

DE JURE NEXUS LAW JOURNAL

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COPYRIGHT LAW IN MODERN ART: WHICH FORMS OF MODERN ART SHOULD BE PROVIDED WITH COPYRIGHT PROTECTION?**Abstract**

Copyrights have the goal of protecting the rights of artists. In cases where there is a confusion as to what kind of art can even be considered art, like splatters or lines, it will still be copyrightable as long as it fulfils certain criteria. The article will look into modern arts in public domain, recreated works as it gives new and modern meaning to the same as well as the contentiousness of abstract modern art. That is what this paper examines.

Introduction

The main aim of copyright law is to protect the interest of artists who create original work that is of a publishable nature. The point of copyright protection is to ensure that the artist benefit from the creation of their original work and nobody else gets any undue benefit from their work. It goes with the notion that due work gets due credit and benefits. The law of copyright in India is governed by the Copyrights Act of 1957. The act was amended in 1999 to fulfill the needed features of the Berne Convention that protects the copyrights rights of persons globally and sets standards for protection of such rights.

Economic Theory

This theory propounds that the benefit of the protective rights should be in direct proportion to its market value monetarily. The point of IPR is to create incentives to encourage creativity, innovation and originality. Hence creating the monetary value for the failed attempts as well act as a cause to take risks. The dispute between the authors of the work and the owners are two different entities. Most times the owner is not the author, but gets benefits even though not as much. This is a huge criticism of the theory mentioned. The criticism fears the “free rider theory”.

What Constitutes Art

According to the World Intellectual Property Organisation, any works that creatively express themselves fall under the ambit of copyright law. These works are considered to be considered as art. Hence Visual Arts such as Paintings, Sculptures, Literary works as well as Video, Plays and Music are considered art. The Copyrights Act of 1957 provides for Cinematographic work as well as sound recordings to fall within the ambit of Copyright work. Literary work also covers visual arts.

Copyrighting Art

Subject Matter of Work

Subject matter of a copyright is covered under section 13 of the Copyrights Act 1957 (hereby referred to as the Act) which subsists of the following:

1. Literary Work
2. Cinematographic Work
3. Sound Recordings

The subject matter of a copyright is essentially what it protects and the criteria for its protection. The Subject Matter of literary work also encompasses artistic works. The core requirement for copyright protection of any work is the clause of originality of the work.

The most recent case of *Marico Ltd vs. Mrs. Jagit Kaur* stated that for the work to fall under the ambit of literary protected work, it mustn't be of a superior quality but must be original and only then will it qualify as literary work under Section 13 of the Act.

Originality of Subject matter

A copyright will exist only if there is originality in the work created or literature published. The case of *Macmillan & Co. v. Cooper* stated that it is not necessary for the work created to be a hundred percent original in order to be a subject matter of copyright, but there should be an effort put into the work and mustn't be identical to another's work. The case of *University of London Press Ltd. v. Universal Tutorial Press Ltd.* the doctrine of sweat of the brow was coined where if the author put in effort to think of the work it would be considered original. Hence translations, abridgement and adaptations of literary works are protected by copyrights.

The question of identical work by two people doesn't not bar for being a subject matter to literary work. Two authors can make two literary works separately and be similar but both will be protected as subject matter to copyright protection. The reason for this being the originality and the work that went into it by them. The principle of natural rights plays here.

Natural rights/ labor theory

All intellectual property stems from the core values of hard work, patience, inventiveness, artistry and originality. This theory propounds that as there is a belief that all intellectual property is hard, work and that they all have a natural right to protect it is derived from John Locke that any author thinks he can do as he pleases since it is his work and hence comes the theory of natural rights.

Modern Art

Forms of Traditional Art

The era of Modern Visual Art can be assumed from 1960s to 1970s that encompass various eras of Abstract Art, Impressionist, Post-Impressionist Art, Blockism as well as Pop Art. From these genres of visual art, those of Abstract art and Pop Art seem to gather contention for copyrights.

Further when it comes to Videos, we live in an era of social media where recreations and iterations of work is what the platforms are consisted off. Hence the question of originality comes into play.

Abstract Art

Abstract art is art that is basis the interpretation of the artist and the intention behind the work. Abstract Art is one which is very difficult to define. However the Encyclopaedia Britanica has attempted this by defining abstract art as a non-objective art form which is representative in a spiritual sense but non – representative art where there lacks a perceptible angle. It's based on the colour the lines the tone and the texture. This art form acts as a complete contrast to art that focused on human civilisation to reproduce the same and hence had visual standpoint has more girth as compared to one that barely has expressive functioning.

In case where a canvas merely has a few sputters of paint, or inaccurate shapes, the question of sweat of brow appears. Has there been an effort put into the same so as to the author to

reap benefits. The Answer is yes. Even though it cannot be articulated but in case a viewer is drawn to the structure of the placement of the line art and wishes to recreate or use the print of it, the author or owner of the work must be given due credit and benefits. Abstract Art plays a massive role in modern art. However if the work is copyrighted, the protection is an issue due to it being structure less and open to interpretation.

According to section 13 (1)(a) of Copyright Act of 1957 copyright subsists in original literary, dramatic, musical and artistic works.

Section 2 (e) defines artistic works to mean:

1. A painting a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
2. An work of architecture; and
3. Any other work of artistic craftsmanship.

Hence as per the provisions in the Act Section 2 (e) sub section (iii) the artistic works, irrespective of having any artistic quality, can be copyrighted. The question of protection of the idea subsists however.

In order for a copyright to stand it is necessary for the artistic work to have tangibility and originality. Hence if there is an assumption that there has been the sharing of an idea for art it cannot be protected.

“It is a well-accepted principle of copyright law that there is no copyright in the facts per se, as facts are not created, nor have they originated with the author any work which embodies these facts. The issue of copyright is closely connected to that of commercial viability, and commercial consequence and implications.”¹

This means that in case an artistic work is abstract irrespective of the level of abstract, it can be sold with a consideration in return, and hence if there are benefits to be reaped from the same, the right to copyright will exist. This according to the case is despite the physicality of the art work. There however still lies the conflict of copyrightable material for modern art that is object based or based on a design. The recreations of pre-existing objects in themselves have copyrightable rights, for example the Campbell’s Soup Can by Andy

¹ Eastern Book Company v. D. B. Modak (2008) 1 S. C. C. 1.

Warhol that was seen in the recent cases involving the artist Koons. In *Blanch v. Koons*² the photographer Andrea Blanche sued Koons over his recreation of her photograph as a painting in an abstract format. The Courts however stated that as Koons had seen the photograph in the *Allure Magazine*. Koons then used portion of the photograph seen in an advertisement in his painting due to which he gave it a new meaning in his work *Niagara* in 2000. It was stated to be “transformational” and due to tangibility and originality of changing the meaning of the used work it was not copyright infringement. There is however a difference between novelty and originality.

Author of Copyright

According to Section 2(d) of the Copyrights Act 1957, the author of a work in terms of a piece of literature is the author of the work, in terms of music is the composer and in terms of art is the artist (sculptor, painter or photographer). The creator of the work is the author if the work and is the first person to own the work. According to the Berne Convention, they are the first to gain benefits from the copyrighted work. It further defines the author as the person under whose name the work will show.

Right of Author to Relinquish their Rights

Under section 21 of the Act, the author has the right to relinquish all their privileges under the copyright post informing the registrar of copyrights and these rights shall stop from the minute the same is done (no royalties or infringement etc.)

Ownership of Copyright

Section 17 of the Copyrights Act 1957 states that the author of the work copyrighted is the first owner of the work. Further the right to ownership will only be available to who qualify under this act. Ownership can be assigned as provided for under Section 18 of the Act where the owner has the right to assign the copyright they possess to another party in entirety or partly.

Ownership under employment

The author of the work will however not have the ownership of the art in case they are employed under an authority. This was seen in the case of *Thoman v. Manorama* where the plaintiff was a cartoonist with a popular magazine, however on gaining popularity left he job to work independently. On doing so they assumed they could continue using the comics

² *Blanch v. Koons*, 396 F. Supp. 2d 476

under the Manorama but, as they worked under the magazine, it held the ownership of the copyright, not the author.

Hence as long as the work has not been copied, there is no infringement. Hence as the similarity is practiced, the expression is protected. In cases where brush strokes are unique with a new expression with a lack of similarity, the art however modern can be protected with its appropriation being infringement.

Photography

Photography and moving pictures that fall within the aspect of copyrights protected arts. However the new trend Paparazzi creates a new dilemma. In 2020 singer Ariana Grande posted her picture to promote her new Album release. However the photograph was tagged for copyright infringement as the singer song writer posted the same without due credit or payment to a Robert Barbera who is a New York Based paparazzo. The photograph though promotional and taken of Grande without her permission was the creative works of a second individual. According to court documents, the Instagram post received over 3 million likes. The photos were also allegedly registered with the U.S. Copyright Office. Barbera is suing for either the profits that Grande earned from the post, or \$25,000 in damages for each photo. The paparazzo won the case and the same has been done with many other artists.

The problem with this however is that the photograph was published without consent in Public Domain. By definition, public domain works are not subjects of copyright, this cannot serve as the requisite similarity for copyright infringement as stated in the case of *The Bridgeman Art Library and Ltd. v. Corel Corp.*³

Hence the copyrighting of the same is contested. However the benefit reaped by the same is another factor for the placement of rights.

Utilitarian Theory

Based on the principles of Bentham, a utilitarian theory is the theory that is for the best of society. This theory envisages to makes all IPR laws universal so that it benefits the author and society highly. An incentive theory of better benefits for this theory is propounded. This theory believes that the more the inventions that are published are done the better, hence the incentives.

³ The Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421 (S.D.N.Y. 1998)].

Criticism

The incentive to be provided to all IPR holders will back fire as the future payments will keep increasing hence stagnant pay is terrible incentive.

Ethic and Reward Theory

The separation of the IPR from the morality of society is followed in this theory. The IPR is treated as a:

“an expression of acknowledgement and indebtedness to an author for doing more than society expects or feels that they are obliged to do.”

Most IPR create a morality on the reception of legal rights in the form of, copyrights and hence this theory propounds that the focus should be on the rights and not the morality.

Conclusion

The question of Modern Art is focused on the difference in the line between art and object exists. The point fair play is massive here. This refers to the animation factor of the work, this means the concept where the story of the art must not be compromised or infrangible. If the art can sell then the art can be copyrighted. This separation represents an important policy decision of what parts of a work authors should be allowed to monopolize and what part belongs in the public domain, so others are free to build on them.⁴ Courts must look into the concept of creation of the separation between the personhood and the art.

Hence abstract art or any art that can be sold or used to gain benefit must have copyrights. This is irrespective of the artistic value of the same. The comparison of IPR with tangible assets is clearly demonstrated in the theoretical discussions that have taken place on the subject. The crux of the copyright theory is that the creator of the property should enjoy maximum benefits from it and hence the comparison with profitable and tangible assets is done. This refers to inspired, homages or recreations unless there is a new aspect to it.

⁴ Copyright Problems in Post-Modern Art, Lori Pertuzzelli; DePaul Journal of Art, Technology and Intellectual Property; Volume 5, Issue 1 Winter 1994/Spring 1995