood. If a Scientist, therefore, takes the services of another person with a view to transcribe his thoughts, findings and material in the form of a book or articles, can it mean that the author of the Scientific material is not the Scientist himself but the author is the person in whose language the material is expressed ? In such a case the person who transcribed the thoughts may not even be able to understand the material which is being written, but he may still have to be regarded as a sole author, if Donoghue's case is accepted as correct. Surely the intention of the Copyright Act cannot be to give the status of an author only to the person in whose language the literary piece is written while completely ignoring the person who contributed the entire material which enabled the person to show his mastery over the language.

A literary work consists of matter or material or subject which is expressed in a language and is written down. Both the subject matter and the language are important. It is difficult to comprehend, or to accept, that when two people agree to produce a work where one provides the material, on his own, and the other expresses the same in a language which is presentable to the public then the entire credit for such an undertaking or literary work should go to the person who has transcribed the thoughts of another. To me it appears that if there is intellectual contribution by two or more persons pursuant to a reconverted joint design, to the composition of a literary work then those persons have to be regarded as joint authors.

In the present case, from what has been stated by Prof Kabir in the preface, it is clear that there was active and close intellectual collaboration and cooperation, between Maulana Azad and Prof. Humayun Kabir which resulted in the book **India Wins Freedom**. There was a reconverted joint design between the two in the writing of the book. The material for the book was supplied by Maulana

Azad with a clear understanding that Prof. Kabir will describe those thoughts and conversation and write the same in English language. It is not as if Maulana Azad did not know English. The preface itself shows that Maulana Azad, along with Prof. Kabir, read every word of the manuscript and made alterations, additions, omissions and corrections. It is Maulana Azad who decided as to which 30 pages of the book were not to be published and it is he who decided as to which of his views should be contained in the book. In fact Prof. Kabir has categorically stated that his function was only to record Maulana Azad's findings and it would have been highly improper to let his (Prof. Kabir's) views colour the narrative.

Even the conduct of Prof. Kabir belies the contention that it is he who was the sole author. As already noted hereinabove, 50% of the royalty of the book has been paid to the legal representatives of Maulana Azad. This is an arrangement which was entered into by Prof. Kabir with Orient Longman. if Prof. Kabir had regarded himself as the sole author then there would have been no occasion or necessity for securing payment of royalty to the legal representatives of Maulana Azad.

For the aforesaid reasons, it is not possible for me to come to the conclusion that Prof. Kabir was the sole author of the aforesaid work. As at present advised, it appears to me that Maulana Azad and Prof. Kabir have to be regarded as the joint authors of the said work. Prof. Kabir was more than a mere scribe of the thoughts of Maulana Azad. Both of them actively and intellectually collaborated in the compositions of the literary work.

Another case which examined the ownership of songs and music was ***Gee Pee Films Pvt. Ltd. v. Pratik Chowdhury and Ors.*** [(2002) 24 PTC 392 Calcutta]. This related to ownership of copyright in song and music composed and sung under a contract. The court delved deep into the issues as could be seen from the following extracts.

It is apparent from the ... provisions contained in the Act that so far lyrics and musical works are concerned, lyricist and composer respectively are the authors thereof and in view of Section 17 of the Act, the first owner of the copyright of lyrics and musical works shall be the authors unless it is shown that such work was made in course of author's employment under a contract of service or apprenticeship with his employer and there is no agreement to the contrary as regards retention of copyright.

Now the plaintiff having admitted in the application that defendant Nos. 3 to 5 are lyricist and composer of the disputed songs, it is for the plaintiff to prove prima facie that those works were made by defendant Nos. 3 to 5 in course of their employment under a contract of service or apprenticeship under plaintiff and that there was no agreement to the contrary as regards copyrights.

In Paragraph 5 of the petition, the plaintiff stated that in or about the year 1999 it commissioned defendant Nos. 3 and 5 to compose Bengali non-film lyrics and music for rendition thereof by defendant No. 1 and pursuant to the said request arid on consideration thereof paid by the plaintiff, the defendant Nos. 3 and 5 wrote the lyrics and composed the music in respect of those two songs. In Paragraph 6, the plaintiff stated that it engaged defendant No. 1 to sing and/ or

render the aforesaid two Bengali non-film musical composition or song and "commissioned" the defendant No. 1 to render the aforesaid number with other non-film Bengali songs. In Paragraph 20, it was stated that the plaintiff duly recorded the performance rendered by defendant No. 1 in terms of the arrangement by and between the plaintiff and the defendants after the petitioner had "commissioned" defendant Nos. 3 and 5 to compose the lyrics, tune and music relating to the said songs.

The verb 'commission' according to Oxford Advanced Learner's Dictionary of Current English, Fourth Edition means "give somebody the job of making something". The following examples are given therein :— "He commissioned a statute of his wife"; "commission an artist to paint a picture".

According to The Wordsworth Dictionary of English Usage, 1995 edition, the verb 'commission' means "to give an order (esp. for a work of art) to; The following example has been given therein :— "He was commissioned to paint the Lord Mayor's portrait".

The aforesaid statements made in Paragraphs 5, 6 and 20 make it abundantly clear that the case made out by the plaintiff is that it engaged those defendants for the purpose of writing, composing and singing those two songs on remuneration. In my view, the aforesaid averments make out a clear case of contract for service but not a contract of service. It may not be out of place to mention here that Section 17 of the Act specifies the only instances where an author, although engaged under a 'contract for service', loses copyright. Those are the cases of taking photograph, drawing painting or portrait, engraving and making cinematograph film. In the present case, the defendants were not engaged for any of the aforesaid jobs.

In the instant case it is not the plaintiffs case that the defendant Nos. 1 and 3 to 5 were its employees at any point of time and in course of such employment those songs were written, composed or sung. Under the aforesaid circumstances, in my view, no case has been made out by the plaintiff that the defendant Nos. 1 and 3 to 5 were his employees under a contract of service.

If we apply the aforesaid test to the fact of the present case, the answer must be in affirmative and thus no case has been made out to bring the transaction within the purview of 'contract of service' as mentioned in Section 17(c) of the Act,

Thus, even the plaint averments do not suggest that, there existed a case of employment of defendant Nos. 1 and 3 to 5 under a contract of service. Therefore, even on the basis of averments made in the application no case has been made out for 'copyright over lyrics and musical works.

The next question is whether the plaintiff has acquired any right over sound recording. As pointed out earlier, according to the provision of Section 2(d) of the Act, producer of the sound recording is the author thereof and according to Section 17, the copyright of such sound recording vests in such producer. From the averments made in the application, it is clear that the plaintiff paid the hire charges of the studio and made all necessary payment for recording. Those averments make out at the most a case of financing the recording. But there is no averment in the petition indicating that the plaintiff has also taken 'responsibility' of such recording. The learned counsel appearing on behalf of the plaintiff placed

strong reliance upon the observations in Copinger & Skone James on Copyright where it was stated that the author of sound recording is to be taken to be producer as he is the person by whom arrangements necessary for making the recording are undertaken. They also drew attention to the observations that "the word 'undertaken' implies that it is the person directly responsible for such arrangements particularly in the financial sense, who is the author." It may not be out of place to mention here that previously Section 9(2)(aa) of 1988 English Copyright Act simply defined the author of sound recording as being the person by whom the arrangement necessary for the making of recording were undertaken. The expression 'producer' was however introduced into the 1988 Act with effect from December 1, 1996 by the Copyright and Related Rights Regulations, 1996.

In my opinion, the aforesaid observations cannot benefit the plaintiff in any way in view of a totally different definition of 'producer' in Section 2 (uu) of the Act, According to the aforesaid provision, in order to be a producer, a person must take initiative as well as responsibility of the recording. I have already indicated that all that have been stated in the application as regards right over sound recording is that plaintiff paid all the expenses of recording including hire charges of studio and remuneration of the musician. Those averments, in my view, will not bring the plaintiff within the purview of "producer" unless in addition to the aforesaid statements, the plaintiff avers that it has also taken responsibility of such recording. The mere statement that a master tape of recording owned by the plaintiff was prepared and retained by it does not suggest that it has taken responsibility of such recording. If a person bears all the expenses for recording and keep the master tape thereof, such facts do not imply that he has also taken responsibility of the recording and thus cannot be held to be a producer. The word "responsibility" appearing in Section 2(uu) of the Act, in my view, does not refer to financial responsibility, but means "consequential legal liability" for such recording.

Therefore, I find substance in the contention of the learned counsel for the defendants that no statement has been made in the application avowing consequential legal liability of the recording and as such plaintiff cannot be held to be the producer of sound recording.

Self Assessment Questions **(Spend 3 minutes each)**

3) Who has the copyright in the work of a government employee which work is created as part of his duties?

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4) A school teacher of the Board of Secondary Education, Uttar Pradesh sets a question paper for the Board of Secondary Education, Tamil Nadu. Who has the copyright?

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3.4 TERM OF COPYRIGHT

The Berne Convention for the Protection of Literary and Artistic Works provides for a minimum term of protection of copyrights which is until fifty years after the death of the author. India too had provided for this term until 1991 when the period of protection was extended from life of the author plus fifty years to life of the author plus sixty years, where the first owner of copyright is a human being.

At present, the Copyright Act provides for a term of protection in literary, dramatic, musical and artistic works published within the life time of the author until sixty years from the beginning of the calendar year next following the year in which the author dies. In case the authorship is jointly held by more than one person, the countdown starts from the year of death of the author who dies last.

In the case of a literary, dramatic or musical and artistic work which is published anonymously or pseudonymously, the term of copyright is for sixty years from the year of publication. However, once the identity of the author is revealed, the term of protection will last until sixty years from the beginning of the calendar year following the year of death of the author just like the other works.

In the case of a literary, dramatic musical work or an engraving published posthumously, copyright shall subsist for sixty years from the year of publication.

In the case of cinematograph films, and sound recordings, the term of copyright is sixty years from the year of publication. Thus, the copyright in a film produced in the year 1950 would expire on 31 December 2011.

Until the amendments to the Copyright Act in 2012, which came into force on 21 June 2012,the period of protection for photographs was sixty years only without any reference to the life of the author. But the 2012 removed the difference between photographs and other artistic works in the matter of duration of protection.

In the case of works in which government or public undertaking or an international organisation is the first owner, the copyright subsists until sixty years from the year of publication.

In all cases the calculation of the sixty years will commence from the beginning of the calendar year following the year of publication or year of death of the

author, or the last surviving author in case of joint authorship, as the case may be. That is to say, 31st December is the date of expiry of copyright in any work depending on year of publication or year of death of the author.

Case Law

The issue of duration of the copyright of an author's literary work came up in the Allahabad High Court in the case of ***Newspapers Ltd. v. Ratna Shankar Prasad*** [AIR 1977 All 356]. This related to the copyright in the works of late Shri Jai Shankar Prasad. He was a prolific writer in Hindi. By 16th of Dec. 1936 he had completed 24 books, on which date he entered into an agreement with the Newspapers Ltd. Allahabad, a public limited company, Under the agreement it was stipulated that Newspapers Ltd. at its own risk and expense would produce and publish the 24 books mentioned in the agreement and any other book that might be written, compiled or edited by the author in question; that during the legal term, of restricted copyright the publishers shall have the exclusive right of producing and publishing the works and the author will not during the continuance of this agreement publish or permit to be published any other edition, translation or abridgement or extract of the works and the copyright of the works shall remain the property of the author. As a consideration of this agreement the publisher agreed to pay to the author a royalty of 20 per cent of the advertised retail price on all copies sold during the legal term of unrestricted copyright. Sri Jai Shankar Prasad died on 15th of November 1937 leaving behind his son Sri Ratna Shankar Prasad who had been accepting the royalty after the death of his father for some time. Later in 1957 and 1964 he had differences with the publisher and asked them to stop publishing the works. The case came up on that. In June 1964 Shri Ratna Shankar Prasad claimed to be the absolute holder of the Copyright. Later he filed a case against the Newspapers Ltd.. The Newspapers Ltd. argued that the copyright in the works of Sri Jai Shankar Prasad had expired at the end of twenty-five years after the death of the author as per the Copyright Act 1914. Shri Ratna Shankar Prasad argued that the term of copyright of the works of Shri Jai Shankar Prasad would be governed by the copyright Act of 1957 which provided for a period of protection until fifty years after the death of the author.

The court took the view that the period of protection for the writings of Shri Jai Shankar Prasad who died in 1937 would be governed by the old Act.

The question is whether the present case would be governed by the old Act of 1914 or by the New Act of 1957. Section 79 of the Copyright Act of 1957 is a saving. Sub-section (5) of Section 79 provides:

"Except as otherwise provided in this Act, where any person is entitled immediately before the commencement of this Act to copyright in any work or any right in such copy right or to an interest in any such right, he shall continue to be entitled to such right or interest for the period for which he would have been entitled thereto if this Act had not come into force."

The saving clause also indicates that the rights and liabilities accrued and incurred under the old Act are not to be affected by the New Act. The whole question hinges upon whether the New Act of 1957 would govern the rights of the parties or access the] Act of 1914. The saving Section 79 Sub-section (5) of the Act of 1957 leaves no room for doubt that the rights of the parties would be governed

by the old Act and if that be so, the position under the old Act is quite clear. The legal term on the date of agreement in view of the provisions of Section 5 of the Act of 1914 was only twenty-five years.

Self Assessment Questions **(Spend 3 minutes each)**

5) Two persons jointly wrote a history book. One person died in 1970 and the other person in 1980. When will the copyright expire?

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6) An employee of an international organisation prepared a report as part of his duties in 1975. He died in the following year. When will the copyright in that report expire?

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3.5 SUMMARY

In this Unit, we have seen that authorship and ownership of copyright could be held by different entities depending on the circumstances of creation of the work. Mostly, in independently created works, the copyright is with the author whereas in works created as part of employment, the copyright ownership is with the employer. Also, in case of cinematograph films and sound recordings the ownership of copyrights is with the producers. We have also seen that the normal duration of copyright in India is life term of the author plus sixty years post mortem. However, in cases where the ownership is not with a human entity it is generally sixty years. Similarly in the cases of cinematograph films and sound recordings the term of copyright is for sixty years.

3.6 TERMINAL QUESTIONS

1) A journalist working as an employee of a newspaper has written a series of articles on drought situation in a state. The articles were published by the newspaper. Later, he wants to publish the articles as a book. Does he need the permission of his employers?

2) A person has engaged a photographer for taking photographs of his marriage and paid him the agreed to amount. Later, the photographer released a photo album of several marriages covered by him including all the photographs he took in this case. Is there any case for infringement action against the photographer?

3.7 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 3.1

2) Refer to Section 3.1

3) Refer to Section 3.3

4) Refer to Section 3.3

5) Refer to Section 3.4

6) Refer to Section 3.4

Terminal Questions

1) Refer to Section 3.3

2) Refer to Section 3.3

3.8 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart, Chapters 4, 5 and 6.

2) Copyright and Industrial Designs by P. Narayanan, Chapters 6 and 9.

3. Lal's Commentary on Copyright Act, Chapter IV Section 17.

4) Iyengar's The Copyright Act,1957, Introduction, Chapter IV Section 17 and Chapter V.

5) How Copyright Works in Practice by Kala Thairani, Chapters VI and VII.

UNIT 4 EXCEPTIONS AND LIMITATIONS

Structure

4.1 Introduction

4.2 Objectives

4.3 Exceptions and Limitations

4.4 Summary

4.5 Terminal Questions

4.6 Answers and Hints

4.6 References and Suggested Readings

4.1 INTRODUCTION

In this Unit, we will look into the contexts in which use of a copyrighted work without specific authorisation of the owner will not be considered as an infringement of the copyright in that work. .The copyright law provides exclusive rights to authors over their original works. This is to encourage creativity, since rights ensure that unauthorised persons cannot misappropriate the gains from a work. That would be motivation for further creation. At the same time, literary, dramatic, musical and artistic works are also part of the culture of a society. They are also to be part of education and learning. Therefore, fair access to these works has to be ensured. This is done through by allowing certain uses without specific authorisation of the copyright owner. These uses are referred to as exceptions and limitations to the copyrights. In certain jurisdictions such as in the United States of America, they are called fair uses. Indian law generally uses the term fair dealing. The provisions, of course, are very elaborate.

4.2 OBJECTIVES

After studying this unit, you will be able to:

- assess the contexts in which you can use a copyrighted work without special authorisation from the owner of the copyright therein; and
- appreciate the case laws related to it.

4.3 EXCEPTIONS AND LIMITATIONS

Section 52 of the Copyright Act declares certain acts not to be infringements of the rights granted by the Act. It says that a fair dealing with any work, not being a computer programme, for the purposes of private or personal use, including research and criticism or review shall not be an infringement. This allows most of the genuine, non-commercial, personal uses including research purposes. It also permits fair dealing with a work for the reporting of current events and current affairs including the reporting of a lecture delivered in public. This facilitates the work of journalists. It would extend to both print media and electronic media. However, the fair dealing exemption does not apply to computer programmes though they are also literary works.

The term 'fair dealing' is not defined in the Act. The general approach is that it should not be a substantial reproduction of a work and it should not be for commercial purposes. Substantiality is both a question of quantity and quality. The following observations of Lord Denning in ***Hubbard v. Vesper*** **(1972)** are illuminating:

"One must consider first the number of quotations and extracts. Are they altogether too long to be fair ? Then consider the use made of them. If they are used as a basis for comment, criticism or review that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose that may be unfair."

In regard to computer programmes, the law provides specific exceptions. These include the making of copies or adaptation of a computer programme by the lawful possessor of a copy of the programme in order to utilise the computer programme for the purpose for which it was supplied, or to make back-up copies purely as a temporary protection against loss, destruction or damage. It also permits reverse engineering and decompilation of a programme so as to enable operating the programme with another independently created programme, provided the needed information is not otherwise readily available. It also permits the making of copies or adaptation of a computer programme from a personally legally obtained copy for non-commercial personal use.

The storing of any work in any electronic medium for purposes of private or persona use or for research or criticism or review or for reporting of current events and current affairs, including the incidental storage of any computer programme which is not itself an infringing copy for the same purpose will also not be considered an infringement.

To facilitate Internet communications, the Act provides very specific exceptions for the transient or incidental storage of a work purely in the technical process of electronic transmission or communication to the public and also for the transient or incidental storage of a work for the purpose of providing electronic links, access or integration. However, where the access or integration has been expressly prohibited by the right holder, this exception will not apply.

The law also provides for a takedown notice. That is if the copyright owner sends a written notice to the person responsible for the storage of the copy that such transient or incidental storage is an infringement, then the person responsible for facilitating the access shall stop the access. But such stoppage will be for a maximum of twenty-one days within which the copyright owner should obtain necessary court orders. Otherwise, the access provider can resume the facility.

Reproduction of any work for the purposes of judicial proceedings or parliamentary work will not be an infringement. Earlier this was limited to literary, dramatic and musical works only.

The reproduction of a literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction, or as part of the questions to be answered in an examination or in answers to such questions. Other exemptions for educational purposes include the publication in a collection mainly composed of non-copyright matter, bona fide intended for the use of educational institution, provided that not more than two such passages from works by the same author are published

by the same publisher during any period of five years, and the performance in the course of activities of an educational institution of a literary, dramatic or musical work by the staff and students of the institutions or a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution.

Other permitted uses include the following:

The performance of a literary, dramatic, or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;

The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics;

The publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public;

The making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture;

The performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony, including a marriage procession and other social festivities associated with a marriage, or an official ceremony.

The Act also provides that the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work will not be an infringement.

Another exception is in regard to the making of a three-dimensional object from a two-dimensional artistic work, such as technical drawing, for the purposes of industrial application of any purely functional part of a useful device.

The Indian Act has a special provision with regard to sound recordings known popularly as version recording. The Act allows the making of sound recordings in respect of any literary, dramatic or musical work, if sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work and the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold and royalties in respect of all such sound recordings to be made by him at the rate fixed by the Copyright Board in this behalf. There are few attendant conditions also to this provision to ensure that it is not misused and that the copyright owner is not at a loss. This exception, after the 2012 amendment, has been moved to the category of statutory licences.

An important exception added by the 2012 amendments was the one for persons with disability. The adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format by any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research will not be an infringement. Any organisation working for

the benefit of the persons with disabilities in case the normal format prevent the enjoyment of such works by such persons can also do so. This exception is on condition that the copies in the accessible format shall be made available to the persons with disabilities on a non-profit basis. The person or organisation who makes such formats available can however, recover the cost of production. The organisation making such copies accessible to the persons with disabilities should ensure that the copies of works in such accessible format are used only by persons with disabilities and that those copies do not enter ordinary channels of business.

The Act also provides that the importation of copies of any literary or artistic works, such as labels, company logos or promotional or explanatory material that is purely incidental to other goods or products being imported lawfully is exempted.

The provisions in the Act ensures that the needs of private, personal uses, education, research, news reporting and uses for the purposes of the legislatures and judiciary are permitted without any hindrance. The deciding criterion is that the use should be fair.

Copyright is limited by the national laws. This is a kind of territorial limitation. But the TRIPS norm of national treatment enables foreigners to enjoy the same rights as a national, subject, of course to the two countries being members of the TRIPS Agreement. However, in the matter of duration of copyright, the law of the country of origin of the work prevails.

Case Law

A case where the issue of fair dealing came up and was examined exhaustively is the ***Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors.*** in the Delhi High Court in the year 2008 pronounced on 17 September, 2008 [I.A. 9823/2005, 51/2006 and 647/2006 in CS(OS) 1656/ 2005]

The court looked into case laws in the USA, UK and in India where the scope and extent of 'fair use' (in the US) and 'fair dealing' (in India and UK) were examined. This examination throws much light on the concept of exceptions and limitations and, therefore, the relevant extracts from the judgment are reproduced below:

The next question is whether such copying will be covered under the fair use exemption provided under Section 52 of the Act, assuming that the plaintiffs prima facie have established a copyright claim. Relevant parts of Section 52 of the Act are extracted below:

The doctrine of fair use or fair dealing is an integral part of copyright law. It permits reproduction of the copyrighted work or use in a manner, which, but for the exception carved out would have amounted to infringement of the copyright. In a seminal article published in 1990 Judge Pierre N Leval, wrote:

"The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law. Fair use should not be considered

a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity". [**Toward A Fair Use Standard,** 103 HARV. L. REV. 1105 (1990)].

One of the earliest decisions to deal with the doctrine of fair use was ***Folsom et al. v. Marsh et al,*** 9 F. Cas. 342, 1841 US App, where the (US)Supreme Court laid down the following:

"In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy."

The breadth of the fair use doctrine use was put to test in (the US case of) ***Harper and Row v. Nation Enterprises*** 471 US 539 (1985). Harper had contracted to publish Presidents Ford's memoirs. In exchange for $ 25,000, Harper allowed Time Magazine to extract 7500 word passage from the book, which dealt with the pardon to President Nixon. The Editor of *Nation* Magazine wrote an article relying on an unauthorised version of the memoir, which reproduced 300 to 400 words of the passage contracted to the *Time* Magazine. The article in *Nation* appeared before the article in Times and the latter refused to pay up the balance money to Harper. Harper brought an action for infringement of copyright, and *Nation* put up a fair use defence. The Court noted that the four factors identified by Congress (17 U. S. C. 107) as especially relevant in determining whether the use was fair were: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work and proceeded to test the facts on each of these grounds. In its analysis, the Court applied much emphasis on the commercial character of the defendant's use and its implication on the potential market of the copyrighted work. While doing so it recalled the observations made in***Sony Corp. of America v. Universal City Studios,*** Inc., 464 US 417 (1984), that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright". The Court, while fortifying the commercial-non-commercial divide, held that the fourth factor was the single most important factor while determining fair use. It is however, important to note the dissenting opinion of Justice Brennan in this regard. He regarded the majority opinion as conferring monopoly on historical facts and not merely on the exception. He cautioned that this approach would prove counter-productive to the very end of granting copyright protection and observed that:

"In my judgment, the Court's fair use analysis has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history. The failure to distinguish between information and literary form permeates every aspect of the Court's fair use analysis, and leads the Court to the wrong result in this case. Application of the statutorily prescribed analysis with attention to the distinction between information and literary form leads to a straightforward finding of fair use."

The contours of the fair use standard shifted somewhat with the decision in ***Campbell v. Accuff- Rose Music***, 510 US 569 (1994). The Supreme Court unanimously upheld the claim of the defendants that their parody to the plaintiff's song 'Oh, Pretty Woman' was covered by the fair use exception. It was uncontested that the defendant's song amounted infringement but for the 'fair use' exception. The Court held that all the traditional four factors employed to reach a conclusion of fair use are to be treated together, not in isolation and no undue preference can be given to any one of them. In relation to the first factor, it was held that Court must look into the nature of the use, i.e. whether it was for educational purposes or for review or criticism. The central enquiry (according to the Court) is to see if the work merely supersedes and supplants the original work or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; in other words, whether and to what extent the new work is 'transformative'. The Court borrowed the latter expression from Judge Pierre Leval. Transformative works, the Court held, have a greater chance of falling within the fair use defence and such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright. If one may put it differently, the question to be addressed would be is there a value addition, which alters the original work in a not insignificant measure. The second factor, which evaluates the nature of the copyrighted work, is intended to find out if the work actually merits copyright, that is, whether copyright law was intended, at its core, to cover such works. However, the Court cautioned that this factor is not likely to help much in separating the fair use sheep from the infringing goats, in cases where the subsequent work is transformative. The third factor, which deals with the extent of copying, does not entail that the reproduction of the entire work would militate against the finding of fair use. There could be cases where the copying could be substantial and the courts finds fair use, at the same time there could be cases where the copying though insubstantial could be held as infringement. Lastly, the court observed that the fourth factor, where the market harm to the copyrighted work had to be assessed, could not be the sole determinative factor. The Courts have to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market. The Court went on to hold that the defendants use, was covered by the doctrine of fair use and did not amount to infringement.

The Court's holding in Campbell, has been followed in ***Sun Trust Bank v. Houghton Mifflin,*** 268 F.3d 1257 (11th Cir.2001) (vacating the injunction on '**The Wind Done Gone'** a fictional work based on Margaret Mitchell's **Gone With the Wind**); ***Bill Graham Archives v. Dorling Kindersley***, 2006 US App LEXIS 11593 (holding that reproduction of images appearing in posters and

tickets, in a coffee table biography fall within the fair use exception) and very recently in ***Peter Letterese and Associates v. World Institute of Scientology Enterprises***, D.C. Docket No. 04-61178-CV-PCH (July 8, 2008).

In the United Kingdom, in ***Hubbard v. Vosper***, (1972) 2 WLR 389, the Court while dealing with the question of what amounts to fair use observed as follows:

"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.

To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide."

Indian law too, in relation to copyright infringement is interesting. The Supreme Court in RG Anand had to adjudicate whether the film produced by the defendant had in any manner infringed the copyright held by the plaintiff in his play. The Court after referring to a number of authorities on the subject observed that the same idea might be developed in different ways and if the defendant's work is nothing but a colourable imitation of the plaintiff's work, then it would amount to infringement. It set out the following as the test for determining infringement:

"One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original."

Remarkably, the court, presciently in its judgment propounded a principle resembling the 'transformative work' doctrine developed in the United States much later. It held that:

"Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises."

In *Ramaiah* .., the Andhra Pradesh High Court had to consider whether a guide book prepared to help students understand and study a text called 'Girija Kalyanam' amounted to infringement. The Court took note of the fact that the guide consisted of three portions, the first of which gave meanings to the text. The second portion contained annotations and illustrations of the meanings and the third portion consisted of probable questions and answers. The Court distinguished the facts from that in ***Blackwood and Sons v. AN Parasuraman*** …, where the infringing work merely eliminated certain passages from the original work and retained the essential part of the narration in substantial form. Since, the guide was found to be much more than a mere replication of the earlier work, incorporating questions and answers, analysis, etc, the injunction was refused.

In *EM Forster* …, the Court had to determine whether a guide published for the novel 'A Passage to India' violated the copyright in the original novel. Here again, the Court noted that there was no verbatim reproduction of the entire novel. The guide was divided into different portions, which consisted of an introduction to the characters, the life and philosophy of EM Forster, a brief introduction to the works of EM Forster and of course an abridged version of the novel; though not chronological. The Court observed, referring to ***Kartar Singh Giani v. Ladha Singh***, AIR1934 Lah 777 that in the guise of copyright law the plaintiff cannot ask the courts to close all the avenues of research, scholarship and all frontiers of human knowledge. The court found that the guide did not constitute an infringement and therefore, did not go into the question of fair dealing. In *Romesh Chowdhry* … too, the facts involved publication of guide books to books published by the University in accordance with its syllabi. The Court found that the guides were not colourable imitations of the University publications and amounted to criticism and review of those books. It also observed that since the University in their syllabus published these books for the students, the matter had gone into the hands of the students and no copyrights on the strict sense of the term remained with the complainant?

The question of fair dealing came up for consideration in ***Civic Chandran v. Ammini Amma*** 1996(16) PTC 670. The defendants had published a play **'Ningal Are Communistakki'**, that was intended to be a critique of a famous play **'Ningal Enna Communistakki'**. The court referred to ***Hubbard v. Vosper*** **and** ***RG Anand*** and concluded that the play was meant to be a critique and therefore, constituted fair dealing under Section 52. It observed that the latter work was not market competitor to the prior work, and by itself constituted a literary work with some amount of originality. Moreover, the Court held that the nature of the work, that is to criticize the social structures in Kerala, by itself meant that certain sequences, events and incidents would be common to both the prior and the subsequent work, and that the latter was not meant to imitate the former. Injunction was therefore, denied.

Copyright law is premised on the promotion of creativity through sufficient protection. On the other hand, various exemptions and doctrines in copyright law, whether statutorily embedded or judicially innovated, recognise the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information. Two doctrines that could immediately be summoned are the idea-expression dichotomy and the doctrine of 'fair use' or 'fair dealing'. Public interest in the free flow of information is ensured through the idea-expression dichotomy, which ensures that no copyright is granted in ideas, facts or information. This creates a public pool of information and idea from which everyone can draw. At the same time, as Judge Leval observes, all creativity is in part derivative, in that, no creativity is completely original; "each advance stands on building blocks fashioned by prior thinkers" (Bernard Shaw expressed it by saying that Shakespeare was a "tall man", but he (Shaw) was taller as he stood on Shakespeare's shoulders). Judge Leval further observed that most important areas of intellectual creativity like philosophy, literature and sciences are referential, and require continuous re-examination of existing theses.

The doctrine of fair use then, legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public

pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. Fair use provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and that the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts to identify fair use.

One crucial test, of the four-factor test, as developed by the American courts, is the transformative character of the use. The Courts should in cases like the present ask whether the purpose served by the subsequent (or infringing) work is substantially different (or is the same) from the purpose served by the prior work. The subsequent work must be different in character; it must not be a mere substitute, in that, it is not sufficient that only superficial changes are made, the basic character remaining the same, to be called transformative. This determination, according to the Court is closely knit with the other three factors, and therefore, central to the determination of fair use. If the work is transformative, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work.

In the present case, this court has considered the plaintiff's textbooks, as well as the defendant works. The following aspects stand out;

a) The plaintiff's textbooks, so far as they contain the 'theory' portions, have not been copied;

b) The plaintiff's books do not contain the steps, or process aiding the solutions (or answers) to the questions/ problems, in each chapter. The learner is expected, on the basis of the text and the theory, to apply his mind, and solve such problems

c) The defendants' copies do not contain the text and the theory portions, analysing the problems;

d) The defendants' copies contain the questions as well as answers, which are found in the plaintiffs' textbooks;

e) The defendants provide the problem solving 'step-by-step' method to arrive at answers to the questions.

A careful analysis of the above would show that whereas the plaintiff's texts do not contain or describe the step-by-step process of arriving at solutions (answers), the defendants' books provide them. The defendant's books do not contain the theoretical or explanatory content- they are present in the plaintiffs' textbooks. The use of questions and answers by the defendants, who provide the step-by-step process of reasoning, is for a different purpose. Though to a purist or one who delights in intellectual pursuits, such works may be distasteful, - even offensive there is no gainsaying that they neither pretend to be textbooks, nor reproduce all that are contained in them. They are designed to cater to a category of student 'weak' in their understanding of the subject.

The purpose and manner of use of the questions found in the plaintiff's textbooks, by the defendants is thus different; additionally, in their books, missing in the plaintiff's works are the steps or process of problem solving. Thus, the defendants' works can be said to be 'transformative', amounting to 'review' under Section 52 (1) (a) (ii) of the Act. Here, the term 'review' has to be interpreted in the context. The plaintiffs claim to copyright is premised the work being a 'literary' one. The review or commentary, of a part of such mathematical work too would have to be seen in the background of this claim.

'Review' according to the Shorter Oxford Dictionary (Fifth edition) means "view, inspect or examine a second time or again.." In the context of a mathematical work a review could involve re-examination or a treatise on the subject. In that sense, the defendants' revisiting the questions, and assisting the students to solve then, by providing the 'step by step' reasoning prima facie amounts to a review, thus falling within the 'fair dealing' provision of Section 52 (1) (a) (ii) of the Act.

Self Assessment Questions **(Spend 3 minutes each)**

1) You are undertaking a research. You have to quote in your research thesis from a number of sources. Examine the need for taking permission of the copyright owners of those works.

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2) Your college wants to stage a play for its annual day. Reflect on the copyright issues that may be involved in staging the play.

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4.4 SUMMARY

In this Unit, we have seen that there are many uses of a copyrighted work which do not require any specific authorisation of the copyright owner. Mostly they should be fair dealings, which really do not deprive the copyright owner of his rightful economic returns. A fair dealing with works for personal uses without any commercial purposes are generally exempt. Uses for legislative and judicial purposes also are exempt.

4.5 TERMINAL QUESTIONS

1) What are the kinds of special provisions regarding use of copyrighted material by educational institutions or for educational purposes?
2) What are the special provisions regarding reproduction of a sound recording?
3) What are the exceptions provided for computer programmes in the matter of copyright?
4) What are the exceptions provided for making works available to persons with disabilities?

4.6 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 4.3
2) Refer to Section 4.3

Terminal Questions

1) Refer to Section 4.3
3) Refer to Section 4.3
3) Refer to Section 4.3

4.7 REFERENCES AND SUGGESTED READINGS

1) International Copyright and Neighbouring Rights by S. M. Stewart, Chapters 4, 5 and 6.
2) Copyright and Industrial Designs by P. Narayanan, Chapter 14.
3) Lal's Commentary on Copyright Act, Chapter XI Section 52.
4) Iyengar's The Copyright Act,1957, Introduction, Chapter XI Section 52.

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