

# **Infringement Analysis in Copyright Law**

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Conceptually speaking, copyright infringement analysis in a given factual scenario involves three basic steps – (i) establishing that the work is protected under copyright, exists; (ii) the alleged infringing act falls within the scope of exclusivity offered for that work; and (iii) the act is actually infringing in nature. The scope of this note is limited to direct infringement of copyright.

## **Standard for Determining Originality**

As per Section 13 of the Indian Copyright Act, copyright subsists, *inter alia*, in ‘original’ literary, dramatic, artistic, musical works as well as cinematographic films and sound recordings. The plaintiff in any copyright infringement suit must first establish that his work is original if it is literary, dramatic, artistic or musical in nature. However, originality itself has not been defined anywhere in the Copyright Act. Indian courts have relied upon doctrines laid down in various judicial pronouncements in the UK and the US.

The Privy Council, in the case *Macmillan & Company Ltd. v. Cooper*,<sup>1</sup> approved the principle laid down in *University of London Press v. University Tutorial Press*<sup>2</sup>, which laid down that copyright over a work arises and subsists in that work due to the skill and labour spent on that work, rather than due to inventive thought. This is more popularly known as the ‘sweat of the brow’ theory – originality derives merely from the fact that sufficient labour, skill, capital and effort (whether physical or otherwise) has been applied. This seems to be the original principle adopted in India as well, as illustrated by the Delhi High Court judgment in the case of *Burlington Home Shopping v. Rajnish*

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<sup>1</sup> See *Macmillan Company v. J.K. Cooper*, (1924) 26 BOMLR 292

<sup>2</sup> See *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601

*Chibber*,<sup>3</sup> where it was held that a compilation may be considered a copyrightable work by virtue of the fact that there was devotion of time, labour and skill in creating the said compilation.

However, recently, the law in other countries has departed from the ‘sweat of the brow’ doctrine. The landmark US Supreme Court decision of *Feist Publications v. Rural Telephone Service*<sup>4</sup> rejected the ‘sweat of the brow’ doctrine on the basis that it flouts basic copyright principles and creates a monopoly, and instead, laid down the principle of ‘minimum modicum of creativity’. Effectively, this new doctrine of ‘minimum modicum of creativity’ stipulates that originality subsists in a work where a sufficient amount of intellectual creativity and judgment has gone into the creation of that work.

The Indian Supreme Court, in its landmark judgment of *Eastern Book Company v. D.B. Modak*<sup>5</sup>, departed from both these approaches and for the purposes of Indian law, established a standard of originality that fell midway between ‘sweat of the brow’ and ‘minimum modicum of creativity’. In doing so, the Indian Supreme Court was simply following the reasoning given by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*,<sup>6</sup> the case which first established this midway standard. In reality, this midway standard is extremely difficult to practice and implement. According to this midway standard, an ‘original’ must be a “*product of an exercise of skill and judgment*”, where ‘skill’ is “*the use of one's knowledge, developed aptitude or practised ability in producing the work*” and ‘judgment’ is “*the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work*”.<sup>7</sup> As per the Canadian Supreme Court, this exercise of skill and judgment must not be “so trivial that it could be characterized as a purely mechanical exercise” and must be “*more than a mere copy of another work.*”<sup>8</sup> At the

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<sup>3</sup> 61 (1995) DLT 6

<sup>4</sup> See *Feist v. Rural*, 499 U.S. 340 (1991)

<sup>5</sup> See *Eastern Book Company v. D. B. Modak*, AIR 2008 SC 809

<sup>6</sup> 2004 (1) SCR 339 (Canada)

<sup>7</sup> *Id.* at para.16.

<sup>8</sup> *Id.*

same time, “*creativity is not required*” to make the work ‘original’.<sup>9</sup> As evident, a great deal of ambiguity exists around the practical implementation of this standard.

## **Rights of the Owner**

After establishing originality, the next issue for the purposes of infringement analysis is whether the allegedly infringing act falls within the scope of exclusivity delineated to the owner (and to persons authorized by such owner) under the law. The Indian Copyright Act, 1957, under Section 14, defines copyright to consist of certain rights, which varies with each type of work. A detailed exposition of these rights is beyond the scope of this short note. Generally speaking, this includes the right to reproduction, publication, translation and adaptation. In order to successfully prove a claim of infringement, the plaintiff has to establish that the defendant(s) has engaged in one of the acts that falls within the scope of exclusivity under Section 14, depending on the type of work involved.

## **Infringement Test**

Once the rights of the owner have been established, the next step is proving that there is actual infringement. Of course, if the defendant, say, makes copies of a copyrighted work and commercially exploits such copies, nothing further needs to be proved to establish infringement apart from what has been discussed above. However, more complicated questions arise when the defendant the alleged infringing work involved relates to something, which is similar to, but not identical with the plaintiff’s work. In such cases, in order to prove infringement, the plaintiff must show that:<sup>10</sup>

1. The defendant *copied* directly from the plaintiff’s work, and
2. The elements copied, when taken together, amounts to an **improper appropriation**.

## **Copying**

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<sup>9</sup> *Id.* at para.25.

<sup>10</sup> See *Arnstein v. Porter*, 154 F.2d 464

The plaintiff must prove that the defendant has copied his work through any means possible and available to him, and the effect of such proof is that the defendant cannot escape liability by claiming innocence and that he had no knowledge of the work which was copyright-protected. Any resemblance between the plaintiff's work and the defendant's work would not necessarily imply an instance of infringement of the plaintiff's work,<sup>11</sup> although it may play a role in proving infringement. The copying requirement protects that defendant who has never consulted the plaintiff's work nor has had access to it, but whose work is, because of coincidence or artistic convention, substantially similar to that of plaintiff's.

Recognizing that direct evidence of copying will be rarely available, courts have universally allowed copyright owners to prove copying on the basis of circumstantial evidence, specifically through inferences from the defendant's **access** to the plaintiff's work and from any similarities between two works.<sup>12</sup> Copying can, therefore, be proved by **inference**. It can be inferred that the defendant has in fact copied the plaintiff's work from the fact that the defendant had access to the plaintiff's work and from the similarities between his work and that of the plaintiff's. The rationale behind this is that given the sufficient opportunity that the defendant had to copy the plaintiff's work in addition to the striking similarity between the two works, the evidence in hand is indicative of copyright infringement.

There is a reciprocal relationship between *proof of access* and *similarity* and this relationship is subject to two important limitations:

- “If there are no similarities, no amount of evidence of access will suffice to prove copying.”<sup>13</sup>
- “If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and the defendant arrived at the same result.”<sup>14</sup>

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<sup>11</sup> See Paul Goldstein's Goldstein on Copyright, Vol. II 3<sup>rd</sup> edn., Aspen Publishers, p.no. 9.3

<sup>12</sup> See Paul Goldstein's Goldstein on Copyright, Vol. II 3<sup>rd</sup> edn., Aspen Publishers, p.no. 9.6. *Urmi Juvekar v. CNN-IBN*

<sup>13</sup> See *Arnstein v. Porter*, 154 F.2d 464

<sup>14</sup> *ibid*

If the plaintiff offers sufficient proof of access and similarity which would support an inference of copying, the defendant must introduce evidence to rebut such an inference which proves against him.<sup>15</sup>

### **Improper Appropriation**

In order to establish “Improper Appropriation”, the plaintiff must meet two tests:

1. The plaintiff must show that the defendant’s work has appropriated that expression of a copyright work which is protected under copyright law;<sup>16</sup> and
2. The plaintiff must show that audiences will perceive substantial similarities between the defendant’s work and the plaintiff’s protected expression.<sup>17</sup>

### The Protected Expression Test

The first test for improper appropriation is to identify whether the defendant’s work copies any protected expression from the plaintiff’s work, i.e., exclude those elements from the plaintiff’s work, which are not protectable under law. Examples of such elements are expressions which to which the Merger Doctrine<sup>18</sup> applies or the doctrine of “*Scenes a faire*” applies.<sup>19</sup> The Court first separates these elements from the work that is alleged to be copied.

Of course, in reality, the most difficult task is to determine the point at which the unprotectible ideas in a copyrighted work end and where the protected expression starts. In *Nichols v. Universal Pictures Corp.*<sup>20</sup>, Judge Learned Hand held that

*“When the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of*

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<sup>15</sup> See *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063

<sup>16</sup> See *Kohus v. Mariol*, 382 F.3d 848

<sup>17</sup> *ibid*

<sup>18</sup> This arises in situations where the idea and expression merge and since copyright law does not protect ideas per se, that element is not protected under copyright.

<sup>19</sup> This relates to those elements, which necessarily have to be present in any form of expression of an idea and hence, not protected under copyright.

<sup>20</sup> See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119

*what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.*"<sup>21</sup>

### The Audience Test

To establish infringement, the plaintiff must then demonstrate that any audience would find the expression in the defendant's work substantially similar to the plaintiff's work. Courts sometimes refer to this test as an "audience" test and sometimes as an "ordinary observer" test. The principle of this test is that to a third person, or a layman, the two works should seem so substantially similar that they would not be able to distinguish between the two.

Specifically in the context of computer programs, the U.S. Second Circuit Court in the case *Computer Associates International, Inc. v. Altai, Inc.*<sup>22</sup>, formulated the "Abstraction-Filtration-Comparison" test. This test comprises a three step methodology whereby a court must first break down the program alleged to be infringing into its constituent structural parts, thus segregating the ideas from the expressions through *abstraction*. Then, by examining each of these expressions for exceptions such as the Merger Doctrine, accounting for an expression that is necessarily incidental to those ideas, and other expressions which are public knowledge and are openly available in the public domain, a court would thereafter be able to *filter* out all non-protectable material. Left with the kernel(s) of creative expression after following this process of elimination, the court's last step would be to *compare* this material, protected by copyright, with the allegedly infringing program.<sup>23</sup> This would involve something similar to the test of 'substantial similarity' discussed above. On the whole, one may clearly see the similarities between the test laid down in the Altai case and the original tests followed in the context of other works.

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<sup>21</sup> *ibid*

<sup>22</sup> See *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693

<sup>23</sup> *ibid*

## **Position in India and Conclusion**

The position of law in India is slightly different in this regard. A thorough reading of the Supreme Court's decision in *R.G.Anand v. Deluxe Films*<sup>24</sup> would show that infringement in India is normally established through comparison of the two works from a holistic perspective. Although the said decision does specifically state, for instance, that ideas *per se* are not protectable, the similarity in the ideas between the two works involved in that case seems to have been a factor that the Court considered. Therefore, the law in India prescribes more of a total "look and feel" of the work involved, as seen from the perspective of the viewer / audience. Therefore, while courts in the USA have been attempting to go in depth into the subtleties in infringement analysis, Indian case-law paint a much broader, albeit, much more subjective test.

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<sup>24</sup> See *R.G.Anand v. Deluxe Films*, AIR 1978 SC 1614