

## **COPYRIGHT LAW IN INDIA**

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### **PUBLIC DOMAIN**

To address the issues of copyright infringement over the original Mona Lisa, it shall first be asserted that the original work of Leonardo Da Vinci is in the “public domain”. “When copyright in a work comes to an end, the work is said to enter the public domain”<sup>1</sup> Usually, after the creator of a work has died and a period of 70 years or more has passed since, due to the passage of time the copyright does not persist over the work and a new work can be created using the original.<sup>2</sup> In this case, both the impugned works by Duchamp (1919) and Dali (1954) were clearly after the stipulated period of the passage of time after the original creator’s death (Da Vinci passed away in 1519), therefore no copyright persists. However, copyright laws did not exist in the 16th Century. So, clearly Leonardo Da Vinci’s work can be recreated and reinterpreted.

The position in India, according to the Delhi High Court is as follows: If a work exists in the public domain, “nobody has the right to appropriate such matter for one's own exclusivity”<sup>3</sup> and no copyright remains so no question of infringement can arise.

This paper aims to shed light on India’s position on the three most pertinent questions in Copyright Law, with special emphasis on the MONA LISA, which are as follows:

Could the two subsequent works be considered “Original” (in light of the 16th Century work)?

Does the recreation amount to “fair use”?

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<sup>1</sup> Available at <http://www.copyrightuser.org/create/public-domain/duration/>

<sup>2</sup> *Ibid*

<sup>3</sup> Para 41,42, *Syndicate of the Press of the Universtiy of Cambridge on Behalf of the Chancellor, Masters and School v. B.D Bhandari and Ors.* (2011) 185 DLT 346 (DB)

Is there a violation of “moral rights”?

## ORIGINALITY

To determine originality, there exist primarily two doctrines, out of which positions on originality have been carved in various countries. The first is the Doctrine of “Sweat of the Brow” according to which the creativity of a work is overpowered by the work done by the creator in creating the product. An original work according to this doctrine would require a considerable amount of skill and labour and time devoted towards the creation of the work, however, the work should not be completely copied from another work. This doctrine can be best explained by an English (U.K.) case which held that the only requirement of originality is that it originated from the creator, and that it took a basic amount of “skill, judgement and labour”<sup>4</sup> to create it and the “literary and accuracy merit of such work is immaterial”.<sup>5</sup>

The second doctrine is the Doctrine of “Modicum of Creativity”. This doctrine can be best explained by the U.S. Supreme Court<sup>6</sup> which negated the “Sweat of the Brow” and said that “There needs to be a significant amount of creativity and judgement gone into the creation of that work.”<sup>7</sup>

### **India:**

The Copyright Act, 1957 states that a copyright exists for “original literary, dramatic, musical and artistic works.”<sup>8</sup> Since originality does not always mean innovation, the test of Originality is up to the discretion of the courts.

The Indian courts used to take after the English Courts. In a judgement by an Indian court, which involved compilations such as almanacs, dictionaries, encyclopaedias, the court held that neither originality nor original research is needed for a work to be copyrightable.<sup>9</sup> However, there was a shift to the Doctrine of “Modicum of Creativity”. The Indian Supreme

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<sup>4</sup> *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd* [1964] 1 WLR 273

<sup>5</sup> *Ibid*

<sup>6</sup> *Feist Publication Inc. v. Rural Telephone Service* 499 U.S. 340, 342 (1991)

<sup>7</sup> *Ibid*

<sup>8</sup> S.13 (1) , Indian Copyright Act, 1957

<sup>9</sup> *Mishra Bandhu v. Shivraton* ,AIR 1970 MP 261

Court held that there should be a “minimum requirement of creativity”<sup>10</sup>. The standard of creativity is not as high as the U.S. but instead of an entirely novel creation there should be a minimum level of creativity that should have been utilised in the creation of the work.

The Concept of Derivative Works is also prevalent in Indian Copyright Law, Indian courts do recognise the principle of derivative works and that they are capable of separate copyright and do not infringe upon the right of the original work<sup>11</sup>. In a judgement by the Delhi High Court it was held “In order to qualify for independent right in derivative of collective work, there should be additional matter injected in a prior work”<sup>12</sup> and in another judgement by the Supreme Court it was held that “in order to qualify for a separate copyright as a derivative or collective work, the additional matter injected in a prior work or the matter of rearranging or otherwise transforming a prior work, must constitute more than a minimal contribution.”<sup>13</sup>

Q) Will the impugned works of Duchamp and Dali be treated as a copy of the original “Mona Lisa”?

Applying the criteria of original work as held by the Supreme Court of India<sup>14</sup>, there should be at least a minimal level of creativity and judgement in creating the final work. In Duchamp’s work “L.H.O.O.Q”, the creations are detectable and not “trivial” in nature. In adding the facial hair and caption to the picture (which sounds like a French sentence meaning- she has a hot arse), the intention of the creator is clear, which was not to recreate but to mock (it was a joke on Da Vinci’s homosexuality)<sup>15</sup>. The creator, Duchamp has used a basic level of creativity and judgement in doing so. Similarly, Dali in his work “Self Portrait” has added elements of masculinity which clearly emulate himself. He added his eyes and his iconic moustache, as well as manly hands along with silver coins, clearly changing the meaning of the original work and using a certain level of creativity and judgement in doing so.

To the issue of distinguishability, the courts of the United States, present the view that if there is a “distinguishable variation” then that variation is enough to grant originality of the work of

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<sup>10</sup> *Eastern Book Company v. D.B. Modak* 2002 PTC 641

<sup>11</sup> *IPRS vs Eastern India Motion Pictures* AIR 1977 SC 1443

<sup>12</sup> *American Express Bank Ltd., vs. Ms. Priya Puri*, (2006) III LLJ 540 Del.

<sup>13</sup> *Eastern Book Company v. D.B. Modak* 2002 PTC 641

<sup>14</sup> *Ibid*

<sup>15</sup> Available at <https://www.theguardian.com/culture/2001/may/26/art>

fine art to the creator.<sup>16</sup> A similar position is maintained by the Supreme Court of India which held that the question of infringement cannot arise “where however apart from the similarities appearing in the two works, there are also material and broad dissimilarities which negative the intention to copy the original”<sup>17</sup>. Applying this principle to Duchamp’s work, there were distinguishing factors like the facial hair and caption, and in Dali’s work, there was a different face with facial hair, many hands and silver coins. Therefore, the subsequent works are original according to the distinguishable factors and the dissimilarities.

Moreover, applying the position in India of Derivative Works, both Dali and Duchamp used elements of the original Mona Lisa, but satisfied the addition of original elements, and the addition of such elements more than what a minimal contribution would entail. Since, both completely changed the meaning and expression of thought of the original while using elements of the original, they can be treated as original or derivative works, each having their separate copyright.

## **FAIR USE/ FAIR DEALING**

Even though it is a well-established principle that the holder of the copyright has the exclusive right to exercise control and do anything with respect to the work<sup>18</sup>, there are exceptions to this rule. Fair Use is one such exception which basically means “any copying of copyrighted material done for a limited and “transformative” purpose, such as to comment upon, criticize, or parody a copyrighted work.”<sup>19</sup> It usually falls into 2 varieties-“parody” or “criticism”.

Being a doctrine of law of the United States<sup>20</sup>, there is significant contribution by the courts of the U.S. in shaping “fair use”. The primary criteria laid down for determining if a recreation or use of work is Fair Use or not is – “(i) the purpose and character of your use (ii) the nature of the copyrighted work (iii) the amount and substantiality of the portion taken, and (iv) the effect

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<sup>16</sup> *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)

<sup>17</sup> *R.G. Anand v Delux Films* AIR 1978 SC 1613

<sup>18</sup> S.14, Indian Copyright Act, 1957

<sup>19</sup> Available at <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>

<sup>20</sup> Available at [https://en.wikipedia.org/wiki/Fair\\_use#Policy\\_arguments\\_about\\_fair\\_use](https://en.wikipedia.org/wiki/Fair_use#Policy_arguments_about_fair_use)

of the use upon the potential market”<sup>21</sup>. The U.S. Court of Appeals held in a case that fair use is not only a defence against infringement, but an expressly provided right and exception.<sup>22</sup>

### **India:**

The Copyright Act lays down a criteria for “Fair Dealing” such as personal use, criticism, or reporting of events<sup>23</sup>. In addition to the above, a similar regard has been given to Fair Dealings as an exception and an exclusive right against infringement in Copyright Law.<sup>24</sup>

The Delhi High Court in a judgement said –“The purpose - ostensibly or obliquely, should not be to ride piggy back on the work of another.”<sup>25</sup> Basically implying that there should still be a basic review of copying elements of the work, and the exception of fair use does not extend to mere copying of the work. Further, the Kerala High Court laid down principles taking into consideration- “(1) the quantum and value of the matter taken; (2) the purpose;(3) the likelihood of competition between the two works.”<sup>26</sup>

Q) Are the subsequent works of Dali and Duchamp covered under Fair Use/Dealing?

Although, the work of Da Vinci is in the “public domain” as explained earlier and cannot claim copyright infringement, for the purposes of this paper, the assertion of the claims of fair use can still be proven.

According to the U.S. Supreme Court, the definition of Parody is “use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works”<sup>27</sup>. Duchamp’s “L.H.O.O.Q.” used the backdrop of the “Mona Lisa” by Da Vinci and added facial hair and a caption, which provided a different meaning to the work, and was a joke on the homosexuality of Da Vinci<sup>28</sup>. Therefore, it is clearly covered under this definition. Similarly, Dali’s “Self Portrait”, used the backdrop of the Mona Lisa, but with eyebrows, facial features, moustache, and hands of a man, making a joke about the Mona Lisa being masculine

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<sup>21</sup> S. 107, U.S. Copyright Act

<sup>22</sup> *Lenz v. Universal*– 801 F.3d 1126 (2015)

<sup>23</sup> S. 52 (1) (A), Indian Copyright Act, 1957

<sup>24</sup> *SK DUTT v. LAW BOOK CO. & Ors.* AIR 1954 ALL 750

<sup>25</sup> *Super Cassettes Industries vs Mr Chintamani Rao*

<sup>26</sup> *Civic Chandran V Ammini Amma* 1996 PTR 142

<sup>27</sup> *Campbell v. Acuff-Rose Music, Inc*- 510 U.S. 569 (1994)

<sup>28</sup> Available at <https://www.theguardian.com/culture/2001/may/26/art>

and being portrayed as Dali himself. This too, is covered under the given definition of a parody to the original work. Upon establishment of the above, it can be cited that the U.S. courts also very clearly deem parody as fair use, and not an infringement over the exclusive right of the copyright holder.<sup>29</sup>

Applying the aforementioned tests of the Indian courts as well by the Delhi High Court,<sup>30</sup> Duchamp's and Dali's works were not mere recreations and copies of the original "Mona Lisa" but had their distinct elements and were original in their own right.<sup>31</sup>

Therefore, the works of Dali and Duchamp were nothing more than parodies, and are indeed covered under the exception of Fair Use/ Dealing.

Q) Can the work of Dali (1954) claim fair use over the work of Duchamp(1919)?

Yes, the work of Dali added elements and had transformative value. As per the U.S. Court in a judgement, if there is too much usage of the original work, and the transformative value cannot be found, then the defence of Fair Use cannot be claimed.<sup>32</sup> However, in this case, there were elements totally different and additional to the facial hair and captioning utilised by Duchamp. The change to a masculine character clearly proves the transformative value of Dali's work.

Applying the Kerala High Court judgement<sup>33</sup>, irrespective of the quantum of material taken from Duchamp's work, the criticism or parody of Dali's "Self Portrait" was directed towards the original work, which has been proven to be protected under fair use. The purpose of Dali's work was to put another personal modification to the famed artwork and not to compete with Duchamp's rendition of it. Therefore, Dali's work suffices as fair use.

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<sup>29</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>30</sup> *Super Cassettes Industries vs Mr Chintamani Rao*

<sup>31</sup> *R.G. Anand v Delux Films* AIR 1978 SC 1613

<sup>32</sup> *Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D. N.Y. 2008)

<sup>33</sup> *Civic Chandran V Ammini Amma* 1996 PTR 142

## MORAL RIGHTS

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”<sup>34</sup> Since, literary works are expressions of thoughts of the creator, moral rights are part of the social concept of the exclusivity and right to protect the owner from the exploitation of his work. Moral Rights include the right of the creator to object to “distortion or mutilation”<sup>35</sup>.

This brings up the question of parodies being violative of the moral rights as they essentially mock the original work. Some believe that Moral Rights of an author should protect against the author. In fact, in a U.K judgement, a parody was considered as infringement due to the mutilation being derogatory to the author.<sup>36</sup> However, some believe that since parodies can be made to any element of the work, it cannot be treated as derogatory as it does not claim to be the same as the original work so it cannot be objected to by the creator as hurting the reputation or integrity of the creator.<sup>37</sup> Since parodies, are covered under the fair use, they cannot be held to infringe upon the work.

### *India:*

The Indian Copyright Act,1957<sup>38</sup> very clearly postulates 2 moral rights- the first one relating to the right of complete and exclusive ownership of the work to the author/creator and the second the right to object to or prevent any derogation or mutilation to his/her work.<sup>39</sup>

The Delhi High Court, applies the above provision solely to the rights of the creator or the author.<sup>40</sup> It also extended and described the mandate of moral rights of the Author/Creator to include-“ (i) paternity right, (ii) right to disseminate his work, (iii) right of integrity and (iv) right to withdraw from publication one’s work”<sup>41</sup> A limit was also created as to the mutilation

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<sup>34</sup> Art. 27(2), Universal Declaration on Human Rights

<sup>35</sup> Art. 6 (1), Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971)

<sup>36</sup> *Alan Clark v Associated Newspapers* (1998) 1 All ER 959.

<sup>37</sup> Copyright and the Parody Problem, Lissette Karlsson (2013)

<sup>38</sup> S. 57, Indian Copyright Act,1957

<sup>39</sup> Available at <http://www.legalserviceindia.com/article/1195-Copyright-Law-in-India.html>

<sup>40</sup> *Sartaj Singh Pannu vs Gurbani Media Pvt Ltd*

<sup>41</sup> *Amar Nath Sehgal v. UOI* 2005 (30) PTC 253 Del

and conversion of the work, in saying that the recreated work should not completely modify the original work so as to change its basic themes (and characters).<sup>42</sup>

Q) Can Da Vinci claim violation of Moral Rights by Dali and Duchamp?

It is to be asserted that moral rights vest with the creator of the work even in the absence of a copyright.<sup>43</sup> Moreover, the Delhi High Court held “that mutilation is nothing but the destruction of the work to render it imperfect and is therefore prejudicial to the reputation of the author.”<sup>44</sup> The work of Duchamp, was a personal attack at Da Vinci’s homosexuality and can be construed to tarnish the reputation of Da Vinci. Therefore, Da Vinci can object to the mutilation of his work in the case of Duchamp by asserting his Right of Integrity. Dali’s work had transformative value and the mutilation was not for the purpose of hurting the integrity of the creator. Herein lies the dogma between parodies and moral rights, and parodies will always derogate or mutilate the original work.

Therefore, if the works are looked at objectively, in both the cases, Duchamp and Dali, are not violating Da Vinci’s moral right of paternity over the work clearly. Duchamp’s and Dali’s work are a parody and have transformative value, therefore, protected by the exception of fair use as proved hereinabove. Applying the judgement of the Delhi High Court<sup>45</sup>, the limitation of mutilation was not violated as it still used basic characteristics of the original Mona Lisa, and even though the meaning changed, the basic theme was still the same and such works were reminiscent of the Original Mona Lisa on the face of it.

The above is entirely true for Dali and cannot be held to be against the moral rights of the original creator, the same however cannot be held for Duchamp.

Q) Can Duchamp claim violation of Moral Rights towards Dali’s “Self Portrait”?

It needs to be established that the context of both works was entirely different. Duchamp’s work was a part of the Dada Movement which was an aimed attack at the archetypal presence

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<sup>42</sup> *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.* (1986) 1987 AIR (Delhi) 13

<sup>43</sup> *Amar Nath Sehgal v. UOI* 2005 (30) PTC 253 Del

<sup>44</sup> *Ibid*

<sup>45</sup> *Supra* Note 42



of the Mona Lisa.<sup>46</sup> Dali along with Phillipe Halsman referenced “L.H.O.O.Q” and released “Self Portrait” as a part of a photomontage released the same year.<sup>47</sup>

It can be argued that taking the idea of adding facial hair to the Mona Lisa, and modifying it to be his own features could amount to changing the basic characteristics of “L.H.O.O.Q.”, which can be construed to be misleading the public and hurting the reputation of the creator.<sup>48</sup>

However, “Copyright Acts are not concerned with the originality of ideas, but with the expression of thought”<sup>49</sup>. Dali merely took the idea of facial hair on the Mona Lisa from Duchamp, and made it his own.

No violation of moral rights as Dali’s intention was not to infringe Duchamp’s right of integrity over his work, as the expression of thought of Dali’s work was as an artistic work, rather than an attack on the creator (Duchamp).

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<sup>46</sup> Available at <http://www.artnews.com/2013/03/19/she-has-a-hot-smile-dali-on-the-mona-lisa-attacks/>

<sup>47</sup> Available at <https://www.dalipaintings.com/self-portrait-mona-lisa.jsp>

<sup>48</sup> *Prouty v. National Broadcasting Co.* 26F.Supp. 265, 265-266 (D.Mass. 1939)

<sup>49</sup> *University of London Press v University Tutorial Press* [1916] 2 Ch. 601