

Subject: Law

Production of Courseware
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Paper : Intellectual Property

Module : Subject-matter requirement in Indian
Copyright Law



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Module Detail	
Subject name	Law
Paper name	Intellectual Property
Module name/ Title	Subject-matter requirement in Indian Copyright Law
Module Id	Law/IP/#15
Pre- requisites	Basics of IP, concepts, economics of copyright; TRIPS
Objectives	<ol style="list-style-type: none">1. To study the importance of subject-matter in copyright law.2. Pre-requisites for qualifying as a subject matter of Copyright.3. To understand the concept of originality and its importance in Copyright laws.
Key words	Copyright, original work, literary, dramatic, artistic, abridgement, subject matter of copyright.



Introduction

This module aims at introducing the reader to concepts related to what constitutes 'Copyrightable subject matter' as well as 'what is excluded from Copyright protection.' In doing so, important case law are discussed to analyse the standard for subject matter requirement in Indian Copyright law primarily. We shall begin with some fundamentals.

Learning Outcome:

1. To understand the nature of copyrights and its pre-requisites.
2. To critically examine the concept of originality governing the copyright laws.
3. To evaluate the exclusion of certain requirements for protection under copyright laws.
4. To distinguish copyrightable literary works from non-copyrightable work.
5. To understand what actually constitutes literary, dramatic & artistic works.
6. To explain the reasons for exclusion of certain subject matter from the ambit of copyright laws.

Fundamentals of Copyright

Copyright is not a perpetual right. It exists for a specific term. After the expiry of the term, the 'work' falls in the public domain and is then open for public to use without permission of the owner. The term of protection afforded to *any* 'work' which qualifies as a Copyrightable subject matter may be understood in two parts. For literary, dramatic, musical and artistic works the term is life of the author and 60 more years from the beginning of the calendar year next following the year in which the author dies; Secondly, for photographs, cinematograph films, and sound recording it is until 60 years from the beginning of the calendar years next following the year in which the work is first published or released.



Prerequisite for qualifying as a subject-matter of copyright

Section 13 of the Indian Copyright Act describes the kind of works that enjoy copyright protection –

(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) records.

[...]

Section 13 (a) of the Indian Copyright Act provides that only **original** literary, dramatic, musical or artistic work would qualify as being copyrightable.

Thus, not all works enjoy copyright protection. A literary, dramatic, musical or artistic work has to be original in order to enjoy copyright protection.

Understanding Originality

Originality relates for the work to **originate from the author**. Copyright law requires that the ‘expression’ of the idea in the work must not be copied from another’s work and that it should originate from the author.

In *University of London Press v. University Tutorial Press* (Chancery Division - Commercial Law Disputes),¹ the Court observed that original does not mean an inventive or novel thought. While holding that mathematics examination paper in this case was original literary work, it was held that: A “work which is expressed in print or writing irrespective of whether the quality or style is high [is original work].”

In *Walter v. Lane*,² the Court observed that the author must exercise his/her own labour and skill in creating the work, for the work to be afforded copyright protection. This ruling however is not good law anymore as subsequent to this decision the UK Copyright Act has been amended and originality as a requirement has been mandated by law. However for the sake of conceptual clarity, the facts of the case need be comprehended. The Times had employed short-hand writers to transcribe speeches delivered by Lord Rose Berry. The transcripts of the speeches were published in the Times. The defendant compiled the transcripts along with other speeches and addresses made by Lord Rose Berry and published a book. The shorthand

¹2 Ch. 601 (Chancery Division 1916).

²[1900] AC 539



writers sued the defendant alleging that the book was not an original work of authorship. The majority opinion of the Court was in favour of the shorthand writers when the Court observed that though the shorthand writers had no copyright in the speeches themselves they had copyright in the transcripts of such speeches which were developed by them. Hence they can successfully prevent the Defendant from appropriating the fruits of their labour by publishing the transcripts without permission.

In *Ladbroke v. Hill*,³ the form of fixed odds football betting coupons was held to be original literary work. In this case, R claimed to have devised a certain form of fixed odds football betting coupons offering an attractive variety for customers to wager at widely different odds. The Court found that the arrangement and content of the coupons were the central point of the business. The Plaintiff claimed that their forms of coupons were allegedly copied by R and so an infringement action was initiated. The Court had to address the issue of whether the coupons are copyrightable subject matter. The Court found in favour of the Plaintiffs, observing that the coupons must contain an assorted selection of bets that will attract a customer and induce him to fill up the coupon in preference to rival coupons; to this end the Plaintiffs have devoted much work, money and ingenuity to develop the form of fixed odds football betting coupons which while being profitable to them will fill the coupon with the greatest allure for the customer. Therefore the form of fixed odds football betting coupons originated from the Plaintiffs and was held to be original literary work.

Section 13 of the Indian Copyright Act: Works in which copyright shall not subsist

(3) Copyright shall not subsist--

- (a) in any cinematograph film *if* a substantial part of the film is an infringement of the copyright in any other work;
- (b) in any record made in respect of a literary, dramatic or musical work, if in making the record, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a record 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 record is made.

(5) In the case of an architectural work of art, copyright shall subsist *only* in the artistic character and design and shall *not extend to* processes or methods of construction.

1.2.2 What is excluded from the subject matter requirement?

Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices are not copyrightable subject matter.

- However, written or recorded descriptions, explanations, or illustrations of such ideas are protectable under copyright law.

Titles, names, short phrases, slogans and mere listings of ingredients or contents are not copyrightable subject matter.

3[1964] 1 All ER 465



- However, some titles and words might be protected under trademark law if their use is associated with a particular product or service.

Works that are not fixed in a tangible form of expression, such as an improvised speech or performance that is not written down or otherwise recorded are not copyrightable subject matter.

Works consisting entirely of information that is commonly available and contains no originality (for example, standard calendars, standard measures and rulers, lists or tables compiled from public documents or other common sources) are not copyrightable subject matter.

Hereinafter, a discussion on the particular aspects of works that constitute copyrightable subject matter shall be dealt with.

1.3 Literary Work

Not all literary works enjoy copyright protection. Section 2(o) of the Indian Copyright Act does not define the term 'literary work' as such but it includes computer programmes, tables and compilations including computer databases within the ambit of what is described as *literary work*. Therefore, literary works are not limited to works of literature alone, but include all works expressed in print or writing (other than dramatic or musical works).

Also noteworthy is that the protection is *not* limited to words, but includes symbols and numerals. The scope of the subject matter protected as a literary work is enhanced by the fact that a work will be protected irrespective of the quality or style of the creation in question.

Points to ponder –

Literary work has to have the following characteristics:

- It must be original and be fixed in some form.
- The word literature has to be understood in the same manner as it is understood in political and electioneering sense.
- Hence *no literary merit* is required.
- Therefore almost every kind of written material work would constitute literary work within the meaning of Section 13 (1).

1.3.1 Some examples to help distinguish of copyrightable literary works from non-copyrightable ones is described hereunder:

Abridgement of an author's work means a statement designed to be complete and accurate of the thoughts, opinions and ideas expressed by the author therein but set forth much more concisely in the compressed language of the abridger. Therefore, an abridgement connotes to a new book. The abridger being the author of such new book.

Case law: Macmillan & Co. v Cooper⁴

⁴(1924) 26 BOMLR 292



Appellant's book had text consisting of passages selected from North's Translation of Plutarch's *Life of Alexander*, with words being introduced in some places to give it a form of an unbroken narrative. North's translation consisted of 40000 words, the text of the Appellant's book consisted of 22000 words. Appellant alleged that a similar book published by Respondents was an infringement of their copyright. It was held that, sufficient knowledge, labour, judgment or literary skill was not expended by Appellant to entitle him to copyright protection. Appellant's work did not amount to abridgement, which connotes a new book and is to be distinguished from mere extracts.

The Act includes **compilations** as a form of literary work. Therefore arrangement of broadcasting programmes, a telephone directory, a list of registered bills of sale, deeds of arrangement extracted from official sources, biographical notes of prominent golfers published in a golf manual, a manual of the classified information for the use of motor car insurers, football coupons and a chemist's catalogue of drugs for sale are all copyrightable subject matter.

New editions of books: Where a copyright work is edited, there may be two copyrights existing simultaneously. The copyright in the original text vests in the original author and the copyright in the additions and re-arrangements of the text, vests in the person who makes the new edition.

Law reports and judicial decisions: A law reporter may have a copyright in his/her work, *if* such report qualifies as being an original work. However, the copyright in the judgments delivered by the courts vests in the government.

According to Section 2(n) **lectures** would include addresses, speeches and sermons. Copyright can subsist in a lecture only if it is in a written form. Previously extempore speeches were not copyrightable subject matter, however since the Copyright Amendment Act 1994, a person delivering a lecture is defined as a 'performer' under Section 2 (qq) of the Indian Copyright Act, 1957.

Letters qualify as the kind of literature which is protected by copyright law, wherein copyright in the letters vests in the writer and not to the addressee.

Titles, names, short phrases, and slogans are not considered literary work, therefore no copyright subsists in such. Essentially such phrases or words are part of the public domain and if they were copyrighted then the owner of such copyright would enjoy a limited monopoly right over them thereby excluding or controlling the public from using such phrases or words during the term of the copyright. Copyright law does not aim at holding the public ransom for what is essentially in the public domain.



News is essentially facts, which are not copyrightable subject matter. In the famous case of *Express Newspapers*,⁵ the issue before the Court was whether a newspaper has copyright in its news story and whether it amounts to infringement if another newspaper picks up the same story and reproduces it in its own words. The Court held that no one has right over the facts narrated in a story.

Invented words are subject matter of trademark law and not considered to be copyrightable. In the case of *Exxon Corp v Exxon Insurance Consultants International Ltd.*,⁶ a company invented the word 'Exxon' as its corporate name and trademark. Another company which borrowed the name without the consent was sued. It was held that copyright cannot subsist in a work just because it is original and literary. The work must offer information, instruction or pleasure in the form of literary enjoyment to be defined as a literary work.

1.4 Dramatic work

Section 2(h) of the Indian Copyright Act defines dramatic works to include any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise. [but does not include a cinematographic film.]

Simply put, a work of action, with or without words or music, which is capable of being performed before an audience is a dramatic work. Copyright subsists not only in the actual words of the work but in the dramatic incidents of the work as well.

The essence of a dramatic work is a story or a narrative. As a prerequisite in copyright law, for a piece of dramatic action to be protectable, a written description of the acts of the performer is essential. Therefore, a dance or pantomime by itself, sans the written description, is not capable of protection as a dramatic work.

Noteworthy case law includes the following:-

- a) *Tate v. Fullbrook*⁷: The Court while addressing the issue of whether scenic effects taken in isolation, without regard to the words and incidents of the piece constitute copyrightable subject matter, found in the negative. In essence, it was held that a dramatic piece in its entirety along with the scenic effects is protected as dramatic work under Copyright Law.

⁵*Express newspapers v. News (U.K)* 1991 FSR 36.

⁶[1982] Ch. 119.

⁷1 K.B. 821 (C.A. 1908).



- b) *Norowzian v. Arks Ltd*⁸: This English case lays down that a film or a motion picture can also qualify as a dramatic work. The Court of Appeal observed that for a dramatic work it must be "capable of being performed before an audience" and in enabling such capability the work may not necessarily involve physical performance by a human being but can include performances by artificial means such as the playing of a film. The Claimant in the case had directed a short film with no dialogue titled *Joy* in the year 1992. The striking feature of film was the visual effect in the nature of apparent sudden changes in the position of the protagonist (the hero) while dancing to music. This special effect was produced by using an editing technique known as "jump cutting". The Trial Court held that a dramatic work is one which was capable of being 'physically' performed. However, the Court of Appeals interpreted the requirement that a dramatic work must be "capable of being performed" quite liberally to include performances by *artificial* means such as the playing of a film as well. The Court held that, the film is a work of action and it is capable of being performed before an audience, therefore it qualifies as a dramatic work.
- c) *Fortune Films International v. Dev Anand*⁹: In the instant case, the Bombay High Court has held that motion picture is not a dramatic work within the meaning of Section 2 (h) of the Indian Copyright Act, 1957. The plaintiff (Dev Anand) in the case argued that a cinematographic film comprises of several dramatic works. Most of the drama in the film ensues from the performance or acting demonstrated by the cine artist. Therefore, every dramatic element should qualify and be protected as a dramatic work defined under Section 2 (h) of the Act. The Court held that though the definition is inclusive, yet it cannot be stretched to include every exertion or effort of a dramatic nature. The definition cannot be interpreted to include a motion picture in line with a piece of recitation or choreography or entertainment in dumb show. Hence motion picture was held not to be a dramatic work.
- d) *Green v. Broadcasting Corporation of New Zealand*¹⁰: This English case clarifies the position of television formats as a dramatic work. The Privy Council held that the work or format in question must have *sufficient unity* to be capable of performance before an audience, and this was lacking in the "dramatic format" of the television show titled 'Opportunity Knocks'. The

⁸[1999] EWCA Civ 3014.

⁹AIR 1979 Bom 17

¹⁰[1989] R.P.C. 700 (PC)



author and compere (Green) of a talent show titled Opportunity Knocks sought to prevent the Broadcasting Corporation of New Zealand from using a similar show format under the same name. Other similarities between the two shows included features wherein sponsors were to introduce contestants to the viewers, a "clapometer" device as a means of assessing audience reaction and catch-phrases used by the compere such as "This is your show, folks, and I do mean you" to capture the attention of the viewer. The Privy Council refused to recognise that copyright subsisted in the scripts or "dramatic format" of the show *Opportunity Knocks*. The Court observed that the show's format lacked sufficient unity and also certainty with respect to the subject matter.

1.5 Musical Works

Section 2(p) of the Indian Copyright Act defines musical work to mean a work consisting of music and includes any graphic notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. The requirement of fixation in graphical notation within the definition of musical works has been done away with. The definition seeks to cover all forms of music irrespective of it being fixed. The definition of a musical work clarifies that it does not include words intended to be sung or spoken with the music or action intended to be performed with the music.

Point to Ponder: If a dramatic work may include music, then will the music be entitled to a separate copyright?

Answer: Yes, notwithstanding that the music also forms an integral part of the dramatic work, it shall be entitled to a separate copyright protection as a musical work.

1.6 Artistic Works

Section 2(c) of the Indian Copyright Act defines artistic works to include

A painting, a drawing (including a diagram, map, chart, or plan), an engraving or a photograph, whether or not any such work possesses any artistic quality.

A work of architecture.

Any other work of artistic craftsmanship.

To be protectable as an *artistic* work, the work ought to satisfy the prerequisite of 'originality' as defined in the Act. No *artistic quality* is required. Therefore anybody who can paint an original artwork can be entitled to copyright protection from the time the artwork has been created by him/her. Copyright law while attributing authorship to a painter does not delve into the subjective assessment of how good or poor an artwork is. That kind of assessment is left to be made by connoisseurs and dealers of art, and is understood to be outside the purview of copyright law.

Similarly works of architecture are protected as artistic work as long as they are originating from the author, i.e., the architect. *Architectural drawings*, diagrams, charts, maps, plans and even circuit diagrams are all protected as artistic works. However, one must take note that the building or structure



which constitutes a work of architecture is built on the basis of a plan which enjoys a separate copyright apart from the copyright in the building itself.

Point to ponder:

- (i) Is a straight line drawn with the help of a ruler a drawing, and therefore protectable as artistic work?

Answer: In the case of *British Northdrop v. Texteam Blackburn Ltd*,¹¹ it was held that one should be a little slow to exclude drawings from copyrightability on the mere score of simplicity. Apart from the cases of barren and naked simplicity like a straight line, a simple work should be held to be copyrightable.

A *sculpture* would be an example of a work of artistic craftsmanship. Copyright law affords protection to the work involving the art of carving, modeling, welding or otherwise producing figurative or abstract works of art in three dimensions as long as this work originates from the sculptor.

Point to ponder:

- (i) Are sets of machine made replicas of the Taj Mahal sold as décor items capable of being protected as works of artistic craftsmanship?

Answer: No. Machine made replicas are not considered artistic craftsmanship.

1.7 Photographs

A photographic work includes any photo lithograph or any work produced by any process analogous to photography (*but* does not include any part of a cinematographic film). As is the case of all copyrightable subject matter, the photograph has to be original.

Point to ponder:

- (i) Does a photograph of an already existing photograph enjoy copyright protection?

Answer: No. A photograph of an already existing photograph is *not* an original work. Therefore it will not be afforded copyright protection.

- (ii) Is a painting based on scenery captured in a photograph an infringement of the copyright in the photograph?

Answer: No. However if the photograph itself is found to be not original, then a painting based on such photograph is not an infringement. For discussion on this point, one may refer to the case of *Bauman v Fussell*¹² where a photograph of bird fight was held to be not original and hence a painting based on it was not an infringement.

1.8 Cinematographic Works

Section 2(f) explains that 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

¹¹[1974] RPC 57

¹² [1978] RPC 485



recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films.

Points to ponder:

- (i) Does a remake of a foreign language film enjoy the same protection as the original version of the film?

Answer: A remake of a foreign language film is a derivative work and even when authorized to remake the film, in order for your remake to enjoy the same protection as the original version of the film, it must display some originality of its own.

- (ii) What if the original version of the film above is in public domain now, can you still remake it? And if you do, does your remake then enjoy a copyright protection as if it were an original?

Answer: if the original version of the film is in the public domain, anyone is free to remake it. However, in order for this remake to enjoy copyright protection it must contain sufficient new expression over and above that embodied in the older version. Originality is sine qua non of Copyright law.

- (iii) Is the e-tutorial accompanying this module a cinematographic film?

Answer: Yes. The e-tutorial is a visual recording on camera produced through a process from which a moving image of the tutor may be produced and includes a sound recording accompanying such visual recording. Therefore it is a cinematographic film.

1.9 Sound recording

Sound recording as a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. The sound recording should not infringe copyright in any other work.

Example of a sound recording is a CD-ROM.

Point to ponder:

- (i) Does the audio recording of this e-tutorial qualify for separate copyright protection as a sound recording?

Answer: Yes, if the audio recording is fixed on a medium such as a phonogram or CD ROM.

- (ii) What if there is no separate audio recording but it forms part of the audio-visual as a whole, does it enjoy protection as a sound-recording as well?



Answer: Yes, the right of the sound recording is different from the subject-matter recorded as they are subjects of independent subject-matters.

2.0 Summary

Section 13 of the Indian Copyright Act provides that only original literary, dramatic, musical or artistic work; Cinematographic films and sound recordings qualify as Copyrightable subject matter. Titles, names, short phrases, slogans and facts are not copyrightable. The prerequisites for any work to qualify for copyright protection, is that the work must be original and also expressed in some form in a medium. The general standards for according Copyright protection to these 'works' are briefly summarized herein below:-

- a. Copyright law does not delve into subjective assessment of the quality of the work. Therefore no literary merit is required for a literary work to be copyrightable. As long as the work is original i.e., it originates from the author, it is protectable under copyright law.
- b. Dramatic incidents of a show are protected as dramatic work. The work ought to have a story or a narrative for being afforded protection.
- c. All forms of music irrespective of it being fixed is protected as musical work. A musical work does not include words intended to be sung or spoken with the music or action intended to be performed with the music.
- d. No artistic quality is required for according copyright protection to artistic works such as paintings, sculpture, architecture or any other work of artistic craftsmanship.
- e. Copyright will not subsist in a Cinematographic film if the substantial part of the film is an infringement of the copyright in any other work. The prerequisite of originality is emphasized even in the case of cinematographic films. This is essentially to protect the interest of the financial investors who invest in the making of cinematographic films.
- f. Works which include a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or even the method by which the sounds are produced are protected as copyrightable works, as long as the sound recording does not infringe copyright in any other work.



Points to Remember

- 1. Copyright is a term based right and not a perpetual one.**
- 2. To afford to be a subject matter of copyright any literary dramatic or artistic work has to withstand the test of originality.**
- 3. In the case of Walter v. Lane, the court observed that the author must exercise his/her own labour and skill in creating the work, for the work to be afforded copyright protection.**
- 4. Sec 13 is a negative provision which provides that no work shall be granted copyright if any part of it is an infringement of copyright in another work.**
- 5. In Tate v. Fullbrook it was held that a dramatic piece in its entirety alongwith the scenic effects is protected as dramatic work under Copyright Law.**
- 6. In Norowzian v. Arks Ltd, This English case lays down that a film or a motion picture can also qualify as a dramatic work.**

Self-check Exercises

- What are the pre requisites to be a subject matter of copyright?
- Explain the literary works that are
- Explain the concept of originality with decided case laws.
- What are the different types of literary works that qualify to be subject matter of copyright?
- Briefly explain the copyrights available in sound recordings and cinematographic films.