“INDIAN COPYRIGHT LAW- AN ANALYSIS OF LITERARY WORKS”

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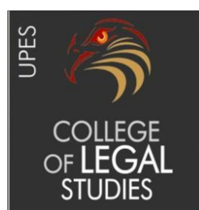

College of Legal Studies

University of Petroleum and Energy Studies

Dehradun

2016

DECLARATION

I declare that the dissertation entitled **"INDIAN COPYRIGHT LAW- AN ANALYSIS OF LITERARY WORKS"** is the outcome of my own work conducted under the supervision of ***Prof. Krishna Deo Singh Chauhan***, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Monalisa Panda

Date: 12/04/2016

CERTIFICATE

This is to certify that the research work entitled **"INDIAN COPYRIGHT LAW- AN ANALYSIS OF LITERARY WORKS"** is the work done by ***Monalisa Panda*** under my guidance and supervision for the partial fulfilment of the requirement of B.B.A LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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- *Manu Bhandari versus Kala Vikas Pictures Ltd. AIR 1987 Del. 13.*
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LIST OF ABBREVIATIONS

- AIR - All India Reporter
- CB - Copyright Board
- CD - Copyright Digital Discs
- ICA, 1957 - Indian Copyright Act, 1957
- IP - Intellectual Property
- IPRs - Intellectual Property Rights
- IT Act - Information Technology Act, 2000
- MR - Moral Rights
- NR - Neighbouring Rights
- PCT - Patent Co-operation Treaty
- PTC - Patent, Trademark and Copyright
- TRIPS - Agreement on Trade Related Aspects of Intellectual Property Rights
- UCC - Universal Copyright Convention
- UNCITRAL- United Nations Commission on International Trade Law
- WCT - WIPO Copyright Treaty
- WIPO - World Intellectual Property
- WPPT - WIPO Performances and Phonograms Treaty
- WTO - World Trade Organisation

INTRODUCTION

In the modern world, the law of copyright provides the legal frame work not only for the protection of the traditional beneficiaries of the copyright, the individual writer composer or artist, but also for the investment required for the creation of works by the major cultural industries, the publishing, film, broadcasting and recording industries, and the computer, software industry. Copyright is important not only to the individuals and industries which depend upon it for their livelihood but it also impinges one way or another on the daily life of members of the public or business. The object of Copyright Law is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. The long period of copyright encourages authors and artists to create works of literature, music and art. Copyright protection is essential to encourage exploitation of copyright work for the benefit of the public. There is no copyright in an idea as such. But once it is written down, the writing is the subject of copyright and no one is entitled to copy it on the plea that it was only an idea.

In India we have The Copyright Act of 1957 which consolidates the law relating to copyright protection in India. The Act confers copyright protection in the form of Economic Rights of the author and Moral Rights of the author. According to Section 13 (1)(a) copyright subsists only in an original literary work. The term “Literary work” in common parlance means any work written or printed in any language such as novels, poetry, history or books on any subject whatsoever. The meaning given to the term in the copyright Act is not limited to such works but is much wider in scope. The definition of the term under the amended Act is “Literary work” includes computer programmes, tables and compilations including computer databases. It has been held that the words ‘literary work’ cover work which is expressed in print or writing irrespective of the question whether the quality of style is high. The word ‘literary’ in copyright law is to be used in a sense somewhat similar to the use of word ‘literature and refers to written or printed matter. So long as there is a sufficient amount of skill and labour in constructing or selecting the material, no particular skill in the literary form is needed. The words ‘literary work’ under section 13 is not confined to works of literature in the commonly understood sense but include all works expressed writing whether they have any literary merit or not.

RESEARCH METHODOLOGY

STATEMENT OF THE PROBLEM

There is a fine line demarcating a work that is creative and a work that is copied often making it difficult to distinguish between the two.

In order to avail copyright protection, the work has to be original. Apart from being original creativity also plays an important role. Original and non-creative works often face difficulty to get copyright protection.

An idea and an expression often overlap with each other making it difficult to segregate and claim copyright protection.

There is always a clash between works that are either adapted or abridged or simply copied.

OBJECTIVES OF THE STUDY

The law relating to this aspect is quite fragmented and unclear. This dissertation work aims at consolidating the laws together.

SCOPE OF THE RESEARCH

The research in this study envisages the provisions of The Indian Copyright Act, 1957 along with The Copyright Rules, 1958. It also includes the Berne Convention for the Protection of Literary and Artistic Works, Paris Act, 1971 and the WIPO Copyright Treaty, 1996.

RESEARCH QUESTIONS

- Whether a secondary or a derivative work can enjoy protection under the copyright law or not?
- Whether Copyright subsists in ideas or in expressions?

- Whether works which are a mere compilation of data can avail protection under copyright law or not?
- Whether unauthorized use of a copyright protected work always amounts to infringement of copyright or not?
- Whether the author after licensing or assigning his rights, can sue for any derogatory mutilation of his work or not?

HYPOTHESIS

The Copyright Act, 1957 extends its protection only to literary works which are original and creative. Originality and creativity are always given importance to claim protection under copyright law. Non-Original and Non creative works are beyond the purview of protection under this Act.

METHODOLOGY

The research in this study has been done having relied upon "Doctrinal Method" of research. The methodology adopted for this dissertation work is doctrinal, analytical and descriptive. The researcher mainly depended on the secondary sources like statutes, books, articles, journals, case-laws, and e-resources.

LITERATURE REVIEW

- **Dealing 'Fairly" with software in India by Mishita Jethi, Journal of Intellectual Property Rights Vol 16, July 2011**
  This article has referred to the position of software's in India. In India, unlike other nations, we have software's coming under the purview of Copyright Law for protection rather than the Patent Law.
- **Principles of Intellectual Property by N.S. Gopalakrishnan & T.G. Agitha (First Edition, 2009), Eastern Book Company.**
  This is a case book that has dealt with the important Intellectual Property cases of India and at times throwing a sharp contrast of the judicial decisions taken in India and in other foreign nations.

- **Copyright and Industrial Designs by P. Narayanan (Third Edition, 2002), Eastern Law House**

  This book contains the various aspects of Copyright Law, the history of copyright law in India, the various national and International Conventions, an analysis of the literary and other works and cases relating to infringement.

- **Problems of Copyright Enforcement in India by Arvind Kumar, Journal of Intellectual Property Rights Vol 2 January 1997**

  This research article has thrown light on the grey areas of the Copyright Law in India, the drawbacks or the loopholes which our Indian Copyright Law envisages within itself.

- **The WIPO Copyright Treaty 1996**

  The Treaty mentions two subject matters to be protected by copyright one is computer programs, whatever the mode or form of their expression; and the other is compilations of data or other material (“databases"), in any form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations.

- **Whitford Committee’s Report on Copyright and Designs Law 1977**

  This article contains the importance of copyright and as why a work should be copyright protected.

- **The Berne Convention for the Protection of Literary and Artistic Works, (Paris Act, 1971)**

  This convention envisages the provisions for the protection of rights of the authors in their literary and artistic works.

- **Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement)**

  Certain articles of this agreement deal with the Copyright protection and related rights.

CHAPTER 1
INTRODUCTION TO COPYRIGHT LAW

1.1 INTRODUCTION

"*An artistic, literary or musical work is the brainchild of the author, the fruit of his labour and so, considered to be his property. So highly is it prized by all civilised nations that it is thought worthy of protection by national laws and international conventions.*"

- *Justice Chinnappa Reddy*[1]

Man is gifted with intellect that is used for the growth and development of himself and the society at large. The continual process of learning and creating new knowledge with appropriate protection to the creator along with accessibility of his work to the public forms the basis of all contemporary dynamic societies. A formal framework for the "ownership" of the knowledge developed and the "sharing of benefits" between the creators and users of knowledge is provided by a system of intellectual property rights (IPRs). By protecting intellectual property (IP) the legal framework provides an incentive for creators to invest time and resources, to foster innovation and expand knowledge.

Globally, there is a growing recognition of the fact that IP is the knowledge or information with a commercial value. It is also being realized that future prosperity of nations will depend more upon their IP and less upon their natural resources and physical assets such as factories, machines and office buildings as the economy of the twenty first century will be knowledge based. A number of studies conducted in different countries have concluded that newly emerging copyright industries are having tremendous impact on growth of national economies.[2]

Two decades ago IPR was put on the centre stage of the world economic order by the World Trade Organisation (WTO). The member States of WTO were mandated to follow prescribed minimum standards in twenty eight subjects, one of them being IP,

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[1] *Gramophone Co. v Birender Bahadur Pandey* AIR 1984 SC 667.

[2] W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 258 (London Sweet and Maxwell 2nd ed., 1995).

Intellectual property issues and concerns were therefore integrated with other global issues like multilateral trade negotiations, knowledge based models of economic development, protection and exploitation of biodiversity resources, development and transfer of environmentally friendly technology, protection of folklore and indigenous culture, and other aspects of economic and social development. Intellectual property, therefore, started assuming a new centrality in the international community bringing IPRs to the forefront of socio-economic and legal structures.[3]

Intellectual property, according to World Intellectual Property Organization (WIPO), broadly means the legal rights, which result from intellectual activity in the industrial, scientific, literary and artistic fields. It is in the nature of an intangible, incorporeal property.[4] Intellectual property is traditionally divided into two branches:

i) Copyright and

ii) Industrial Property

Copyright law is further divided into two categories:

a) "Copyright law in the strict sense of the word, i.e., the protection of intellectual creativity in literary, artistic and musical works, etc. and
b) The law relating to neighbouring rights, namely the rights of performing artists, producers of phonograms and broadcasting organizations."[5]

1.2 GENERAL PRINCIPLES GOVERNING COPYRIGHT LAW

There are certain considerations and principles, which run through the whole of copyright law. These are listed hereunder:

a) STATUTORY RIGHT

The Indian Copyright Law is governed by a statute and the statutory law is *The Copyright Act, 1957.* According to the Act, in Section 16 it specifies that no person shall be entitled to copyright or any other similar right in any literary, dramatic, musical, artistic work whether published or unpublished, otherwise than under and in accordance with the provisions of this statute.[6]

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[3] SHAHID ALI KHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES 8 (Geneva: WIPO, 2000).
[4] WIPO, INTELLECTUAL PROPERTY READING MATERIAL 5 (1995).
[5] *Ibid.*
[6] *Gramophone Company of India Ltd. V D B Pandey* (1984) 2 SCC 534.

b) REQUIREMENTS FOR OBTAINING COPYRIGHT

In India, copyright comes into existence as soon as a work is created and no formality is required for acquiring copyright. The vesting of copyright in a work is thus automatic. The procedure for registration is optional and not mandatory[7]. Registration is only intended to provide a prima facie evidence of the particulars entered in the register[8]. There is a register of Copyright at the Copyright Office[9]. It is pertinent to note that both published and unpublished are entitled to be registered under the Act. Works published before 21st January 1958 i.e. before the Copyright Act, 1957 came into force, provided the work still enjoys copyright can also be registered under the law.

c) FUNCTIONS OF MODERN COPYRIGHT SYSTEM

Copyright system performs a lot of functions in the society. According to Neil Weinstock[10], copyright performs the following functions in a civil society.

(i) Production function: Copyright provides an incentive[11] for creative expression on a wide array of political, social and aesthetic issues and thus bolsters the discursive foundations for democratic culture and civic association[12]. The main aim of Copyright law in most of the nations to promote the creation and public communication of expressions that are original. In fostering the production and dissemination of fixed original expression concerning a broad range of political, social, cultural and aesthetic matters, copyright promotes the democratic character of civil society. The dissemination of expression is a fundamental building block of any democratic institution.[13]

(ii) Structural function: Copyright is fundamental to keep up the vote based character of open talk in common society. It supports an independent market based sector of authors and publishers as the government

[7] THE COPYRIGHT ACT, 1957, § 45.
[8] *Id* at,§ 48.
[9] *Id* at, § 44.
[10] Netanel Neil Weinstock, *Copyright and Democratic Civil Society*, YALE L.J. ,1996, at 283.
[11] *Deepak Printery, Ahmedabad v The Forward Stationary Mart* 1981 PTC 186 (Guj.); held, the object of copyright law is to protect authors and artists from being exploited.
[12] *Ibid* .
[13] *Ibid,* note 10.

administrators and private patrons do not meddle in their expressive content[14].

(iii) Development function: Copyright has unique part in the setting of improvement, especially since the 1950s when the political guide of the world changed significantly. "Amid this period a few states dynamically got to be free and different states were recently made. In such a situation, creating nations needed to adapt to the colossal issues of instructing the tremendous masses of their kin."[15] For instruction, showing material including literary, scientific and artistic works must be made by creators starting in the group to which the works were tended to. In numerous creating nations, there was a lack of masters in specific regions of learning. This couldn't be gotten under way without sureties to the creator of sufficient compensation for their endeavours; copyright framework accordingly supplied an indispensable motivation for creators and distributers to add to their store of information.

d) BALANCING ACT UNDER COPYRIGHT SYSTEM

Contribution to the store of wealth in society has to be coupled with the citizen's right to have access to this accumulated wealth for the purposes of effective participation in civil association. A critical issue in copyright law is how to balance the tension between the copyright proprietor's desire to restrict access of the copyrighted works only to those willing to pay for such access and the public's interest in freely using the protected work. The balance is provided by the doctrine of "fair dealing" and provision for non-voluntary licenses in specific situations. These doctrines allow copying of a copyrighted legislation permits such types of acts in relation to copyright work.

For example, "Section 52 of permits inter alia, fair dealing of work for the purposes of research or private use; Section 31B provides for compulsory license for the benefit of the disabled and Section 31 for the published works withheld from public."[16]

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[14] *Ibid.* note 13.
[15] WIPO, INTELLECTUAL PROPERTY READING MATERIAL 189 (1995).
[16] THE COPYRIGHT ACT, 1957.

e) SUBJECT MATTER RELATING TO COPYRIGHT PROTECTION

Usually most of the nations through their copyright laws provide for protection to the literary works that includes poems, novels and stories. Under section 13 of our Indian Act envisages the subject matter for copyright protection.

f) COPYRIGHT VESTS IN ORIGINAL WORK

The copyright vests in original literary, dramatic, musical and artistic works. The basic idea behind the originality is to protect works are original from the author and are not copied from someone else's work. In India, Copyright protection is given to *original, dramatic, musical, artistic and* ***literary works,*** and hence only works with original skill and labour are protected and not to ideas. The word 'original' does not, in this connection, mean that the word must be the expression of original thoughts or inventive thoughts, the originality required relates to the expression of thoughts.[17] "A mere copyist does not obtain copyright in his copy."[18] Works like abridgement, compilation, translation etc. are however, original even though the author has drawn on knowledge common to him and others[19], or the existing material is already used. The word "original" usually are not prefixed with derivative works for example cinematography films and sound recordings.

g) COPYRIGHT DOES NOT VEST IN AN IDEA

"Copyright protection extends to expression and not to ideas, procedures, and methods of operation or mathematical concepts as such"[20]. The original expression of idea or information or thought in some expressive is protected.

An infringement happens only when the infringer has made an unauthorised use of the expression of the thought or information is expressed. "The defendant must, to be liable, have made a substantial use of the form; he is not liable if he has taken from the work the essential idea, however original and

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[17] *University of London Press Ltd. V University Tutorial Press Ltd*. (1916) 2 Ch. 601 at 608.

[18] Lord James in *Walter v Lane* (1900) A.C. 539 at 554.

[19] *University of London Press v University of Tutorial Press* (1916) 2 Ch. 601.

[20] WIPO Copyright Treaty, 1996, art. 2; TRIPS, 1994, art.9(2). It clarifies the scope of copyright protection. Such a provision is neither present in the Berne Convention for the protection of literary and artistic works nor in The Copyright Act, 1957 of India. The principle is, however, followed by the judiciary.

expressed the idea in his own form, or used the idea for his own purposes."[21] Under laws like, *quasi*-contract, doctrine of unjust enrichment or breach of trust or confidence, ideas can be copyright protected.

Example: If X discloses an idea to Y on the implicit understanding that if Y uses the ides he will pay X. X will be protected under doctrine of unjust enrichment or *quasi*-contract but not law of copyright.[22]Delhi High Court[23] had few occasions to deal with somewhat similar situations but it decided the cases under the copyright law and held that when an idea is converted into a concept it becomes copyrightable.

h) COPYRIGHT AND INDEPENDENT CREATION

Copyright operates to prevent a person from copying the copyright work. In so far as it is possible for a person to create the same or similar work independently, there is no copyright infringement. Similarity of the infringing work to the author's or proprietor's copyrighted work does not of itself establish copyright infringement if the similarity results from at both works deal with the same subject or have a common source. Nevertheless, it is the unfair appropriation of the labour of another that constitutes legal infringement.[24]

i) COPYRIGHT IS A BUNDLE OF RIGHTS

The word copyright is not a singular term but it refers to 3 bundles of rights under the copyright legislation:

(1) The *exclusive economic rights.* The enumeration of the author's exclusive economic rights under different international conventions and various national legislations is not uniform. Several rights overlap and the precise scope of each right vary from one country to another. Nevertheless, Berne Convention,

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[21] *Hollinrake v. Truswell* (1894) 3 Ch. 420; *Mc. Crum v. Eisner* (1918) 87 I.J. Ch. 99; *Wilmer v. Hatchin & co. (1936)* Mac. C.C.13.

[22] *Minnear v.Tors.* 226 Cal App. 2d 495(1968).

[23] *Anil Gupta v. Kunal Dasgupta* 2002 (25) PTC 1 (Del); *Zee Teleflims Ltd. v. Sundail Communication* 2003 (27) PTC 457 (Bom) (DB); *Urmi Juvekar Chiang v. Global Broadcast News Ltd.* 2008 (36) PTC 377 (Bom).

[24] *R.G.Anand v. Deluxe Films* AIR 1978 SC 1613.

the Universal Copyright Convention and virtually every national copyright statute has the following basic economic rights or their equivalents:

(a) The reproduction right
(b) The adaption right
(c) The distribution right
(d) The public performance right
(e) The broadcasting right

In India these rights are enumerate under section 14 of the The Copyright Act, 1957.

(2) Moral rights or special rights of the authority

Independently of the author's economic rights, and even after the transfer of the said rights, the author has the moral rights. [25] These moral rights include:

The paternity right or the right to claim ownership of the book and to be the integrity right or the right to object to any distortion, mutilation or other amendment to the work. The amendment of 2012 has inserted a new section 38B whereby, moral rights have been prescribed to the performers also. The two rights granted are the right of identification of the performance and integrity right.

(3) Neighbouring or related rights

Special rights are given to broadcasting organization and performers under section 37 and 38 of the act, 1957. These are referred to as "neighbouring rights under international convention".

j) SPLIT COPYRIGHT

Copyright s a bundle of rights, therefore, it can be split and exploited in different ways.

k) NEGATIVE RIGHT

[25] The Copyright Act, 1957, § 57, refers to the moral rights as "author's special rights"; Berne Convention, Article 6.

Copyright imposes a negative duty on others, i.e., it prohibits others from using the work for unrealistic gains, without the consent or license of the owner of the rights. The general principle, therefore, is that works that are protected cannot be exploited without the permission of the owner/ author.

I) A RIGHT WITH LIMITATIONS

Copy right is not an absolute right of the owner. It is subject to the following limitations:

i. *Temporal limitations*:

   As embedded in the law, Copyright does not continue for an infinite period. The law provides for a limited period of duration during which the economics of the owner of the Copyrighted work exist. There after the period, "the work falls in the public domain that is anyone can make use of work without permission from the legal heirs of the copyright owner."[26]

ii. *Permitted use or fair use or fair dealing doctrine.*

   Certain acts normally restricted by copyright may, in circumstances specific in the law, be done without the authorization of the copyright owner. This is commonly referred to as free uses of the work or fair dealing doctrine.[27] Such examples include, inter alia, reproduction of work for research or exclusively for the self or private use of the person.

iii. *Geographical limitations:*

   The law of the country protects the owner of the copyright in a work.

iv. *Non voluntary licenses:*

   The laws of some nations allow the use of copyright protected works without authorization, provided that fair royalty or remuneration is given to the owner of the copyright protected work.

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[26] THE COPYRIGHT ACT, 1957,§ 22-29.

[27] The Berne Convention, art. 9, 10; THE COPYRIGHT ACT, 1957, § 52; TRIPS 1994, art. 13; WCT, 1996, art. 10.

m) CONCURRENT COPYRIGHT

It is very often assumed when a book or a cassette is sold or a fail exhibited or drama performed on stage that somebody owes the copyright. This is misnomer, as a number of copyright interests can exist at the same time.

Example: Renu is the author of a novel "Sheetal" having copyright in the novel which is a literary work. B concerts it into a drama for the purpose of staging it in a theatre. B has copyright in the dramatic work. C, D, E and F the four actors of the play have rights in their performance and G, the music composer has a copyright in the music.

n) OVERLAP BETWEEN COPYRIGHT NAD INDUSTRIAL DESIGNS

"According to section 15 of the copyright act, copyright does not vest in any design which is registered under the Designs Act, 2000 or which is capable of being registered but which has not been so registered and has been reproduced more than fifty times by an industrial process by the owner of the copyright."[28]

o) CIVIL AND CRIMINAL REMEDIES AND BORDER MEASURES

These are three types of remedies against infringement of copyright in various works.

Civil remedies which include damages, account of profits and injunction, delivery of the infringing copies and damages for copying or conversion.

Criminal remedies provide imposition of fine or imprisonment of the accused or both; seizer and delivery of infringing copies to the authorized owner of the copyrighted work.

Administrative remedy is available against importation of infringing copies to the copyright owner. In India, the registrar of copyright has been authorized pass an order for prohibition on the importation of such infringed copies into India. This can be done by an application from the owner or authorised agent of the copyright.

[28] *Godrej Consumer Products Ltd. v. Ashok Kumar Jain* 2010 (43) PTC 606 (CB).

p) ELIGIBILITY FOR COPYRIGHT PROTECTION IN INDIA

"Copyright subsists both in published and unpublished work. An owner of copyright can get protection in India in his unpublished work if on the date of making of the work he is a citizen of India or domiciled in India."[29] In case of a published work, the work has to be first published in India.[30] If the work is first published outside India, then the author on the date of publication should be a citizen of India. In case the author is dead on the date of publication, then on the date of his death he should have been citizen of India. If the work is a work of joint authorship then the conditions have to be satisfied by all the authors.

"If the subject matter of protection is a work of architecture then only the location of work is important and not the residence or citizenship of the author. The artist of the work of architecture gets protection under the Act if the work is located in India."[31]

The Berne Convention states [32] "that the owner of the copyright in a work is protected by the law of the country against acts registered by copyright, which are done in that country. For protection against such acts done in another country, he must refer to the law of the country. If both countries are members of one of the international conventions on copyright, the practical problems arising from this geographical limitation are minimized."[33]

[29] THE COPYRIGHT ACT, 1957, § 13(2) (ii).
[30] *Id*. at § 13.
[31] Inserted by Act 34 of 1994, w.e.f. 10/05/1995.
[32] Art.9(2), 10 , 14(2)(b), 11(2) and 13(1).
[33] TRIPS, 1994, art. 13.

CHAPTER 2

HISTORY

2.1 INTRODUCTION

In the contemporary age, the general public has comprehended the worth and need of the copyright law and in view of this each country, be it substantial or little, created or creating has encircled its own particular copyright law and are step by step correcting it to get it congruity with the changing needs of the general public[34]. The progression of invention and innovation has gone up; therefore we must have laws to cope with the progressions and inventions. In this manner, the countries are endeavouring hard which can take into account the needs that are being involved and hence are trying to create copyright laws. Copyright in itself is a kind and intriguing subject. Like patents, copyright is additionally a sort of intellectual property right. It is a proprietary right of the artist, author or creator and comes into existence as soon as the work is created.[35] "It is the exclusive right to do or authorise others to do certain acts in relation to dramatic, musical and artistic works, literary works, cinematograph film, sound recordings, computer databases etc. i.e. it is the right to copy or reproduce the work in which copyright subsists."[36]

2.2 ORIGIN AND DEVELOPMENT OF COPYRIGHT

The idea of copyright protection emerged with the invention of printing, which made the literary works to be duplicated by mechanical process. Prior, to that hand copying was the sole mean of reproduction. After, the invention of Guttenberg's printing press in Germany in 1436, a need to protect the printers and booksellers was recognised and thus certain privileges to printers, publishers and also authors were granted. The art of printing spread quickly in Europe.[37] "After 1483, England emerged as a major centre of printing trade in Europe. The spread of this technological innovation led to creation of a class of intermediaries, who made initial investment in bringing out the book, i.e., the printers, who doubled as booksellers as well. They were called the 'stationer's' in

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[34] S.D. GEET & A. A. DESHPANDE, LEGAL ASPECTS OF BUSINESS, 9-22 (Nirali Prakashan, 2008).
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid* .

England."[38] In 1557, Queen Mary I, granted the privilege of regulating the book trade to the Stationer's company of London.[39]

In 1662, the Licensing Act was passed in England, which prohibited the printing of any book which was not licensed and registered with the Stationers' Company.[40] This was the first short lived era where a clear law was passed aiming at protection of copyright and piracy in literature. "It was only with the passing of the Queen Anne's Statute of 1709, that, the rights of the authors over their work came to be legally recognised, and the concept of 'public domain' was established, though not explicitly."[41]

2.2.1 STATUTE OF ANNE

The first codified law came in presence with the passing of the statute of Anne, which came into power on tenth April 1710. It was the vital lawful clarification of bona fide copyright. It was the principal legitimate explanation of genuine copyright. Queen Anne's statute gave upon the creators surprisingly, the statutory right to profit by their scholarly works by giving upon them the sole right to print their works, for a restricted time of twenty-one years for works distributed before the date of institution i.e. from tenth April 1710, those works which had not been exchanged to the Stationer's Guild. "Those works which were published subsequent to the enactment of the statute of Anne enjoyed a protection of fourteen years. Prior to the Statute of Anne, the common law of England recognised a perpetual right of property in the author's copy in the manuscript."[42] Statute of Anne was designed to destroy the bookseller's monopoly of the book trade and to prevent its recurrence[43] "and sought to divorce the evil of privileged censorship from free expression, thus facilitating an

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[38] Stephen M. Stewart, *International Copyright and Neighbouring Rights* 20 (1983).

[39] Jacqueline M.B, *Seignette, Challenges to the Creator Doctrine – Authorship, Copyright Ownership and the Exploitation of Creative Works in the Netherlands, Germany and the United States* 13 (1994).

[40] E.P. Skone James, et al, *Copinger and Skone James on Copyright*, para 1-24 (1991).

[41] L. Ray Patterson & Stanley W. Lindberg, THE NATURE OF COPYRIGHT : A LAW OF USER'S RIGHTS, ATHENS UNIVERSITY OF GEORGIA PRESS (1991) ' the authors characterize the original Statue of Anne not as a major expansion in the protection of works, but as actually creating a public domain, by limiting the duration of protected works, by limiting the duration of protected works and by requiring formalities', Note 25; Edward Samuels, *The Public Domain in Copyright Law*, 41 JOURNAL OF THE COPYRIGHT SOCIETY 137 (1993) available at http://www.edwardsamuels.com/copyright/beynd/articles/public.html#fn25 accessed on 20/03/2016 at 10:30 am.

[42] This is often referred to as 'Common Law Copyright'; AKHIL PRASAD AND ADITI AGGARWALA, COPYRIGHT LAW DESK BOOK, 127 (2009).

[43] L. Ray Patterson, '*Understanding the Copyright Clause*', 47 J COPYRIGHT SOCIETY USA 365, 379 (2000).

equilibrium between the rights of the authors and the rights of the public to have access to print material."[44] It has been described that The statute of Anne marked the end of autocracy in English Copyright and established a set of democratic principles: recognition of the author as the ultimate beneficiary and the fountainhead of protection and a guarantee of legal protection against unauthorised use for limited times, without any elements of prior restraint of censorship by government or its agents'.[45] The Statute of Anne, was a short statute that comprised of just 11 parts:

- To enhance learning.
- To save the author and disallowing other to print or reprint the book/literary work for a duration limited to 21 years.

The Act was a respite to ameliorate the conditions of authors by securing them their just dues. The Act aimed at encouragement of learning and spread of knowledge and preservation of culture which can be inferred from the fact that the Book's title had to be registered with the Stationer's register and nine copies of the same was to be deposited in libraries of the listed universities with an express prohibition that such Universities shall not have a right to print such books which have been deposited and the book were meant only for accessibility and advancement of knowledge. The statute had another positive angle as regards the economics of publishing involved in that it titled the same in favour of the citizen and any person could now bring a complaint against the bookseller or the printer if they charged a price which such a person conceived to be too high and unreasonable. In order for such a complaint to be effectuated and redressed some of the highest ranks of the nobility, clergy, Vice-chancellors of University and the Judiciary were authorised and empowered to limit and printed books price to be settled at the best of their judgments or judgment as the case may be, in their respective jurisdiction, with costs to the complainant to be borne by such defaulting bookseller or printer. Furthermore such defaulting party was to give a public notice in the Gazette of the settled price and enhanced punishment was prescribed for repeating this offence after the price was settled and the defaulting party was brought to book. This Act did not confer a monopolistic status to the authors but only secured them the right to be entitled to their legitimate dues. However the increase in the term of protection to the lifetime of the author was still

[44] *Ibid* .
[45] Barbara Ringer, *'Bowker Memorial Lecture'*,Publisher's Weekly, 18 November 1974, at 27; Stephan M. Stewart, *International Copyright & Neighbouring Rights* 12 (1983).

due and took place subsequently. The Copyright Acts of 1814, and 1842 increased the duration of protection from fourteen, to twenty-eight, to forty-two years respectively. Thus, the phase after 1710 where books over which copyright had been secured were beginning to lapse, witnessed the real tensions in codified copyright law, as to whether there existed a common law copyright, independent of the statute. The booksellers tried their best to claim their copyright after expiration of 21 years in the pre-1710 works. For more than half a century, in what became known as the 'Battle of the Booksellers,' the lower courts sustained them in this view by granting injunctions after expiration of the statutory term[46] . Based on Lockean theory that "every man has a natural right of property to the fruits of his labour"[47], "the Stationers, claimed their perpetual right to publish and sell acquired copies which were acquired from the authors who sold their manuscripts."[48] The case of *Millar v. Taylor*, upheld the perpetual protection of common right and hence brought triumph to stationers. However, this decision could not stand the test of time and five years later, the House of Lords overruled Millar's decision that no perpetual copyright existed in copyright law. This principle of balancing the exclusive right of the author or publisher in the work came with the historic judgment of the House of Lords in the case of Donaldson v. Beckett[49]. "Queen Anne's Statute was the first statute, which opened the gates for the law of copyright in its true sense and afforded protection to the authors for their creative works, as its prime objective, rather than protecting the monopoly of publishers, who indulged in unjust enrichment of their pockets under the sanction of law at the expense of such 'men of letters'. The statute was indeed a turning point in the history of copyright laws."[50]

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[46] William F. Patry, *Copyright Law and Practice,* available at <http://digital-lawonline.info/patry/patry2.html> accessed on 22/03/2016 at 11:00 am. A similar situation was faced by France when it came to the renewal of a privilege of a Parisian publisher at the beginning of the eighteenth century.

[47] Locke, Second Treatise, Chapter V, § 27.

[48] Jacqueline M.B. Seibnette, Challanges to the Creator Doctrine – Authorship, Copyright Ownership and the Exploitation of Creative Works in the Netherlands, Germany and the United States, at 15, 1994.

[49] 4 Burr (4th edn.) 2303, 98 Eng Rep 201 (KB 1769).

[50] AKHIL PRASAD AND ADITI AGGARWALA, 132-133 (Copyright Law Desk Book, 2009).

2.2.2 HISTORY OF COPYRIGHT LAW IN INDIA

Modern copyright law developed in India gradually, in a span of 150 years[51]. "The first brush of India with copyright law happened in 1847 through an enactment during the East India Company's regime. The Act passed by Governor-General of India affirmed the applicability of English copyright law to India"[52]. As indicated by the 1847 sanctioning, the term of copyright was for the lifetime of the creator in addition to seven years after death and couldn't surpass forty-two years all in all. In spite of the fact that the creator denied production after his passing, the Government had the power to give permit for its distribution. The demonstration of infringement was comprehensive of unapproved printing of a copyright work for 'deal, contract or trade', or 'for offering, distributed or presenting to deal or contract'. Under this act the case for infringement could be instituted in the '*highest local court exercising original civil jurisdiction*'. Under a contract for service copyright, the Act specified that in '*any encyclopaedia, review, magazine, periodical work or work published in a series of books or parts*' shall vest in the *'proprietor, projector, publisher or conductor'*. It was regarded that the duplicates of the encroached work were the property of the proprietor of the copyrighted work for all reasons. In particular, the copyright in a work was not programmed not at all like today. Enlistment of the work with Home Office was obligatory for the assurance of rights under this order. Nonetheless, the Act particularly held the subsistence of copyright in the creator, and his entitlement to sue for its infringement to the degree accessible in some other law with the exception of 1847 Act. At the time of its introduction in India, copyright law had already been in the developing stage in Britain for over a century and the provisions of the 1847 enactment were reflected in the later enactments[53]. The Copyright Act 1911, repealed

[51] There has been so far, no study on pre-modern copyright-type legislation that may have been in existence in India prior to the colonial period. As in Europe, the 'arts' in India had historically been supported through patronage, although the forms that this patronage took were diverse. To illustrate, the historian Romila Thapar lists three distinct kinds of patronage that were in vogue: 'Embedded' patronage where the patron and recipient are built into the system, for instance where particular literary/musical forms were ritually continued through generations as in the writing of royal biographies or ritual eulogizing of rulers; Secondly, patronage as a deliberate act of choice where a community decides to donate wealth and labour towards the building of a monument which encapsulates its religious values – here the patron is not a single person but a recognizable group; Lastly, the most common form of patronagsse where the recipient is either a retainer or is commissioned by a patron.

[52] KALA THAIRANI, HOW COPYRIGHT WORKS IN PRACTICE 2 (1996).

[53] Rajkumar S.Adukia, *Handbook on Intellectual Property Rights in India*, available at http://www.metastudio.org/Science%20and%20Ethics/file/readDoc/535a76367d9d331598f49e2d/34_Hb_on_IPR.pdf, accessed on 21/03/2016 at 11:30 am.

the earlier statues based on the subject, it was also made applicable to all colonies of the British including India. In 1914, the Indian Copyright Act was enacted with some modified provisions of Copyright Act 1911, some new provisions were added to them applicable in India. The Indian Copyright Act 1914 remained applicable in India until it was replaced by the *The Copyright Act, 1957*.[54]

2.2.3 COPYRIGHT LAW IN INDIA

In India, the Copyright Act, 1957 (as amended in 1999), the Rules made there under and the International Copyright Order, 1999 govern Copyright and neighbouring rights. This Act has been amended five times i.e. 1983,1984,1992,1999 and most recently in 2012.The Act is divided into 15 chapters with 79 sections. Moreover, the Central Government, by virtue of section 78 is empowered to make rules by notification in the Official Gazette, for carrying out the purposes of this Act. Under the Act, "a copyright office was established under the control of a registrar of copyright who was to act under the superintendence and direction of central government"[55] . The principal function of this office was to maintain a register of copyright containing the names or titles of work, the names and addresses of authors, etc[56]. The registrar had certain powers like entertaining and disposing of applications for compulsory licenses and to inquire into complaints of importation of infringing copies. A Copyright Board[57] had been set up under the Act and the proceedings before it are deemed to be judicial proceedings[58]. The definition of copyright included the exclusive right to communicate works by radio diffusion; the cinematograph was given a separate copyright; the term of copyright protection was extended from 23 to 50 years which was again extended to 60 years in 1992[59]; term of copyright for different categories of work was also specified[60]. The right to present the translation of a work was made parallel with other rights emerging out of copyright[61] . Provisions

[54] V.K AHUJA, LAW OF COPYRIGHT AND NEIGHBOURING RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES 2-3, (2007).
[55] THE COPYRIGHT ACT, 1957, § 9.
[56] *Id*. at § 44 and 45.
[57] *Id*. at § 11.
[58] *Id*. at § 12.
[59] *Id*. at § 22.
[60] *Id*. at § 22 to 29. The works included literary, dramatic, musical and artistic works.
[61] *Id*. at § 14. According to the Act of 1914, the sole right to produce a translation of a work first published in India extinguished after 10 years of its first publication.

relating to assignment[62] of ownership and licensing of copyrighted work including mandatory/compulsory licensing in certain conditions[63], rights relating to the broadcasting organisations[64] , international copyright[65], definition of infringement of copyright[66], exceptions to the exclusive rights conferred upon the author or acts which do not constitute infringement[67] , special rights of the authors[68], civil remedies and criminal remedies against infringement and remedies against groundless legal proceedings or threats[69] were also put forth.

2.3 THE INDIAN COPYRIGHT (AMENDMENT) ACT, 2012

The Amendment Act 2012 has extended the rights of the performer's and broadcasting organisations, the major thrust of amendments was on eliminating unequal treatment meted out to lyricists and music composers of copyrighted works incorporated in cinematograph film owing to the contractual practice in Indian entertainment industry. Under industry practice, one time-lump sum payment was made and lyricists and music composers were assigning all rights to the film's producer. This meant that lyricist and music composers had no further right to any royalty accruing from their work even if the work was being utilized in mediums other than the cinematograph film. A proviso was added to Section 17, which provided that clauses (b) and (c) of the section will have no impact on the right of the author of the work which was incorporated in the cinema, this was done to give rights to the lyricist and music composers. One of the major points of this amendment was to ensure that users of copyrighted material users of copyrighted materials have affirmative access to protected materials and their fair use rights are duly protected and enforced. For meeting this requirement, the Amendment Act broadened the scope of statutory and compulsory licensing provisions and also empowered the broadcasting organisations to broadcast any prior published literary, musical work and sound recording by giving a prior notice to the copyright owner and paying royalty at

[62] THE COPYRIGHT ACT, 1957 § 18 to 19A.
[63] *Id*. at § 30to 32B.
[64] *Id*. at § 37.
[65] *Id*. at § 40.
[66] *Id*. at § 51.
[67] *Id*. at § 52.
[68] *Id*. at § 57.
[69] *Id*. at § s 54 to 70.

the rates prescribed by the Copyright Board[70]. Further, amendments also recognised the need to ensure access to reading material for the differently abled people by way of introduction of Section 52(1)(zb), is broadly worded, and allows the conversion of any work in any format accessible by any individual or organisation till such reproduction is for the benefit of disable persons and the transforming organisation or individual is working on a non-profit basis ensuring that such copies are not used for business. The Amendment Act has also tried to the Copyright Act in conformity with technological advances and concomitant international developments and so Section 65A and 65 B are added to promote digital rights management. The aim of these provisions is to safeguard the rights of the copyright owners in the digital domain. Further, to ensure that the digital advances are useful for the users and do not restrict access unreasonably and to protect the Internet Service Providers (ISPs) in section 52(b) and 52(c) are included. "These provisions protect ISPs from liability of copyright infringement in case of transient and incidental storage of the work for the purpose of providing access."[71]

2.4. CONCLUSION

The Copyright has traversed a great journey since the advent of printing press and from the passing of the first statue i.e. statute of Anne till the Copyright Act, 1957. This long journey has seen many developments such as the advancement of technology, which has not only eased the dissemination of the work but also has made the sharing easy and without boundaries. The Indian Copyright Act has been amended time and again to bring it in conformity with the changing times, technology and the needs of the society. A few years back the knowledge about copyright was less but with the change in times the society is becoming aware of the need of protection of the creative works in any form, format and media.

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[70] THE COPYRIGHT ACT, 1957, § 31D.

[71] Abhai Pandey, *Inside Views: The Indian Copyright (Amendment) Act, 2012 and its functioning so far*, available at http://www.ip-watch.org/2016/03/21/the-indian-copyright-amendmentact-2012-and-its-functioning-so-far/ accessed on 21/03/2016 at 11:40 am.

CHAPTER 3

SUBSISTENCE OF COPYRIGHT

3.1 INTRODUCTION

In India, the copyright law is regulated by *The Copyright Act, 1957* and are supported by The Copyright Rules, 1958. The Copyright Act, 1957 has been enacted by the Parliament with a view to amend and consolidate the law relating copyright and has been done with consonance of its legislative powers conferred by Entry 49 of the Seventh Schedule to the Constitution of India. The Copyright Act, 1957 does not explicitly define “Literary work” except that it states that "literary work" includes computer programmes, tables and compilations including computer literary data bases[72]. Computer includes any electronic or similar device having information processing capabilities[73]. And ‘Computer Programme’ means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result[74]. But the term computer database has not been defined under the Act but has been comprehensively defined under the Information Technology Act, 2000.

The collective definition of the expression Literary and Artistic Work has been defined under the “Berne Convention for the Protection of Literary and Artistic Works, as the expression

‘*literary* and artistic *works*’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works

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[72] THE COPYRIGHT ACT, 1957, § 2(O).

[73] *Id.* at § 2 (ffb).

[74] *Id.* at § 2 (ffc).

expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."[75]

Both the Berne Convention and the Copyright Act, 1957 give the inclusive definition of the expression literary work without actually meaning the term separately as literary and work. According to the dictionary meaning literary means well versed in or connected with literature. However the judiciary has connoted a very wide meaning to the term literary. According to Peterson J. "any work which is expressed in print or writing irrespective of the question whether the quality or style is high is literary work."[76]

In India, the Judiciary has expressed that the literary merit or quality is not a pre-requisite for a work to be literary work under the Copyright Act, 1957.[77]

3.2 LITERARY MERIT

A wide definition of literary work has encouraged the courts to include mundane compilations of information such as time tables, indices[78], examination papers[79], directories[80], football fixture lists[81], panchang (almanac)[82], applications[83], contract forms[84], mathematical tables[85], guide books[86], telegraph codes[87], railway time tables[88], and tambola tickets[89] under the expression "literary work".

In Fateh Singh Mehta v O.P. Singhal[90], the Rajasthan High Court held that 'literary work' includes "dissertation" submitted by student. In Satsang v Kiran Chandra

[75] Berne Convention For The Protection Of Literary And Artistic Works, art.2.
[76] *University of London Press v University Tutorial Press* [1916] 2 Ch_601 at 608.
[77] *Rupendra Kashyap v Jiwan Publishing House* 1996 PTC 439 (Del).
[78] *Blacklock V Pearson* [1915] 2 Ch. 376.
[79] *University of London Press v University Tutorial Press* [1916] 2 Ch_601; *Aggarwala Publishing House v. Board of Housing School and Intermediate Education*, U.P AIR 1957 All 9.
[80] *Kelly v Morris* (1866) L.R 1 eq. 34; *Morris v Ashbee* (1868) L.R. 7 Eq. 634.
[81] *Football League v Littlewoods* [1959] Ch. 637.
[82] *Vishwanatha Iyer v Muthukumaraswami*, AIR 1948 Mad. 139.
[83] *Southern v Bailes* (1894) 38 501 to 681.
[84] *Real Estate of New South Wales v Wood* (19230 23 S.R.
[85] *Bailey v Taylor* (1824) 3 L.J.O.S 66.
[86] *E.M. Forster v A. N. Parasuram* AIR 1964 Mad.391.
[87] *Anderson & Co. Ltd. V Lieber Code Co*. (1917) 2 K.B 469.
[88] *Leslie v Young* (1894) A.C. 335 H.L.
[89] *Rai Toys Industries v Munir Printing Press* 1982 PTC 85 Delhi.
[90] AIR 1990 Raj. 8.

Mukhopadhyay[91], the Calcutta High Court held that writings, sermons and sayings of a religious preacher fall within the definition of literary work. In Sulmanglam R. Jayalakshmi v Meta Musical[92], the lyrics held by a swami were held to be "literary work".

3.3 SECONDARY OR DERIVATIVE WORK

Derivative works are those works which are based on existing works, such as translations, compilations, guide books, adaptations and new editions. Although an original prior work is protected under the copyright law, a secondary or derivative work does not enjoy the same status of protection unless:

- The labour is of the appropriate kind
- The effort must bring about a substantial change in the work
- The change must be of the appropriate kind
- The prior work shall be different from secondary work produced
- The doctrine of sweat of the brow is applicable in most of the cases.

Lord Eldon in *Longman v Winchester*[93] observed that

"*In a work consisting of selection from various authors, two men might perhaps make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another."*

In India Copyright subsists throughout India in the following classes of works:

- Original literary, dramatic, musical and artistic works;
- Cinematograph films; and
- Sound recordings

Subsistence of copyright means the existence of a right of copyright. For existence of a copyright over a literary work, it not essential that the work to be original with some literary merit, as derivative work with no literary merit can also come under the

[91] AIR 1973 Cal 533.
[92] AIR 2000 Mad. 454.
[93] 16 Ves. 269, 271; *Spiers v Brown* (1858) 6 W.R. 352 .

purview of copyright law. However the Act has not defined explicitly defined the term literary works, instead has given an inclusive definition.

According to section 2(O) of the Act

"Literary work includes computer programmes, tables and compilations including computer literary data bases."[94]

Hence forth the judiciary has taken the interpreted the term literary works and the

In the case of *V. Govindan v E.M Kone Gopalakrishna*[95], the Madras High Court held that

"It is clearly recognised that all these books (dictionaries, gazetteers, grammars, maps, arithmetic's, almanacs, encyclopaedias and guide books, new publications dealing with similar subject-matter) are capable of having copyright in them. In law books and books of the above description, the amount of 'originality' will be very small, but 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"[96].

Let us have a look at the statutory verbatim of the very so used phrases and terms.

According to **Section 13** of the Act which deals with the

> **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;*

[94] THE COPYRIGHT ACT, 1957,§ 2(O).
[95] AIR 1955 Mad 391.
[96] *V. Govindan v E.M Kone Gopalakrishna* AIR 1955 Mad 391.

(2) Copyright shall not subsist in any work specified in sub-section (1), 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;

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.

According to section 14

***Meaning of copyright**:- (1) For the purposes of this Act, "copyright" means the exclusive right, by virtue of and subject to the provisions of, this Act,------*

(a) in the case of a literary, dramatic or musical work, to do and authorize the doing of any of the following acts, namely:-

(i) to reproduce the work in any material form;
(ii) to publish the work;
(iii) to perform the work in public;
(iv) to produce, reproduce, perform or publish any translation of the work;
(vi) to communicate the work by radio-diffusion or to communicate to the public by a loud-speaker or any other similar instrument the radio-diffusion of the work;
(vii) to make any adaptation of the work;
(viii) to do in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in clauses (i) to (vi);

(2) Any reference in sub-section (1) to the doing of any act in relation to a work or a translation or an adaptation thereof shall include a reference to the doing of that act in relation to a substantial part thereof.

According to section 16

> ***No copyright except as provided in this Act****:-*
>
> *No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.*

As we can interpret from the above statutory verbatim, section 13 clearly defines as to the works where there is a subsistence of copyright. Section 14 gives a clear definition of what copyright means and what are the activities that can be done under this Act. Apart from that Section 16 speaks of works if not under the provision of this Act, and then they are not copyrightable. So in order to obtain a copyright, the work should fall under the heads mentioned under this Act.

The concept of subsistence of copyright has evolved through various judicial pronouncements given by courts if various jurisdictions. There has been no such straight jacket rule to identify whether there has been a subsistence of copyright or not. Courts of various jurisdictions have gone for an in depth analysis of the statutory provisions and hence have arrived at some conclusions which are at times used by other Courts as precedence.

In the next sub heading, we will dealing with cases of various jurisdictions, relating to subsistence of copyright.

3.4 CASE ANALYSIS

3.4.1

BAKER

VERSUS

SELDEN[97]

This case has been a landmark case on the subsistence of copyright. This case has always been referred for the idea-expression dichotomy.

FACTS

- In this case Selden had written a book in which he has described a new and better method of bookkeeping, accounting along with examples.
- Baker on the other hand also wrote a book on bookkeeping and described the accounting a measure in the very same way was Selden has done in his book. Selden when came to know about this, filed a suit for infringement of copyright by Baker of his book.

ISSUES

- Whether Baker has only used the idea or has copied the idea mentioned by Selden in his book?

ARGUMENTS

PLAINTIFF

- The main argument by Selden was that Baker has copied and stolen his method of accounting from his book.

DEFENDANT

- On the other hand, Baker's argument was that a method cannot be copyrighted.

[97] 101 U.S. 99 (1879)

- He contended that he only used the same accounting method and did not copy the any sort of text from Selden's book. Hence there has been no violation of copyright by him.

JUDGMENT

- The Trial Court upheld Selden's claim as it found Baker's book and his bookkeeping standard to be quite similar and identical to that by Baker. Aggrieved by the decision, Baker appealed at the US Supreme Court.
- The Supreme Court held, that a copyright over a book does not extend a right to prevent other people from using and applying the same method. A copyright on the book of bookkeeping cannot be said to give the author the sole right to use the so called method and not be used by any other person. The Court also held that Selden cannot copyright the forms so present in the form as they were quite essential for the accounting system and for mergers. If the concept of merger is just an idea and idea cannot be copyrighted, then so called work behind the mergers are also part of an idea and hence they can't also be copyright protected. It was also held that the forms are not expressive and are functional in nature.
- The Court also held that Selden's act amounted to protect his method of bookkeeping which he could have got under the Patent Act. But since he had only Copyright so it can't be granted in this case. Copyright is only for protection of expressions and not of methods.

Hence the plea by Selden was rejected and Baker was not liable for copyright infringement.

ANALYSIS

A very good interpretation by the judiciary of the terms idea and expression, ideas cannot be copyright protected whereas expressions can be. The judiciary also demarcated the difference between patent and copyright. Patent is for protection of methods, whereas Copyright is for the protection of the expressions. This case has

also served as precedence for various other cases decided by courts of various jurisdictions.

3.4.2

UNIVERSITY OF LONDON PRESS LTD

VERSUS

UNIVERSITY TUTORIAL PRESS LTD[98]

A landmark and a milestone case decided by Peterson J on the issue whether exam papers are original literary works or not.

FACTS

- In this case the University of London, appointed examiners to set question papers which will belong to the University and the university has reserved all the rights to reproduce them again and again without compensating the author who created them.
- For the month of September 1915, two examiners namely Mr Jackson and Professor Lodge were appointed and they were in charge of creating the exam paper for mathematics. After the exams, the University entered into a contract with University of London Press and assigned it the right to publish any specific exam for a period of six years. In the same year, University Tutorial Press published the exam papers which it obtained from the students. It also published the answers of those question papers also.
- The University of London Press on finding the same filed a case of copyright infringement against University Tutorial Press over the published exams.

ISSUES

- Whether exam papers are original literary works or not?

[98] [1916] 2 Ch 601.

CONTENTIONS

PLAINTIFF

- The contention by the plaintiff was that the exam papers so made are original, literary works and hence are liable under the Copyright Law protection. The University has a copyright over the exam papers and no one else can publish it without permission from the University and if done then that act will amount to infringement of copyright.
- Apart from that the questions so set in the examinations are original and are not found in any of the text books. The examiners have spent in a lot of time, skill and labour to form these question papers, not everyone can set the question papers and hence the exam papers are liable to be copyright protected.

DEFENDANTS

- The defendant raised the contention that the exam papers are not original literary works as they have no literary merit in them and also they contain questions which might be found in the text books of mathematics.
- The exam papers have no novel content in them and hence are not subjectable to copyright protection under the law. The Tutorial Press has obtained the question papers from students which were already published in an exam; hence there has been no infringement of copyright.

JUDGMENTS

- The Court after hearing the Arguments of both the parties came to a conclusion that exam papers are original, literary works and hence are liable to protection under the copyright law.
- Peterson J held that:
  "Assuming that they are literary work, the question then is whether they are original. The word original does not in this connection 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. In the present case it was not suggested that any of the papers were copied. Professor Lodge and Mr Jackson proved that they had thought out the questions which they set, and that they made notes or memoranda for future questions and drew on those notes for the purposes of the questions which they set. The papers which they prepared originated from themselves, and were, within the meaning of the Act, original. It was said, however, that they drew upon the stock of knowledge common to mathematicians, and that the time spent in producing the questions was small. These cannot be tests for determining whether copyright exist. If an author, for purposes of copyright, must not draw on the stock of knowledge which is common to himself and others who are students of the same branch of learning, only those historians who discovered fresh historical facts could acquire copyright for their works. If time expended is to be the test, the rapidity of an author like Lord Byron in producing a short poem might be an impediment in the way of acquiring copyright, and, the completer his mastery of his subject, the smaller would be the prospect of the author's success in maintaining his claim to copyright. Some of the questions, it was urged, are questions in book work, that is to say, questions set for the purpose of seeing whether the student has read and understood the books prescribed by the syllabus. But the questions set are not copied from the book; they are questions prepared by the examiner for the purpose of testing the student's acquaintance with the book, and in any case it was admitted that the papers involved selection, judgment, and experience. This objection has not, in my opinion, any substance; if it had, it would only apply to some of the questions in the elementary papers, and would have little, if any, bearing on the paper on advanced mathematics. Then it was said that the questions in the elementary papers were of common type, but this only means that somewhat similar questions have been asked by the other examiners. I suppose that most elementary books on mathematics may be said to be of a common type, but that fact would not give impunity to a predatory infringer. The book and the papers alike originate from the author and are not copied by him from another

book or other papers. The objections with which I have dealt do not appear to me to have any substance, and, after all, there remains the rough practical test that what is worth copying is prima facie worth protecting. In my judgment, then, the papers set by Professor Lodge and Mr Jackson is "original literary work" and proper subject for copyright under the Act of 1911."[99]

- Hence it was held by the Court that examination papers are original literary works and hence are liable for protection under the Copyright Law.

ANALYSIS

A milestone case in copyright law extensively determining that why examination question papers are original literary works and are subjected to protection under the copyright law. Justice Peterson has given a very valuable and commendable observation which served as precedence for the future cases. Even in India, cases of similar subject matter, reference of this case is cited by most parties and judges.

3.4.3

FEIST PUBLICATIONS, INC.

VERSUS

RURAL TELEPHONE SERVICE CO. [100]

This case deals with the subsistence of a copyright. To be protected under copyright law, a work must be independently created and should possess a nominal degree of creativity.

FACTS

- In this case Rural Telephone Service Company Inc.,(hereinafter referred as the plaintiff) was a company in the business of providing telephone service to communities.
- According to the state legislation, the company used to issue free of cost an annual telephone directory to its customers. The telephone directory

[99] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.
[100] 499 U.S. 340.

comprised of both yellow pages and white pages, the yellow pages were for advertisements from where the telephone company used to generate revenue.

- Feist Publications,(hereinafter referred as the defendant) is company engaged in the business of publishing and also publishes a directory which is way wider than the typical directory.
- The defendants also published and distributed free of cost a telephone directory, which also had yellow and white pages in it. The yellow pages were used for publication of advertisements and for generation of income.
- The defendant approached the plaintiff to obtain a license for using its telephone numbers of an area, to which the defendant refused. Later on the defendant used the telephone numbers without the consent of the plaintiff.
- The plaintiff after discovering the same sued the defendant for infringement.

ISSUES

- Whether the names, addresses and the telephone numbers of people are a subject matter of copyright protection or not?

CONTENTIONS

PLAINTIFF

- The main argument of the plaintiff was that the white pages of the directory of the defendants were quite similar to that of their directory's white pages and hence the defendants have copied there work and are liable for infringement.

DEFENDANTS

- The main argument put forth by the respondents were that the contents of the directory are mere facts and are not a subject matter of copyright. There should be some amount of creativity and originality to gain protection under the copyright law.

JUDGMENT

- The District Court and the Court of Appeals held that telephone directories are copyright protectable. But the Supreme Court reversed the decisions held by the lower Courts.
- The Apex Court held that the telephone directories are not a subject matter of copyright and hence are not copyright protectable. The plaintiff's white pages of the directory do not meet the statutory requirement of copyright protection. The court held that the Originality and not "sweat of the brow" is requirement for copyright protection. The court also held that Raw Data are not copyright protectable and hence the plaintiff's white pages are not copyright protectable. And hence there has been no infringement of copyright by the defendants since the white pages had any original, creative work in it.

ANALYSIS

This judgement by the Apex Court failed to identify the requirement of "sweat of the Brow". The Court gave importance only to the originality and degree of creativity which in my opinion is wrong. The Apex Court should have given weight to the time, skill, cost, hard work and labour that was involved in making the telephone directory. Later on this case was considered as a mistaken view of the judiciary.

3.4.4

AGARWALA PUBLISHING HOUSE

VS.

BOARD OF HIGH SCHOOL AND INTERMEDIATE EDUCATION AND ANR[101]

This is a case wherein the main dispute was whether the question papers of an examination are original literary works and can have a copyright or not.

[101] AIR 1967 All 91.

FACTS

- In this case, the Agarwala Publishing House (Plaintiff) was a publishing firm publishing various books for the secondary and higher secondary students. Board of High School and Intermediate Education (Defendant) was the UP State Education Board and is responsible for setting of the question papers, conducting examinations and various other allied activities for in the field of education.
- The petitioners in this case challenged the amendment and regulations made by the defendants wherein it stated that the Board has a copyright over the question papers and a publisher if wants to publish the question paper set by the Board has to pay a fee of Rs5/- for each paper to the Board and has to undertake that it should not publish any answer key or any solutions of the question.

ISSUES

- Whether the question papers of an examination are original literary works and can have a copyright or not?

ARGUMENTS

PLAINTIFF

- The petitioners found this regulation to be very inconsistent and against the law. The petitioners claimed that the question papers set by the Board in the examinations are not any original literary works, and hence no copyright can be claimed over it under Section 13 of The Act, 1957.
- It also contended that even if the question papers have a copyright, it vests with the author who has set and made the paper and not with the Board.

DEFENDANT

- The contention put forth by the defendants was that the question papers literary works under section 2(o) of the Act, 1957 and hence are subjected to copyright protection under the Act, 1957.

- The Board has a copyright claim over the question papers as they are been made under the supervision and guidance of the Board.

JUDGMENT

- The Court rejected the argument that copyright cannot subsist because examination papers are not original literary works. The court also held that the expression “literary works” under section 13 of the Act,1957 not only means works in literature sense but includes all the works expressed in writing whether having any literary merit or not. Hence copyright subsists in the examination question papers as they are original literary work as they contain skill and labour of an author put in it.
- Therefore it was held that examination question papers are original and literary works and hence are liable to copyright protection under the Copyright Act, 1957.

ANALYSIS

This judgement was a landmark judgment in India as the Courts devolved deeper into the term literary works and interpreted the term to include examination question papers which might not have any literary merit on its own like other literature works. It also defined that literary works are not only mean to include works of literature but any other work which has put in it substantial amount of skill and labour.

CHAPTER 4
INFRINGEMENT OF COPYRIGHT

4.1 INTRODUCTION

Copyright infringement issue has brought an alert up in today's reality. At the point when a man purposefully or accidentally duplicates or uses the work of another maker, without his former assent or authorization, or any agreement or permit or task with the creator as secured by the copyright law, it adds up to infringement. Infringement can be comprehensively characterized into two:-

1. Primary infringement;
2. Secondary infringement.

Primary infringement manages the genuine demonstration of duplicating, while secondary infringement manages different sorts of managing like offering the pilfered books, importing and so on.

4.2 TYPES OF INFRINGEMENT

4.2.1 Direct Infringement:

Direct infringement is a strict risk offense and blameworthy expectation is not fundamental to settle criminal obligation. The necessities to build up an instance of copyright infringement under this hypothesis are:

(1) Ownership of a legitimate copyright; and

(2) Copying or infringement of the copyrighted work by the litigant.

Along these lines, a man who guiltlessly or even incidentally infringes a copyright might be held at risk under the Copyright Act of the U.S. what's more, under the laws of different nations. The blameworthy expectation of the offender can be considered for deciding the quantum of harms to be granted for the claimed infringement.

4.2.2 Contributory Infringement:

The contributory infringement pre-assumes the presence of information and cooperation by the affirmed contributory infringer. To claim harms for infringement of the copyright, the offended party needs to demonstrate:

(1) That the respondent knew or ought to have known of the encroaching action; and

(2) That the respondent actuated, brought about, or tangibly added to someone else's infringing movement.

4.2.3 Vicarious Infringement:

Vicarious copyright infringement obligation advanced from the guideline of respondent unrivalled. To succeed on a case of vicarious risk for a direct infringer's activity, an offended party must demonstrate that the respondent:

(1) Had the privilege and capacity to control the direct infringer's activities; and

(2) Derived a direct budgetary advantage from the infringing action.

In this manner, vicarious risk centres not on the information and interest but rather on the relationship between the direct infringer and the litigant.

Lawful point of reference for vicarious copyright infringement risk has created along two general social lines. The principal social line includes the business/worker relationship, while the second includes the lessor/resident relationship.

4.3 MACHINERY FOR ENFORCEMENT OF COPYRIGHT

There are two kinds of machineries available to the copyright owner for enforcing his copyright:

(i) Administrative machinery consisting of the Registrar of Copyright, the Copyright Board and the Customs authorities under the Customs Act.

(ii) Judicial machinery which provides civil remedies under Chapter XII (sections 54-62) and criminal remedies under Chapter XIII (sections 63-70). The copyright owner has an option to opt for the remedy he wants to avail.

4.3.1 ADMINISTRATIVE MACHINERY

(a) Border measures or remedy to prevent to prevent importation of infringing copy (section 53)

One of the significant worries of copyright proprietors has been the trans-border development of infringing material. The onus of counteractive action of this development has dependably been on the customs powers. The customs powers of particular nations at first had opportunity to define standards for this reason. Be that as it may, the TRIPS Agreement surprisingly set down minimal standard to be led by party nations in Part III envisaged in Articles 49-60. India is a signatory to TRIPS; in this manner, it has consented to the standards set down in that.

Section 53 of the Copyright Act preceding 2012 correction gave solution for keep the importation of infringing duplicates into India. The area must be perused with Section 11 of the Customs Act.

The Supreme Court portrayed one crucial distinction between warning under section 11 of the Customs Act and a request made under Section 53 of the Act to be that the previous is quasi- legislative in character, while the last is quasi-judicial character. The quasi- judicial nature of the request made under section 53 is further underlined by the way that an offer is given to the Copyright Board against the request of the Registrar under section 72 of the Copyright Act.

"The effect of an order under section 53 of the Copyright Act is not as portentous as a notification under section 11 of the Customs Act. The registrar is not bound to make an order under section 53 of the Copyright Act as an application is presented to him by the owner of the Copyright. He has naturally to consider the content of the mischief sought to be prevented. He must consider whether the copies would infringe the copyright if the copies were made in India."[102] He must consider whether the applicant owns the copyright or is the duly authorized agent of the owner of copyright. He must hear those claiming to be affected if an order is made and consider any contention that may be put forward as an excuse for the import. He may consider any other relevant circumstance. Since all legitimate defenses are open and the enquiry is *quasi*-judicial, no one can seriously complain.[103]

[102] *Gramophone Co. v Birender Bahadur Pandey* AIR 1984 SC 667 at p.676.
[103] *Ibid*.

The motivation behind the procurement was to give a viable apparatus in the hands of the Registrar for battling the developing hazard of privateer products such as sound video, tapes, CDs, tapes, books and so forth which start from different nations having powerless copyright law or feeble requirement methodology.

"The Anti- Counterfeiting Committee of International Trade Marks Association organized a Round Table Conference in New Delhi on 10 March 2005, to address issues relating to the role of custom authorities, the Registrar of Copyright and related authorities to curb and prevent cross- border counterfeiting and parallel imports in India."[104]

They suggested that section 53 of Copyright Act empowering the Registrar of Copyright to ascertain whether infringing goods are present on a ship or dock and then the custom authorities to act on it is not a workable provision. The customs and Registrar of Copyright cannot be expected to collaborate with each other within the time frame for cross-border enforcement. It was felt that that customs should wield independent authority to detain goods and adjudicate cases. They also suggested that the importer of the goods should be required to indicate the place of manufacture of items that are imported into India.

The amendment has brought forth following significant changes:

(1) Section 53 is not applicable to goods in transit.
(2) The custom authorities are not required to collaborate with the Registrar of copyright before taking any action.
(3) The owner of the work has to deposit some amount as security having regard to the likely expenses on demurrage , cost of storage and compensation to the importer is case it is found that the works are not infringing copies.
(4) The person giving notice has to produce an order from a court having jurisdiction as to the temporary or permanent disposal of such goods within fourteen days from the date of their detention.[105]

[104] THE COPYRIGHT ACT, 1957, § 34 r/w § 53.
[105] Abhai Pandey, *Inside Views: The Indian Copyright (Amendment) Act, 2012 and its functioning so far,* available at http://www.ip-watch.org/2016/03/20/the-indian-copyright-amendmentact-2012-and-its-functioning-so-far/ accessed on 20/03/2016 at 11:40 am.

(b) Border measures required under International Convention

Since TRIPS, 1995, administered by WTO complies with Article 1-21 Appendix of the Berne Convention, the above stated Articles 13 &16 will become a part of TRIPS also. Section 4 of TRIPS Agreement specifically deals with "Special Requirements Related to Border Measures" to be followed by member States and provide detailed guidelines with which such boarder measures must conform in Articles 52-60.

The WCT and WPPT like TRIPS provide that member states shall comply with Articles 1-21 and Appendix of Berne Convention. Both the treaties further oblige the State parties to provide effective enforcement procedures in their national laws against any act of infringement of rights as provided in those treaties. The member States shall also provide expeditious remedies to prevent infringements. This includes civil, administrative and criminal remedies.

India is a party to Berne and TRIPS but not to WCT AND WPPT.

(c) Power of the Copyright Board

A Copyright office is established for the purpose of this Act. It is under the immediate control of Registrar of Copyright who acts under the superintendence and direction of the Central Government.[106]

A Copyright Board is constituted under section 11 of the act for the discharge of certain judicial functions.[107] It consists of a chairman and two other members.[108] The board has power to regulate its own procedure, including the fixation of venue and time of its proceedings. "The board is deemed to be a civil court for the purpose of sections 480 and 482 of the Code of Criminal Procedure. All the proceeding before the board is deemed to be judicial proceeding within the meaning of section 193 and 228 of the Indian Penal Code."[109]

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[106] THE COPYRIGHT ACT, 1957, § 9.
[107] *Id.* at § 12.
[108] Prior to 2012 the Board consisted of two or more members up to a limit of fourteen.
[109] *Id.* at § 12.

(d) Appeals against orders of Registrar of Copyrights and Copyright Board (Section 72)

"Any person aggrieved by any decision or order of the Registrar may appeal to the Copyright Board within three months from the date of the order of decision."[110]

An appeal against all orders passed by the Copyright Board except under section 6 (dealing with publishing of work or temporal duration) lay to the High Court within whose jurisdiction the appellant resides or carries on business.[111]

4.3.2 JUDICIAL MACHINERY

Civil Remedies

Civil remedies include such remedies as are normally available to those whose proprietary rights have been invading. Section 54 specifies that only an "owner of copyright which includes an exclusive licensee can file a suit for civil redress. In case of anonymous or pseudonymous literary, dramatic, musical or artistic works, publisher is the owner till the identity of any of the authors is disclosed."[112]

Section 62 of the Copyright Act permits a plaintiff to sue for infringement in a court inside of whose purview the plaintiff wells or carries on business or works for addition and not as a matter of course where the infringement happens. In *Tata Oil Mills Co. Ltd. v. Hansa Chemical Pharmacy*[113] , it was held "in respect of Union Territory of Delhi, High Court of Delhi has the civil original jurisdiction in every suit the value of which exceeds the amount mentioned in the Delhi High Court Act and as such in the District Court within section 62 of the Copyright Act."[114]

Reliefs Available:

Civil remedies can be divided into three categories:

1. **Injunctions**
   (a) Interlocutory Injunctions

[110] *Id.* at § 72.
[111] *Id.* at § 72.
[112] THE COPYRIGHT ACT, 1957,§ 54.
[113] ILR 1979 (2) Delhi 236.
[114] *Tata Oil Mills Co. Ltd. v. Hansa Chemical Pharmacy,* ILR 1979 (2) Delhi 236.

(b) Anton Piller order

(c) Mareva Injunction

(d) Permanent Injunction

(e) John Doe or Ashok Kumar Order

(f) Injunction for groundless threat of legal proceedings

2. **Damages**
3. **Accounts for profits**
4. **Civil remedies in international conventions**

Criminal remedies:

The Copyright Act gives criminal remedies likewise against infringement of copyright. These remedies are particular and autonomous and can be profited of at the same time with the common remedies imprisonment of the accused or imposition of fine or both, seizure and conveyance –up of all encroaching duplicates to the proprietor of copyright are the criminal remedies. Infringement of copyright is considered as a cognizable offense. Here, "*mens rea* in form of knowledge of the accused is an essential element to constitute the offence of infringement for criminal prosecution. Neglect to ascertain the facts relating to copyright will not tantamount to knowledge. Clear and cogent proof of knowledge is necessary to establish the commission of the offence."[115] However, in *S.R. Upadhyaya v. G.C.Nepali,* [116] "the court held that there is presumption in favor of existence of knowledge if a person publishes something in which he knows that he neither has a copyright nor is right to publish given to him by the copyright owner". [117]

A criminal compliant cannot be dismissed on the grounds that the dispute is civil in character.[118] The pendency of a civil suit does not justify the stay of criminal proceeding in which the same question is involved. However, a criminal court may not give a finding on the question of infringement if the same issue is pending for

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[115] *Cherain P. Joseph v. K. Prabhakaran Nair* AIR 1967 Ker. 234.
[116] AIR 1985 All 275.
[117] *S.R. Upadhyaya v. G.C.Nepali,* AIR 1985 All 275.
[118] *V.S. Sharmaa v. Dharma Rao* AIR 1942 Mad. 124.

decision in a civil suit.[119] Thus, it is advisable to initiate simultaneously the proceedings of civil and criminal as well.

"No prejudice is likely to be caused to any of the parties in as much as both the action is not mutually exclusive but clearly co- extensive and quite different in content and consequence."[120]

Chapter XIII of the Act deal with the offences relating to infringement of copyright. Section 63 makes it an offence for a person to knowingly infringe or abet the infringement of:

(a) The copyright in a work.
(b) Any other rights conferred under this Act, conferred under section 53A.

"However, construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section."[121]

Infringement of copyright in computer program

The Copyright (amendment) Act, 1994, inserted a new section 63B which provides that

> "*if a person knowingly makes use on a computer of an infringing copy of a computer programme shall be punishable with imprisonment for a term which shall be not less than seven days but which may extend upto three years and a fine which is not less than fifty thousand but which may extend to two lakh rupees.*
>
> *However, where the computer program has not been used for a gain or in course of trade or business, the court may for adequate and special reasons to be mentioned in the judgment, not impose any sentence of*

[119] *Supra*.
[120] *Sumeet Machines v. Sumeet Research and holding*,199 PTC 75 (Mad.).
[121] THE COPYRIGHT ACT, 1957, Explanation to § 63.

imprisonment and may impose a fine which may extend to fifty thousand rupees."[122]

Other Criminal Remedies

a) Power of the police to seize infringing copies.
b) Protection of technological measure.
c) Protection of rights management information.
d) Penalty for making false entries in register.
e) Penalty for making any false statements for the purpose of deceiving or influencing any authority or officer.
f) Penalty for contravention of Section 52A with respect to records and video films.
g) Offences by companies.
h) The role of Central Government Enforcement.
i) Disposal of infringement copies or plates.
j) Criminal remedies under international convention.

Most of the time, there has been a tiff between the issue of copyright subsistence and copyright infringement and between copyright infringement and fair use. As mentioned earlier, the Intellectual Property has a very subjective opinion which varies from case to case. There has been no such straight cut method to determine whether there has been an infringement or was it a permit able use under the law. The courts of different countries have gone into deeper interpretation to determine a case of infringement.

In the following sub heading an analysis of cases of different jurisdictions will be done, to have a view as to the observations of Courts on this subject matter.

[122] *Id* at § 63B.

4.4 CASE ANALYSIS

4.4.1

BURLINGTON HOME SHOPPING

VERSUS

RAJNISH CHIBBER & ANOTHER[123]

This case is a landmark case on Copyright Infringement. The main issue in this case was whether certain compilation data can be a subject matter of copyright and hence can claim protection under The Copyright Act, 1957.

FACTS

- In this case Burlington Home Shopping (hereinafter referred as the plaintiff) was a company engaged in mail order service business. Its main business was to publish various “mail order catalogues” of various consumers. These were posted to the plaintiff’s selected list of clients.
- The plaintiff had self-created such a database over 3 years and had made substantial investment of cost and time into it. Mr Rajnish Chibber (hereinafter referred to as the defendant) was an employee of the plaintiff. But he had no involvement in the creation and maintenance of the databases.
- It so happened that after some time, the defendant left the business of the plaintiff and started his own mail shopping order business. During his course of employment, the defendant somehow managed to get a copy of the plaintiff’s database.
- Now after he commenced with his business, he started using the same database of the plaintiff to establish relationship with the plaintiff’s customer and to expand his business.

[123] Del. 1995 PTC (15) 278.

ISSUES

- Whether certain compilation of data can be a subject matter of copyright and hence can claim protection under The Copyright Act, 1957?

CONTENTIONS

PLAINTIFF

- The plaintiff contended that the database was an original literary work and has full right of enjoying it.
- The defendant by using the database has infringed his copyright. Accordingly the suit was filed in the Delhi High Court seeking for an injunction to restrain the defendant from making use of the so mentioned database.

DEFENDANTS

- The defendant on the contrary alleged that the said database was not developed by the plaintiff and hence the plaintiff has no copyright over it.
- Further the defendant argued that he himself has created the database which he is using and that the act of using it for his business won't amount to infringement of copyright of the plaintiff.

JUDGMENT

- Another issues the Court had to address was that whether a database consisting of compilation of mailing addresses of consumers amounted to a subject matter of copyright or not.
- The Honourable Judge threw light at the relevant sections of the Copyright Act, 1957 that were:
  Section 2(o)[124], Section 2 (y)[125], Section 14[126], Section 17 [127]

[124] Section 2(o) defines `literary work' to include (among others) computer programmes, tables and compilations including computer databases.
[125] 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.
[126] Under section 14, literary work is one of the items wherein exclusive rights can be claimed so as to amount to copyright.

- The Court Appointed a Commissioner to gather the relevant and correct information regarding the databases. Both the databases were compared and contrasted; it was found that defendant's database was quite similar to the plaintiff's database. The words, the mistakes, the incorrectness of entries, the commas and the full stop all were similar and comparable with the plaintiff's database. Hence the Court was satisfied on the ground that the defendant had infringed the copyright of the plaintiff.
- The Court also held that the database was the fruit of the effort, time and money of the plaintiff. The defendant by using such database has tried to infringe the copyright of the plaintiff which is totally unjust and not at all acceptable. Apart from that if the defendant uses the plaintiff's database; it would lead to loss of business and costs of the plaintiff.
- Hence the Court granted an injunction in favour of plaintiff thereby restraining the defendant from carrying on his business with the help of the plaintiff's database.

ANALYSIS

A case on copyright over compilation of data was well decided by the court taking into account all the relevant factors. The Indian Courts have devolved much deeper into the statutory provisions and have come up with interpretations of subject matter of copyright protection. The court has given very well importance to skill, cost and labour to determine a matter to be under the umbrella of copyright or not.

[127] 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.

4.4.2

EASTERN BOOK COMPANY AND OTHERS

VERSUS

D.B.MODAK AND ANOTHER[128]

This case is an important and landmark case concerning the Copyright Law because this case relates to various aspects of importance and infringement of the copyright law.

FACTS

- In this case, Eastern Book Company (Appellant) was involved in the business of printing and publishing of law report known as "Supreme Court Cases" wherein all the reported and non-reported judgements of the Supreme Court of India.
- The appellants claim that they make various amendments in the original judgements and make it clear and user friendly. It is said that respondents have launched a software called "Grand Jurix" had brought out a software package called "The Laws" both published on CD-ROMS.
- As per the appellants, all the modules in the packages of the respondent have the appellant's verbatim quoted which are works of the appellants. The appellants claim that the respondents have copied their work right from the style and formatting, to the footnotes, the cross referencing, the copy editing etc. even the arrangement, sequencing and selection has been copied from SCC.
- The appellants filed a suit against the respondents on the grounds infringement of their copyright.

[128] (2008), 1 SCC, 1.

ISSUES

- Whether the entire version of the appellants work i.e. the copy edited judgments in the law report SCC to be treated an original literary work or a derivative work?
- Whether there was any subsistence of copyright in the case of appellant's work or not?

CONTENTIONS

PETITIONER

- The main contention by the appellants was that a substantial skill, labour, cost and hard work are involved in editing and publishing the judgments in SCC.
- The appellants stated that there do not claim monopoly over the judgments but claim copyright protection for their work which they have done with the help of skill and labour.

RESPONDENTS

- The respondents counter argued that the Supreme Court Cases are nothing but derivative work and it lacks originality and does not depict independent creation or even a modicum of creativity.
- The respondents also alleged that for claiming copyright protection, originality is a must. It should be independently created by the author and should not be copied. It should possess at least some minimal level of creativity.

JUDGMENT

- The single bench of the Delhi High Court held that the appellants gave a copyright over the head notes and the respondents are directed not to copy them in their CD-ROMs. However no stay was given.
- The case was appealed in the Division Bench of the High Court of Delhi. The Division Bench modified the judgment of the single bench and held that the respondents can sell their CD-ROMs with the text judgments of Supreme

Court along with their own head and editorial notes. But they should not copy any footnotes, head notes or editorial notes of the appellants appearing in the Journal. Apart from that the Court did not accept the contention of the appellants that they have a copyright over the copy edited judgments of the Supreme Courts published in their journals. Aggrieved by this decision, the Appellants filed a Special Leave Petition before the Supreme Court of India.

- In the Supreme Court, after hearing both the parties analyzed each of the copy edited judgments and then gave its judgment in a very confined and clear way. The Apex Court held that collection of judgments, improving readability and putting in inputs does not make a work entitled for protection on the grounds of creativity. The Court also held that 'SSC Report' does not reflect originality to the work of the author. To be entitled for copyright protection, there must be some substantive variation and not just any trivial variation; there must be at least some degree of creativity.
- But then the Court held that even though the copy edited judgments do not match the standards of creativity for copyright but then the way the appellants have presented their work i.e. the footnoting, the paragraph numbering etc. reflects the brain work and the deep understanding of the subject. The interpretation, the thoughts and application of law all require a lot of skill, labor and deep and full understanding of the subject, which in return do has a tincture of creativity. Not everyone can present the case as the appellants have done.
- Thus with the above explanation the Court partly allowed the appeal. The Court held that the head notes and footnotes of the Journal are the brainwork of the appellants and hence they have a copyright over it. The respondents were directed not to copy those head notes and footnotes appearing in the Journal. The apex court also directed the respondents for quote any paragraph from the appellants' Journal.

ANALYSIS

The Supreme Court's judgment in this case reflected justice and increased our confidence in judiciary. It became quite evident that no one can claim copyright over any raw text taken from any registrar office. A person can claim a copyright over a

derivative work only when it has a tincture and flavor of minimum amount of creativity in it.

4.5 MORAL RIGHTS

4.5.1 AN INTERNATIONAL PERSPECTIVE

Moral rights have their origin in the "*droit moral*" enjoyed by authors in various European countries, notably France, Germany and Italy. It refers collectively to a number of rights, which are more of a personal than commercial character.[129] According to Article 6 of the Berne Convention the member countries are required to grant to authors:

1) The right to claim authorship of the work and

2) The right to grant object to any distortion , mutilation or other modification of , or other derogatory action in relation to the work which would be prejudicial to the author's honour or reputation. These rights remain with the author even after he has transferred his economic rights.[130]

The TRIPS Agreement provides that "members shall not have rights or obligations under this agreement in respect of the rights conferred under Article 6 of the Berne Convention specifying moral rights or the rights derived therefrom."[131] The TRIPS Agreement does not specifically refer which are the rights that are derived from Article 6 of the Berne Convention. The right provided in Article 10(3) of the Berne Convention is believed to be such a right.[132]

Under paragraphs (1) and (2) of the Article, the author may not oppose, under certain circumstances, that quotations be made without his authorization from his work or that his work be used without his authorization for illustration in the course of teaching. It is in respect of these so called "free uses" that Article 10(3) of the Berne

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[129] COPINGER AND SKONE JAMES , COPINGER ON COPYRIGHT 774(London : Sweet and Maxwell, 13 ed. 1991); W.R. CORNISH , INTELLECTUAL PROPERTY : PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS 264 (Sweet and Maxwell 2nd ed., 1993); S.M. STEWART AND HAMISH SANDISON , INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS *109 (2nd ed., 1989).*

[130] *Ibid.*

[131] TRIPS, art. 9 para (1).

[132] WIPO, *Implication of the TRIPS Agreement on Treaties Administered* 13,14 (WIPO publications No. 464(E) 1997).

Convention provides that the right of paternity be respected. It would, therefore, mean that the TRIPS Agreement excludes the application of Article (10)(3) of the Berne Convention , that is , that, under the TRIPS Agreement the said quotation and illustrations need not mention the name of the author. The same applies to Article IV (3) of the BERNE Convention which provides that,

> "*The name of the author shall be indicated on all copies of the translation or reproduction published under a license granted under Article II or Article III.*"

Furthermore it would seem that the TRIPS Agreement also excludes the application of Article 11(2) of the Berne Convention to the extent that the latter provides that the conditions that may be determined under Article 11(2) shall not in any circumstances be prejudicial to the moral rights of the author.

It is important to note that under Article 2 paragraph 2 , of the TRIPS Agreement "Nothing in Parts I to IV of this agreement (and Article 9 in Part II) shall derogate from exiting obligations that Members may have to each other under…the Berne Convention …"[133] Consequently, it would seem that a member of WTO which is not party to the Berne Convention will not have to apply the provisions of the Berne Convention on moral rights and right derived therefrom, while a member of WTO which is party to the Berne Convention will have to apply those provisions, not only with respect to nationals of members of WTO which are party to the Berne Convention, but also with respect to nationals of members of WTO which are not party to the Berne Convention. Right of paternity also assumes that the right to reproduce should only vest with the author.

4.5.2 MORAL RIGHTS IN INDIA

In India moral rights are referred to as special rights under section 57 of the Act. It reads:

> *Author's special right.—*
> *(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*

[133] THE TRIPS AGREEMENT, art.2 para 2.

have the right——[(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 which is done before the expiration of the term of copyright 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 of 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), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

In *Manu Bhandari v. Kala Vikas Pictures Ltd.* [134], the plaintiff had written a novel named "*Aap ka Bunty*" and assigned the filming rights to the defendant who made *"Samay ki Dhara"* as the film. The plaintiff had good reputation in the world of Hindi literature and had acquired a special status for the treatment of contemporary social and psychological issues. The novel had been translated in a dozen Indian and foreign languages, published serial wise in a weekly magazine, and prescribed for graduate and post-graduate course in many universities.

The plaintiff alleged that the characters and theme is mutilated through vulgar dialogues in film. The court help that since there is a change in the medium from literary to cinematograph film, some changes are inevitable. However, the court ordered deletion of certain dialogues and change in certain scenes keeping in mind the honour and reputation of the author of the novel.

The court observed that "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

[134] AIR 1987 Del. 13.

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."[135]

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, "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 the authorship of the work. He has also a right to restrain the infringement or to claim damages for the infringement."[136] These rights are free of creator's copyright and the cures open to the creator under section 55. As it were, section 57 gives extra rights on the creator of an artistic work when contrasted with the proprietor of a general copyright. The exceptional assurance of the protected innovation is underlined by the fact that the cures of a limitation request or harms can be asserted "even after the task either entirely or halfway of the said copyright." Section 57 therefore plainly overrides the terms of the contract of task of the copyright. To put it in an unexpected way, the contract of task would be perused subject to the procurements of section 57 and the terms of contract can't nullify the extraordinary rights and cures ensured by section 57. The contract of trustee of a copyright can't guarantee any rights or immunities in view of the contract which are conflicting with the procurements of section 57.

In *Amar Nath Sehgal v. Union of India* [137]

The court held that "the moral rights of the author are the soul of his works. The author has a right to preserve, protect and nurture his creations through his moral rights. It further help that the destruction of work is the extreme form of mutilation. The destruction of the mural reduced the volume of the author's creative corpus, thus affecting his reputation prejudicially."[138]

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[135] *Manu Bhandari v. Kala Vikas Pictures Ltd, AIR 1987 Del. 13.*
[136] THE COPYRIGHT ACT, 1957.
[137] 2005(30) PTC 253 (Del.) .
[138] The Delhi High Court held in *Amar Nath Sehgal v. Union of India,* 2005(30) PTC 253 (Del.).

4.5.3 MORAL RIGHT OF DIVULGATION

Many countries also recognize a moral right of divulgation, or disclosure[139] "to the economic right of first publication. As a rule, common law countries do not extend a discrete moral right of disclosure."[140] At one time common law copyright, a teaching profoundly established in characteristic rights logic, moored the privilege of first distribution be that as it may, since it's for all intents and purposes complete pre-emption in the common law world, the privilege has involved the interstices of the statutory monetary rights.

Only a small number of countries like France, Germany, Italy and Spain, all in the civil law world, grant authors an explicit moral right to withdraw their work from circulation, typically in situations when the work no longer accurately reflects their views.[141] Indian statute provides no such right. Interestingly, section 31 of the Act provides for compulsory License in cases of work which are withheld from public.

The WPPT, 1996 has envisaged moral rights to performers also.[142] The amendment Act of 2012 has introduced a new provision section 38 B which enunciates moral rights of performers although India is not a member of WCT and WPPT. The two rights namely, the right of integrity and the right of identification as a performer of the performance, are on the same front as provided by the WPPT.

[139] French Intellectual Property Code, art.L.121-2.
[140] S.M. Steward at p. 289 *supra* note 84.
[141] Adolf Pietz, *Legal Principle of Moral Rights in Civil Law Countries,* 1-4 (II Copyright Reporter 1983).
[142] WPPT, 1996, art. 5.

CHAPTER 5

FAIR USE OF COPYRIGHT

5.1 INTRODUCTION

Certain acts are normally restricted by the copyright law, may, in conditions specified in law, be done without the consent of the copyright holder. Such provisions are envisaged for the purposes of balancing the rights of holder with the society at a large.

Article 9(2) of the Berne Convention "authorizes a national legislation to permit the "reproduction" of protected works in "certain special cases" provided two cumulative conditions are fulfilled:

(a) *The reproduction does not conflict with the normal exploitation of the work and*

(b) *Such reproduction does not unreasonably prejudice the legitimate interests of the author"*[143].

The question whether there has been any prejudice to the interest of the author, or not or was it reasonable or not depends upon the various national legislations. The answer has to be given in twofold stages. In the first place by the domestic legislation this generates the exception granted by the convention, and in the second place by the domestic courts interpreting in the national law. Only if the national law chooses to disregard one or both of the conditions laid down by article 9(2) would the member country be in the breach of the convention.[144]

The special cases were considered primarily in light of composition or typewritten duplicates, however cutting edge innovation has given new devices, which deliver significant difficulties to one side of propagation. For instance as of now, a warmed level headed discussion is focused on the recommendation that the Internet and the World Wide Web have vexed the delicate harmony between the creators and clients. "Copyright owners claim that unless copyright law is strengthened, contents will not be available on the internet and the network will fail."[145] "Internet users claim that if their current practices are restricted the Internet will fail to live up to its potential as a

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[143] The Berne Convention, art. 9(2).

[144] S.M STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 122 (London: Butterworths 2nd ed. 1989).

[145] Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 16 (1995).

democratic, interactive medium of communications and social interaction."[146] Measures are being regularly taken internationally and in most countries are taken to reconcile the contradictory interests of the copyright holder and the society. The two major examples of such resolution are formulation and enactment of WCT and WPPT by WIPO and the substantial amendment in the Copyright Act, 1957 in India in 2012.

5.2 FAIR DEALING WITH CERTAIN WORKS

(*i*) ***Section 52(1) (a)****: A fair dealing with any work, not being a computer programme, for the purposes of-*

- *Private or personal use, including research*
- *Criticism or review, whether of that work or of any other work*
- *The reporting of current events*[147] *and current affairs, including the reporting of a lecture delivered in public.*

Explanation – the storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.[148]

(ii) **Fair dealing**: The expression "fair dealing" has not been defined anywhere in the act. In *Hubbard v Vosper*[149] Lord Denning held that fair dealing is unsurprisingly a matter of degree and explained it as

"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 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."[150]

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[146] Pamela Samuelson, *The Copyright Grab, Wired*, available at http://www.wired.com/wired/archived/4.01/whitepaper.html , last accessed on 20/03/2016 at 04:30 pm.
[147] *Super Cassettes Industries v Hamar Television Network Private Ltd*. 2011 (45) PTC 70 (Del.).
[148] THE COPYRIGHT ACT, 1957, § 52 (1) (a).
[149] [1972] 2 Q.B 84 at 94-95.
[150] *Lord Denning* in *Hubbard v Vosper* [1972] 2 Q.B 84 at 94-95.

The court examines these factors in judging the allegation of infringement by the copyright owner on the one hand and the allegation of fair use by the infringer on the other. The incompetence of the courts to put forth a complete list of conditions to be applied in defining fair use is the evidence of the strain courts have had in using the doctrine. Learned Hand J. described the fair use doctrine as the "most troublesome in the whole world of copyright."[151] The doctrine of fair dealing or fair use is used as an affirmative defence and is applied once it is established that the extraordinary flexible doctrine in the sense that its application typically turns on the particular facts in issue. The doctrine has developed through a substantial number of court decisions over the years.[152]

(iii) **Research**:

Research according to the dictionary means, " a search or investigation directed to the discovery of some fact by careful consideration or study of a subject; a course of critical or scientific inquiry".[153] This exception is very vital for researchers in all spheres of life whether sociology, history, science or economics etc. as the burden of development of society in theory and practice lies on the researchers. The researchers need not have to spend time in authorization from where the previous copyright owner has ended. Moreover, the legislature and judiciary exclude research uses on the standing that, these types of works do not hamper with the customary markets of the owners.

In *Williams and Wilkins Co. v United States*[154] the court held that "it was fair use for the defendant to photocopy articles from plaintiff's medical journals for distribution to medical researchers because the copyright owner had not shown that it was, or would be, substantially harmed by the practice."[155]

(iv) **Criticism and Review**:

For criticizing and reviewing any work, it is sometimes becomes necessary to use extracts or quotations from any work. The use of such extracts by the critic does not amount to infringement. In UK, the prerequisite of fairness is that the source must be

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[151] *Dellar v Samuel Goldwyn, Inc.*, 104 F. 2d 661 (2d. Cir. 1939).
[152] *Syndicate of the Press of the University of Cambridge v R D Bhandari* 2011 (47) PTC 244 (Delhi).
[153] Oxford English Dictionary, Vol. VIII.
[154] 487 F. 2d 1345 (1973).
[155] *Williams and Wilkins Co. v United States*, 487 F. 2d 1345 (1973).

acknowledged[156]. The Indian Act, however, no such principle is there but is followed in practice.

In *Chancellor Masters and Scholars of University of Oxford v Narender Publishing House,*[157] the plaintiff claimed copyright in the book 'Oxford Mathematics Part A and Part B' based on syllabus for class IX of J & K State Board of Secondary Education. Defendants copied all the questions of the plaintiff's book and Secondary Education. Defendants copied all the questions of the plaintiff's book and prepared a guidebook titled "Teach Yourself Mathematics (fully solved) Part A" and "Teach Yourself Mathematics (fully solved) Part B". The guidebooks provided step by step approach to finding answers to the questions. The defendants claimed exemption under section 52 (1) (a) as their work fell under "review" of the book.

The court held that "by writing a guide book a "transformative work" comes into existence. A subsequent work is transformative when it is different in character from the previous work. If the work is transformative then it does not matter that the copying is whole or substantial. It further held that "review" according to The Shorter Oxford Dictionary means view, inspect or examine a second time or again…."[158] In the context of a work relating to mathematics, "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 them 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."[159]

The concept of fair use is very tricky. Any person can put in a smart argument and escape in the name of fair use. It has been quite difficult for the judiciary take in the arguments and decide according to the merits of the case. In a particular case, a particular act might be considered as an infringement which in another case might be considered as a fair use. The courts through various judicial pronouncements have set in parameters to determine the acts that constitute fair and which do not. These evolved principles are used by courts of various jurisdictions including India to determine a case on fair use of a literary work.

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[156] CDPA 1988, § 30(i).

[157] 2008 (38) PTC 385 (Del.); *V Ramaiah v K. Lakshmaiah* (1989) PTC 137.

[158] Held by Court in *Chancellor Masters and Scholars of University of Oxford v Narender Publishing House,* 2008 (38) PTC 385 (Del.).

[159] *Ibid.*

5.3 CASE ANALYSIS

5.3.1

HUBBARD AND ANOTHER

versus.

VOSPER AND ANOTHER[160]

This is a case wherein the judiciary tried to interpret and define the expression "Fair Dealing".

FACTS

- In this case, the Church of Scientology sued Cyril Vosper (Defendant) for copyright infringement. The defendant was a former member of the Church of Scientology.
- It was alleged by the L. Ron Hubbard (Plaintiff) that the book "The Mind Benders" written by the plaintiff and Neville Spearman Ltd has published the book, contains material copied from the works of the plaintiff.
- Apart from that it also contains certain confidential information pertaining to the Scientology courses. The Church claimed that the defendant had obtained those confidential information while he was a member of the Church and had signed a declaration not to disclose the same anywhere. The defendant in his arguments took the plea of fair use and stated that he fairly used the excerpts of the plaintiff's work and the information.

ISSUES

- Whether the defendant's book amounted to copyright infringement or amounted to a fair use of the work?

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160 [1972] 2 Q.B. 84.

CONTENTIONS

PLAINTIFF

- The Church claimed that the defendant had obtained those confidential information while he was a member of the Church and had signed a declaration not to disclose the same anywhere.

DEFENDANTS

- The defendant in his arguments took the plea of fair use and stated that he fairly used the excerpts of the plaintiff's work and the information.

JUDGMENTS

- The lower court granted injunction and retrained the publication of the book since there was a strong case of copyright infringement.
- Now the matter went to the Court of Appeals, wherein a three judge bench decided upon the case.
- The Copyright Act, 1956 states that:
  "No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgment."[161]
- The Court considered various evidences of both the books and found evidence that the defendant was per se was not criticizing the work of the author but was actually per se criticizing the subject matter underlying. The Court also concluded that the defendant was making a fair use of the plaintiff's work and hence there has been no infringement of copyright by the defendant. And on the matter of breach of confidence, the Court held that there was barely any evidence of confidential information in the defendant's book. Apart from that even if it is there, the public interest for that information will outweigh the confidentiality of the information.

[161] THE COPYRIGHT ACT 1956, § 6 (2).

- Therefore it was held that the defendant had made fair use of the plaintiff's book and there was no breach of confidence by the defendant by publishing certain information in his book.

ANALYSIS

The judiciary has gone in depth of the statutes for interpreting the actual meaning of fair use. The Court has given a fair and reasonable judgment on the doctrine of fair dealing which can be used as precedence by other courts while forming an opinion on fair use.

5.3.2

HARPER & ROW PUBLISHERS, INC.

Versus.

NATION ENTERPRISES[162]

This case deals with the most fundamental axiom of the Copyright Law i.e. ideas cannot be copyright protected.

FACTS

- In this case Harper & Row Publishers, Inc. (Plaintiff) had obtained the right to publish the memoirs of President Ford named "A Time to Heal".
- There was a contract with the Time Magazine to preview the work before the publication. But before the Time Magazine could publish the article, Nation Enterprises (Defendant), got a copy of the Ford Article and published the same in their Nation Magazine.
- Time Magazine then cancelled the plan of publishing the article and cancelled the contract with the plaintiff.
- Now the plaintiff suffered a huge loss and hence he filed a case of infringement of copyright against the defendant.

[162] 471 U.S. 539 (1985).

ISSUES

- Whether parts of a work of a ready to be published article, if published will amount to fair use or not?

CONTENTIONS

PLAINTIFF

- The defendant by publishing a part of that article which was supposed to be published by Time Magazine has infringed the copyright of the plaintiff.
- The defendant has fraudulently obtained the article and has published it without due permission.

DEFENDANT

- The article so published in Nation Magazine made only a reference of the Ford's Article and did not publish it completely.
- The reference so made does not amount to copyright infringement but falls under the purview of "fair use".

JUDGMENT

- The District Court went ahead and awarded damages to the plaintiff whereas the Second Circuit reversed the decision and held that such an act amounts to fair use of a work.
- The United States Supreme Court granted certiorari. The Apex Court held that a part of such ready to be published work if published does not amount to fair use. The basic idea behind doctrine of fair use is that if one is using fairly one's copyrighted work, and then in ordinary circumstances the copyright holder would have granted permission to use the work. So in order to make it easier to use, the doctrine of fair use has been implemented.
- The two main factors behind the doctrine of fair use: use and effect on the market. Usually a fair use won't lead to economic competition with the copyright holder and second, fair use won't lead to decrease of the market value of the work. But here the use is that it will lead to economic competition

with the copyright holder and the second is that the effect will lead to decrease in the market value of the copyright work, if published a prior.

- Therefore, the Court reversed the decision of the Second Circuit and held that in most of the cases prior publication of a work ready to be published amounts to be an infringement and is not protected by the doctrine of fair use. And this case the Court held that this is a case of infringement of copyright and not a case of fair use.

ANALYSIS

A remarkable case wherein the two most important parameters for determining fair use was laid down. Those two being use and effect on the market. Based on these two parameters and merits of a case, a condition for fair use can be decided by the courts.

CHAPTER 6

DATABASES

6.1 DATABASE

The term Database was included in the definition of "literary work" in section 2 (o) by an amendment in 1999. The Copyright Act, does not define databases. The information Technology Act, 2000 defines [163] the database:

> "*a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network.*"

Prior to the amendment of 1999 the Delhi High Court had an occasion to deal with databases in *Burlington Home Shopping v. Rajnish Chibber & Another*[164], Delhi High Court. The court decided on the issue of infringement by the defendant or not. It did not considered with the issue of originality for the sole motive of applying the copyright protection to compilation of data under the heading literary work in copyright law. The court cited many foreign judgments but did not take the reference of the case *Feist Publication Inc. V. Rural Telephone Services.*[165]

Feist led the way to various judgements dealing with factual information and conditions under which courts will cover the same under the copyright protection. In most of these cases, complier of factual compilations are granted with authority of copyright

In 1996, the WIPO undertook 2 treaties namely WCT AND WPPT to cater with the copyright issues raised by the upcoming technologies , Article 5 of WCT, specifies that the laws of copyright in the member nation must protect compilation of data, but

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[163] THE COPYRIGHT ACT 1956,Explanation (ii) of § 43; Hughes, *Copyright and Databases* 68 (essays in copyright law, 1990); Lea G., *Databases And Copyright* 9CLSR 68 (1993).
[164] (1996) PTR 40 (Del.).
[165] 499 US 340 (1991) as quoted in LEE Burgunder,245.

not the raw data itself. This conforms to United States law as given in *Feist publications Inc. v. Rural Telephone Service.*[166]

At first occasion, these choices appeared to advantage the general population everywhere by permitting access to vast arrangements of data and in the meantime managing protection alongside motivating forces for compilers of data. In any case, it must be considered that the administration's part is to hit parity with the privilege of access to the data and a motivation to the data suppliers to keep on delivering.

In 1996, the European Union passed a Directive, [167] which offered protection to selection and arrangement of the information and not to the substance. The producer of the database be that as it may, has a privilege to keep the unapproved extraction or re-usage from the database, of its substance, in entire or significant part, for business purposes. In this way the order permits the producer of database to have copyright on realities for business purposes and defends the money related and proficient ventures acquired in gathering information.

As per the Council Directive, which offered protection to selection and arrangement of the information and not to the substance. The producer of the database be that as it may, has a privilege to keep the unapproved extraction or re-usage from the database, of its substance, in entire or significant part, for business purposes. In this way the order permits the producer of database to have copyright on realities for business purposes and defends the money related and proficient ventures acquired in gathering information.

Any database might fit the database right as long as a substantial investment has been made in the obtaining, verification and preparation of their substance by the database creator. Database right has a fundamental term of security against unjustifiable extraction and re-usage of the substance, and terminates 15 years after the end of the timetable year in which it was made.

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[166] *Ibid.*
[167] Directive on the Legal Protection of Databases, March 11,1996 .

6.2 COMPUTER PROGRAMMES

In India, computer programmes were included in literary work[168] in 1994. TRIPS 1994 by virtue of Article 10(1) states: "*Computer Programmes, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)*". WCT, 1996 in Article 4 states: "*Computer Programmes are protected as literary works within the meaning of Article 2 of the Berne Convention*". Such protection applies to computer programs, whatever might be the mode or form of their expression.

TRIPS and WCT do not provide for definition the term computer programmes. However, Computer and Computer programme are defined under the Copyright Act, 1957: Computer includes any electronic or similar device having information processing capabilities,[169] and "Computer Programme means a set of instructions expressed in words, codes, schemes or in any other form including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result."[170]

Any computer program goes through a series of evolutionary steps from preliminary conception to detailed and complex expression. Programme is made in the source code in high level language like Fortran or Cobol. Computer converts this into operational terms of object code.

Any computer program experiences a progression of transformative strides from preparatory origination to nitty gritty and complex expression. Program is made in the source code in high level language like Fortran or Cobol. Computer changes over this into operational terms of article code. There are two types of computer programme:1) application programmes and 2) system software.[171]

Application programmes such as WordStar and VisiCalc, directly interact with a human to serve his required needs. By contrast, systems software like Apple-DOS or

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[168] THE COPYRIGHT ACT 1956, § 2(O).
[169] *Id.* at § 2(ffb).
[170] *Id.* at § 2(ff).
[171] Susan A. Dunn, *Defining the Scope of Copyright Protection for Computer Software, 38* Stanford Law Review (1986) p. 497.

PC-DOS do not satisfy only a particular user requirement, but makes the computer hardware functional and enables it to run application programmes.[172]

When the computer industry was in its beginning during the 1960's, there was a huge uncertainty of their protection i.e. whether computer programs could be protected under the IP Law i.e. copyright laws or patent law. On one hand, such programs, when written in the high level source code or language, have all the prerequisites of a creative literary style document. On the other, computer programs serve as an integral parts of an operational machine-just the type of thing excluded from the reaches of copyright.[173]

In 1976, United States Congress significantly revised the Copyright Act after almost 20-year process of discussing and debating the parameters of amendment. Despite the fact that Congress knew about different issues that new innovations, for example, computers postured to copyright arrangement, it perceived that it would not have the capacity to satisfactorily address them in the pending authoritative effort. Therefore, it created the National Commission on New Technological of Copyrighted Works (CONTU) to make recommendations regarding the changes to copyright policy that might be essential in order to cater the new technological developments.

In 1978, almost 3 years of discussion and deliberations, CONTU came up with its final report. CONTU's most conclusive recommendation was that copyright protection should be extended to the computer programs. It stated:

"*The cost of developing computer programs is far greater than the cost of their duplication. Consequently, computer programs …are likely to be disseminated only if the creator can spread its costs over multiple copies of the work with some form of protection is necessary to encourage the creation and broad distribution of computer programs in a competitive market and that the continued availability of copyright protection for computer programs is desirable*."

The last report made it clear that, steady with copyright standards in customary settings, insurance ought to be offered just to the statement of computer programs. Be that as it may, the report was vague session what parts of the programs ought to be

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[172] *Dictionary of Computing,* p. 335 (Oxford University Press, 1983).

[173] Lee B. Burg under, *Legal Aspect of Managing Technology,* West Legal Studies in Business 2nd ed. (2001) p. 299.

considered expression. Moreover, when Congress embraced this proposal in 1980 by changing the Copyright Act, it neglected to uncover its goals about the breaking points of copyright security for computer programs. Accordingly, the 1980 amendment made it clear that programs were to be ensured by copyright however abandoned it to the courts to decide the fitting parameters for security.

In United Kingdom, the CDPA, 1988 gives computer program the status of literary works. In 1991, the European Union Councils embraced a comprehensive ordinance for European Union nations. With certain exceptions, the guiding principles of this directive are almost in parity to those applied in US.

6.3 REMEDIES

6.3.1 Civil Remedies

Civil remedies incorporate such remedies as are normally accessible to those whose restrictive rights have been attacking. Section 54 specifies that only an owner of copyright which includes an exclusive licensee can file a suit for civil redress. In case of anonymous or pseudonymous literary, dramatic, musical or artistic works, publisher is the owner till the identity of any of the authors is disclosed.[174]

Section 62 of the Copyright Act allows a plaintiff to sue for infringement in a court within whose jurisdiction the plaintiff resides or carries on business or works for gain and not necessarily where the infringement takes place. In *Tata Oil Mills Co. Ltd. v. Hansa Chemical Pharmacy*[175] , it was held "in respect of Union Territory of Delhi, High Court of Delhi has the civil original jurisdiction in every suit the value of which exceeds the amount mentioned in the Delhi High Court Act and as such in the District Court within section 62 of the Copyright Act."[176]

Civil remedies can be divided into three categories:

1. Injunctions
2. Damages

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[174] THE COPYRIGHT ACT, 1957, § 54.
[175] ILR 1979 (2) Delhi 236.
[176] Tata Oil Mills Co. Ltd. v. Hansa Chemical Pharmacy, ILR 1979 (2) Delhi 236.

3. Accounts for profits

6.3.2 Criminal remedies:

The Copyright Act provides for criminal remedies as against the infringement of copyright. This remedy is independent and distinct and can be availed simultaneously with the civil remedies, imprisonment of the accused or imposition of fine or both, seizure and delivery –up of all infringing copies to the owner of copyright are the criminal remedies. Infringement of copyright is a cognizable offence. Here, *mens rea* in the form of knowledge of the infringer is an essential element to constitute the crime of infringement for criminal prosecution. Neglect to ascertain the facts relating to copyright will not tantamount to knowledge. Clear and cogent proof of knowledge is necessary to establish the commission of the offence.[177] However, in *S.R. Upadhyaya v. G.C.Nepali,*[178] the court held "that there is presumption in favor of existence of knowledge if a person publishes something in which he knows that he neither has a copyright nor is right to publish given to him by the copyright owner."[179]

In the following sub head, a light will be thrown on the various cases dealing with computer programs and databases wherein, the courts have gone a step further to protect them from unlawful use under this head of Intellectual property i.e. Copyright.

[177] *Cherain P. Joseph v. K. Prabhakaran Nair* AIR 1967 Ker. 234.
[178] AIR 1985 All 275.
[179] *S.R. Upadhyaya v. G.C.Nepali*, AIR 1985 All 275.

6.4 CASE ANALYSIS

6.4.1

COMPUTER ASSOCIATES INTERNATIONAL

versus

ALTAI, INC[180]

This is an inherently famous case on infringement of computer software and misappropriation of trade secret.

FACTS

- In this case, Computer Associates International (Plaintiff) is a company engaged in the designing, developing and marketing various types of computer programmes. It also includes "CA – Scheduler" and a sub program called 'Adapter' of a job scheduling program. Adapter has no independent use and is an integrated component of the above named CA-Scheduler.
- Around in the year 1982, Altai Inc., (Defendant) started to sell its own job-scheduling program named as "Zeke". The Defendants decided to make Zeke run in conjunction with an alternative and different Operating system and hence approached Arney, a computer programmer working for the plaintiff.
- Arney was asked to leave the plaintiff and work for the defendants, to which Arney willingly agreed. Arney managed to get copies of the source code of Adapter's both the version and used to create a new-component program named "Oscar 3.4" for the defendant. Arney copied around 30% of the Adapter's program for Oscar 3.4
- When plaintiff discovered the same, a suit for infringement of copyright was brought forth before the Court.

ISSUES

- Whether to prove copyright infringement is it necessary to show similarity in the protectable nonliteral elements of both the programmes?

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[180] 982 F.2d 693 (2d Cir. 1992).

CONTENTIONS

PLAINTIFF

- The plaintiff argued that the defendants have copied approximately around 30% of their Adapter program's code for their Oscar 3.4.
- The defendants especially Arney has infringed the Copyright and has misappropriated the trade secret of the defendants.

DEFENDANTS

- The defendants argued that the codes of Oscar were not substantially similar to that of Adapter's code.
- That the Oscar 3.5 is substantially different from Adapter.

JUDGMENT

- The District Court awarded damages based on actual and apportioned profits, to the plaintiff as it found copyright infringement relating to Oscar 3.4.
- The Court however denied the fact that Oscar 3.5 was substantially similar to Adapter.
- There was an appeal made against the decision, wherein only the other claims were addressed and not the damages award.
- The source and object codes of a computer program are considered as literal elements and hence are subjected to protection under the copyright law. The Court in this case held that for proving copyright infringement, the non-literal and protectable elements of both the computer programs must be similar.
- It was held that if non- literal portions of a literary work are copyright protected, then the non-literal works of a computer program are also copyright protectable. The Court also laid down a three step procedure to determine the similarity of the non-literal elements of more than one computer programs. The three steps of the procedure test include abstraction, filtration and comparison.
- Therefore the Court of Appeal also upheld the judgement of the District Court on finding all the relevant evidences against the copyright infringement.

ANALYSIS

In this judgment the Court laid down the three steps procedure for identifying the similarity between two or more non literal elements of a computer programs i.e. Abstraction, Filtration and Comparison. Though the Copyright Act, 1957 started the protection of Computer programs from 1984 but sadly there have been no reported cases in this context in India.

6.4.2

APPLE COMPUTER, INC.

Versus

FRANKLIN COMPUTER CORP.[181]

This case has been a landmark case in the history of Computer Programs as it was held that object code or source code of a computer program are part of literary works and are protected from unauthorized copying.

FACTS

- In this case Franklin Computer Corp. was involved in the business of making computers. It started making computers that were 'compatible' with the computers that were produced by Apple Computers.
- A foremost important thing to achieve this was that both must have a same operating software and for that reason Franklin copied the operating system of Apple. When Apple found the same it sued Franklin against Infringement of Copyright.

ISSUES

- Whether computer programs can be copyright protected?
- Whether Franklin is liable for copyright infringement or not?

CONTENTIONS

[181] 714 F.2d 1240 (3d Cir. 1983).

FRANKLIN

- It was contended that operating systems are a process or a method and hence can only be patented and not copyright protected.
- They did agree that they have copies Apple's software and since software are not copyright protectable, therefore there has been no case of copyright infringement.
- They also contented that to make their computers work, Apples operating system was the most apt. And to do so they had to copy Apple's software. Apart from that there was only one expression to express that idea and hence that expression cannot be copyright protected.

APPLE

- Since software, databases are copyright protected under the law; hence operating systems can also be copyright protected. It is not necessary that in order to protect an operating system, it must be patented.
- It was argued by Apple that Franklin has unlawfully copied their operating system thus infringing their copyright.

JUDGMENT

- The Trial Court upheld Franklin's claim and held that there has been no copyright infringement.
- Aggrieved by the decision of the Trial Court, Apple appealed against the order in the Appellate Court. The Appellate Court rejected the contention of method or process are protected under the Patent law. It held that even though, the operating systems are a set of instructions made for making a computer work, but still they can be copyright protected.
- It was also held by the Court that the statutory definition of a computer program explicitly does not differentiate between copyrightable application program and operating systems; hence operating systems cannot be excluded from the purview of copyright protection.
- The Court also observed that there other possible ways of developing a program like reverse engineering. Franklin cloud have opted that but instead

they went of a shortcut method that was straightway copying Apple's operating system.

- Hence Franklin is liable for copyright infringement of Apple's Operating System.

ANALYSIS

A good interpretation of the statutory definitions of computer programs by the Court. It has also expressed view on the idea and expression of computer programs that is, there several ways of achieving a similar operating system which can also be obtained with the help of reverse engineering.

CONCLUSION

Intellectual property is an outcome of human intellect. The fundamental inspiration for its protection is to support the innovative exercises and creations. The part of intellectual property is sine qua non in the monetary and mechanical improvement of a nation. The flourishing accomplished by created nations is the aftereffect of abuse of their licensed innovation. Without productive law to secure licensed innovation, there will be barely any imaginative action or creations and the monetary and mechanical advancement of a nation will stop. It is, accordingly, unavoidable to secure and advance protected innovation.

Intellectual Property Rights (IPRs) expected focal significance in the later past all through the world. Aside from the World Intellectual Property (WIPO), a specific office of the United Nations which is capable fundamentally for the advancement and protection of Intellectual Property rights, the IPRs were additionally arranged under the General Agreement of Tariff and Trade (GATT) and turned into a part of the TRIPs Agreement of WTO Treaty. The TRIPs Agreement advanced minimum standards, trademarks, patents, copyright, geographical indications, industrial designs, layout-design of integrated circuits and undisclosed information which include trade secrets.

In India, we had the first Copyright Act in 1911, and then came the Copyright Act, 1914. All these Acts were finally repealed by "*The Copyright Act, 1957*" which came into force on 21st January, 1958. This act till date has been the most comprehensive legislation on the law of Copyright and has been in force till present date. Due to emerging needs and technological advancements, the law has been subjected to various amendments in 1983, 1984, 1992, 1999 and the latest one being in 2012. This law as amended in 2012 is a standout amongst the most dynamic authorizations on the world. It contains author –friendly amendments on methods of assignments and licenses, and licenses, changes for protection of the incapacitated, audio –visual performers and protection of copyright in the customary and advanced stadium. Despite the fact that India is yet to ratify the two Internet arrangements, in particular, WCT and WPPT, the 2012 corrections make Indian Copyright law agreeable with the Internet settlements.

*"*Literary work includes computer programmes, tables and compilations including computer literary data bases*".*[182] And according to section 13 of the Act, copyright subsists only in literary works that are original and have a minimal degree of creativity. The courts of various jurisdictions have gone in depth of the statutory provisions to interpret what are the works where there is a subsistence of copyrights. The judiciary through various judicial pronouncements[183] have led down the principles of modicum of creativity and sweat of the brow.

The hypothesis set in the beginning of the dissertation work, that copyright subsist only to literary works that are original and creative has been disapproved. Not all literary works in order to secure protection under the copyright law need to have some literary merit in them. Original or derivative work with minimal degree of creativity and substantial skill and labour can secure a protection under the copyright law. Copyright in a work can be either assigned or licensed by an author in lieu of some consideration or royalty. But even after assignment or license, the copyright owner has certain uneconomic rights attached with it i.e. the moral rights of the author.

Whenever a literary work that fails to meet the above mentioned criterion, then the work might be booked under the heading of infringement of copyright. This provision has been envisaged so that the unauthorized people do not enjoy the fruits of a copyright holder without his consent. It also gives a relaxation and edge to the copyright holders from unauthorized exploitation of their work. There have been remedies of both natures, civil and criminal. It solely depends on the authors which remedy they would opt for. At times the judiciary has gone for an in-depth analysis to distinguish between infringement and fair use. At times a work on the face of it might appear as infringement but in reality it might be a fair use of the work.[184] The provision for fair use has been included under section 52 (1) of the act. The provisions for fair use are so included in the act, so that any person who is making a reasonable use of the work is entitled to make use of the work.

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[182] THE COPYRIGHT ACT, 1957, § 2(O).
[183] *University of London Press Ltd Vs University Tutorial Press Ltd* [1916] 2 Ch 601; *Feist Publications, Inc. Vs Rural Telephone Service Co*, 499 U.S. 340.
[184] *Hubbard And Another Vs. Vosper And Another*, [1972] 2 Q.B. 84.

Databases and computer programs are also included under the heading literary works[185] and are hence subjected to protection under the copyright law. It is immaterial of the fact that if a work which can be patented has been put under the heading of copyright, protection to that work won't be extended.[186] Basically in India, the algorithms in the computer programs are considered as literary works and hence are under the purview of copyright law. In India, software is not patented but copyright protected and hence any programmer who wants to protect his software must approach to court under *The Copyright Act, 1957*.

At the end, a copyright in a work subsists on the very day it has been created, registration for copyright is not a statutory mandate but it serves as evidence. The main aim of the copyright law is to ensure that creativity is evolved and the people who have been able to do so are protected from unlawful exploitation and free riding. There are a few drawbacks about our Copyright legislation of which one is that section 16 of the Act envisages that all the works to which copyright protection shall be extended should be specifically mentioned in the Act, any such work not mentioned under the Act won't be considered for the extension of protection under the Copyright Law. Another drawback is that there is no copyright in ideas as such and accordingly there is no remedy under the copyright law for unauthorized use of confidential ideas or information obtained directly or indirectly by one person from another. A remedy will have to be sought by proceedings for breach of confidence or trust. The Copyright laws also do not protect the owner from reverse engineering.

In India, our copyright law is quite up to the mark and in due course of its enactment has proved itself to be a beneficial legislation as it encourages authors to come up with their own ideas, thoughts, expressions and creativity.

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[185] THE COPYRIGHT ACT, 1957,§ 2(O).

[186] *Apple Computer, Inc. Vs Franklin Computer Corp*, 714 F.2d 1240 (3d Cir. 1983).

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