

HOW COPIED IS ORIGINAL?

COPYRIGHT: THEN AND NOW

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This article is divided into two parts.

In the first part which I call ‘Copyright Then’, I will discuss some landmark cases of Copyright Infringement decided in the United Kingdom on the basis of the Doctrine of Sweat of the Brow. I will draw a trail from the non-application of this doctrine in the University of London Press Case to the literal application in *Walter v. Lane* and the eventual selective application in *Ladbroke v. William Hill* case.

In the second part which I call ‘Copyright Now’, I will show that in spite of the monumental metamorphoses in the method of disseminating information, not much has changed in the way we choose to give credit to the producers of such content. I will do this by discussing the recent turn down of the European Union Copyright Directives that aimed to update laws against infringement for this digitizing age by connecting it with case law from the jurisdictions of New Delhi to United States to show an emerging recurrent approach of turndown of the directives between ‘Copyright then and Copyright Now.’

“People do it at work, in community groups, and at home. Whether it is a Sunday school presentation or higher-ed curriculum, a slide show for your uncle’s birthday or for the board meeting, an adorable exchange between two cousins at the reunion, documentation of a rough moment in the town council meeting, a fashion assembly on the DIY designer site Polyvore, a blog post, or a teaser for an important report on YouTube¹”- people are constantly copy pasting without giving the author of the original content any credit. This is where each one of us interacts with the law on Copyright- sometimes as the thief and at others, as the owner. This

¹ Jaszi, Peter and Aufderheide Patricia. *Reclaiming Fair Use: How to Put Balance Back in Copyright*. The University of Chicago Press. Chicago and London, 2011.

makes it significant for us to study the crusade we find ourselves struggling against every now and then.

PART ONE: COPYRIGHT THEN

Let us begin our journey into Copyright from the beginning. To do this, we will discuss the old yet important cases on the subject. The cogent will consequently be laid out thread bare and contrasted against the cavities of reasoning so used.

Doctrine of Sweat of the Brow: A Search for Originality?

*University of London Press Limited v. University Tutorial Press Limited*²

The University of London Press acquired rights over question papers prepared by matriculation examiners hired by the University to prepare examination question papers for the University's students. On the basis of the rights so acquired, the University of London Press was free to publish the question papers later under its own name. Later, University Tutorial Press released a compilation of question papers with sixteen out of forty two question papers, which were identical to those belonging to the University of London Press. University of London Press brought charges of infringement of copyright against University Tutorial Press Limited.

University of London Press' argument was based on the fact that the term "literary work" has a very broad definition, therefore, it includes work in print or writing- from maps to tables to plans, to compilations—all of these are covered within the ambit of the aforesaid term. As a result of which question papers fall within the category of "literary work" and consequently, the University Tutorial Press has copied their work.

University Tutorial Press made the following two arguments. Firstly, it said that it did not copy from the publications of University of London Press but rather it took questions from question papers supplied by students of University of London to publish in its own compilation. This is a weak argument since it surmounts its strength on the semantics of to "copy" versus to "take." In the event that Tutorial Press would have taken legal permission from London Press before

² [1916] 2 Ch 601

publishing content which belonged to London Press- then, it would be correct to say that Tutorial Press did not copy question papers and instead “took” them from London Press. However, since no such permission was taken and question papers were arranged from students writing the exams in the University of London, this argument is invalid. Secondly, University Tutorial Press argued that their compilation was different from that of the University of London since not only did the compilation contain question papers but also answers to and a critique of those question papers. Although this is a strong argument, however the Court does not explore the strength of the same.

The Court held that the essence of legal originality lies in its prohibitory nature- where firstly, one needs to ensure that nobody else’s work was copied and presented as one’s own and secondly, that the work originates from the author’s mind. The need under law for originality emanates not from a want for new ideas but instead from a want for a new way of expressing those ideas. “What is required for originality is not that the expression be novel in the sense that it has never been composed by anyone else before, but that it be not-copied from another work.”³

The Court’s reasoning was based on the fact that the question papers originated from the minds of examiners hired by the University of London Press, who with their considerable diligence, labor, judgment, skill and effort had worked to prepare the question papers- the copyright over such a compilation vests with the University of London and not with the defendant.

This case identified that in a Court of law originality is searched for in the expression of an idea and not in the idea itself. This means that as compared to the layman’s sense of what constitutes original, the legal threshold of ‘originality’ is much lower. The law does not need the author to be one who is constantly rattling off new ideas, rather it is willing to accept old ideas so long as the way they are expressed is new. “Originality is not about how the work says it. It pertains not to content but to form, not to idea but to expression.”⁴

³ Gendreau Ysolde. *An Emerging Intellectual Property Paradigm: Perspectives from Canada*. Queen Mary Studies in Intellectual Property, 2008

⁴ Drassinower Abraham. *What’s Wrong with Copying?* Harvard University Press. United States of America, 1962

The Court attributed originality to mean an original expression and not necessarily an original idea. But while deciding, it chose to employ the doctrine of sweat of the brow while making a decision. This doctrine is another way of reducing the layman's requirement of 'originality' when the same has to be adduced before a Court. The author under this doctrine is deemed to have done original work when she has put in simple diligence in terms of efforts and expense while creating the same. The first noteworthy observation is that according to the doctrine of sweat of the brow, originality does not have the high standard of an idea being born out of an author's mind. Based on this doctrine, so long as an author invests considerable hard work in an expression, the expression is original. And secondly, when one attempts to draw an analogy with the above in the present case and applies these standards to the facts at hand, University Tutorial Press also put in effort. This was done in terms of firstly, solving question papers of the University of London, secondly, by adding a critique to the question papers and thirdly, by including twenty six original question papers. There is a deafening silence that the judgment displays when it comes to this aspect of reasoning. The question before the Court should have been whether the additional solutions and critique along with twenty-six original question papers are enough to constitute 'original' expression legally.

However, with the landmark quote of "what is worth copying is worth protecting" the Court found in favor of University of London Press.

The slip between the cup and the lip is that the doctrine of sweat of the brow in spite of its many tall claims, searches not for 'originality' but deems an expression as original so long as an author invests diligence in it. The determining factor shifts from whether an expression originated in the mind of an author to whether the author exercised skill, effort and judgment while expressing herself. Therefore, even if an idea is copied according to this doctrine so long as the expression is tossed out as a salad of skill and labour, the expression is considered original.

In this case, the Court leaves us with a very powerful quote on the essence of the term 'originality' along with a simplified rendition of the meaning of the doctrine of the sweat of the brow. But, it muddles the application of this doctrine by oversimplifying the concept of originality when it ignores the effort employed by University Tutorial Press in supplementing

the original question papers of the University of London and finds against the Tutorial Press for having lifted sixteen question papers.

A Race to find the Missing 'Original'

*Walter v. Lane*⁵

“It appears that I have come to bury *Walter v. Lane*, not to praise it.”⁶ In the analysis below, I will illustrate how even the most precise application of the Doctrine of Sweat of the Brow fails to pay credit where it is due and ends up attributing the producer’s work to someone else. Instead of tracing the source of the content, the doctrine manages to lose the author to someone who is firstly, hard-working and secondly, quick to ‘fix’ the content.

Earl of Rosebery’s speeches were noted down in shorthand, punctuated, corrected and consequently, made accessible to the public by reporters who published them in *The Times* as verbatim reports. Neville Beeman sought permission from *The Times* and published a compilation of these speeches as a book. When John Lane and Charles Geake published a similar book with such a compilation, *The Times* pressed charges against them.

The question before the Court was whether the reporters working for *The Times* could be considered as authors of those speeches. If the said reporters could be considered as authors of the speeches delivered by the Earl of Rosebery, only then would the copyright over such speeches belong to the reporters. Following this chain, it is only if the reporters own the copyright on the speeches of Earl of Rosebery would the possibility of Charles and Geake having infringed their copyright emerge.

The defendants Charles and Geake argued that the reporters did not exercise any ‘literary skill’ while creating verbatim reports of those speeches. In the absence of literary skill being used, the reporters could not be treated as authors. Since, the reporters could not be treated as authors, they did not own the copyright over speeches delivered by Earl of Rosebery. *The Times* claimed a copyright not on the speeches themselves but on the reports of those speeches prepared by their reporters.

⁵ [1900] AC 539

⁶ Belildo Jose. *Landmark Cases in Intellectual Property Law*. Bloomsbury. Oxford and Portland, Oregon, 2017.

The reasoning employed was a direct application of the Doctrine of Sweat of the Brow. The Court said that the reporters obtained these reports ‘under circumstances of peculiar difficulty’ where they had to strive to match the speed of the speaker while taking down whatever he was saying, to translating the speaker’s words into various languages, to maintaining accuracy while preparing such a report. It is notable here that in the case at hand; Earl of Rosebery did not claim any ownership in this case over the speeches or reports of the same. The Court went onto conclude that in the absence of the brain and handiwork of the reporters, the words of Earl of Rosebery would have remained unrecorded. Copyright in speeches is born only when a speech has been printed and published i.e. fixated in some form. Since the reporters of The Times were doing this fixation under the face of printing and publishing, the copyright belonged to them. Charles and Geake were therefore, held in violation of infringing the reporters’ copyright.

Although the judgment does not mention originality, but it legitimized the idea of appropriating somebody else’s work and being able to own a copyright over the same. “The reports were held to be ‘original’ literary works, even though the intention of the reporters was to produce as accurate a report as possible of a work of which they were not the authors.”⁷ Normally, to understand copyright, one draws an analogy to theft. Whenever somebody else takes away the other’s belonging without her consent, a theft is deemed to have been committed. The idea of copyright is quite similar. It saves products of the mind from being appropriated by another as their own. The essence being that one has a bundle of rights in the expressions of intellectual labour one produces using one’s intellect.

The case underscores the need for having not only expressed an idea but somehow having ‘fixed’ it. In the absence of such fixation by the person who produced the idea, the idea remains vulnerable to being appropriated by whoever ends up fixing it first. It is like stealing so long as one manages to obtain a deed of ownership in the form of ‘fixing’ the content before being caught. In this judgment, the Earl of Rosebery does not claim his copyright. It is peculiar to see that in the absence of the Earl of Rosebery not claiming his copyright, the Court also fails to

⁷ Torrensmans Paul. Copyright Law: A Handbook of Contemporary Research. Research Handbooks in Intellectual Property. United States of America, 2007.

give Earl of Rosebery the rightful credit for his words. Instead it turns into a rat race of who fixed the speeches first, which The Times won.

Originality: A Quality analysis based on ‘Qualitative Copying?’

*Ladbroke (Football) Limited v. William Hill (Football) Limited*⁸

The reasoning in this case can be segregated into two parts where firstly, it talks about the legal inability to fragment content into segments and check for infringement. The elaboration below will critique this by viewing it alongside the University of London case. The non-problematic part of the reasoning is the second component that is on the fact that betting sheets involve some mathematical detail, which do not leave “enough space to distinguish between ideas and expression.”⁹

Ladbroke Limited is in the business of preparing betting sheets. These betting sheets also contained some explanations along with the various options of betting odds. William Hill started selling betting sheets in which fifteen out of sixteen of the columns in the sheet were similar to those of Ladbroke’s sheet. Ladbroke filed a suit on the grounds of infringement of copyright against William Hill. The Court held that content cannot be fractioned into fragments to check for infringement. So, there had not been any infringement of copyright. The case was decided in favour of William Hill.

This was based on two key reasons. Firstly, the Court said that although William Hill may have copied from Ladbroke, still while assessing if a work has been taken from another, one cannot break the work down into multiple parts and check every part for originality. Instead, the barometer of originality has to be applied to the work as a whole. Therefore although a number of columns may have been copied, the work as a whole remains one where William Hill exercised simple diligence. Therefore, based on the doctrine of sweat of the brow, an expression is deemed original when the author invests considerable expense and effort in the same, since William Hill has invested the required effort- his work does not infringe on Ladbroke’s copyright. Secondly, the Court was of the view that one cannot attribute a copyright to content where there are columns generated based on logarithms almost like income tax

⁸ [1964] 1 WLR 273

⁹ Torresmans Paul. Intellectual Property Law. Oxford University Press. United Kingdom, 2013.

returns. “Lord Reid stated, ‘the question whether the defendant has copied a substantial part depends much more on the quality than the quantity of what he has taken.’ No precise formula has been identified for how much a person can actually take from the work of another before infringement arises, and no boundary can be drawn.”¹⁰

While at first brush this judgment seems like a sound one, the issue emerges when it is contrasted against the ruling of *University of London Press v. University Tutorial Press*. In our juxtaposition of the two cases, we can see that in both the cases, a part out of an original compilation has been taken by the defendant and then reproduced without the permission of the author. While in the case of *University of London Press*, the compilation was not checked for infringement as a whole, instead it was held as infringing material because a part of the compilation i.e. sixteen question papers were lifted. On the other hand, in the *Ladbroke Limited* case, we can see that infringement was denied on the ground that the betting sheet as a whole was not lifted and infringement cannot be checked by breaking a work down into parts. There is such a difference in spite of the uniform application of the doctrine of sweat of the brow.

PART TWO: COPYRIGHT NOW

“Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators’ rights are today obstructing innovation and economic growth? The short answer is yes.”¹¹

The beginning of July 2018 witnessed the EU Copyright Directive being voted against by the European Parliament. The Directive was aimed at changing the Copyright Law page on the calendar of digitalizing information. While it catered to the idea of appropriating credit to the rightful author of information, it ignored the credit an author receives from being accessible. Instead the Directives appeared to treat an author like any other professional whose primary objective of writing is making a profit. Authors write to be read, more than writing to be stamped with a maximum retail price limiting access to their words to the adequately moneyed.

¹⁰ Murdie Alan. Q&A Series Intellectual Property Law. Cavendish Publishing Questions & Answers Series. United Kingdom, 2000.

¹¹ Patry, William. *How to Fix Copyright*. Oxford University Press. United Kingdom, 2012.

Article 11 was the first problematic proposition of the Directive. This provision is nicknamed as the “link tax.” According to this anybody who uses a snippet of online journalistic content should first obtain a license from the publisher of such content. The publisher has such a right in her content until the end of twenty years from having published such content.

Article 13, also called as the “Upload Filter” was the second problematic proposition of this Directive. According to this, Internet platforms which host very large amounts of content uploaded by users need to monitor the behaviour of such users and filter the contributions so made to be able to prevent and identify copyright infringement.

The Implications of the Prospective Impositions

First, when a small-scale publisher decides to make something available online, the primary objective is making the information available and accessible to people at large. When such a link tax is imposed, a consumer will be reluctant to pay money to access information written by a small-scale publisher. This could be because of reasons such as lack of credibility of the source of the information, more familiarity with the established big giants writing news etc. As a result of this, there is going to be a hierarchy created both among information available and the source from where it was received, this would create a chilling effect on the small-scale publishers. I say this because, information received from the established giant would have a greater chance of being read as compared to the one sourced from a small publisher. On the other hand, in the current information flood, the Internet allows a small publisher and an established one an equal chance of being read and shared. Also, this would cause the established content providers to become richer, since more people would be willing to pay link tax for information they provide and this would create a monopoly that would work to dissuade a small publisher from starting up at all.

Secondly, since every hyperlink comes with a small summary so that users have a clue about the particular alley of the Internet they are about to visit by clicking on the link, this summary that would inevitably be a snippet from the content would be deemed as infringement. One would then be forced to find answers to questions such as to what extent can a summary of a copyright protected work, be an original literary work. This would also be an infringement of the Berne Conventions right to quote news articles and press summaries.

Thirdly, this would work to inhibit the free flow of information that is necessary to be an active part of democracies of the world. It would also rake havoc with the right of free expression enjoyed by people.

The positive aspect of this provision is that firstly, it would create a culture of being conscious of who the author is and remunerating her for her work and secondly, it would act as a filter for unchecked fake news. However, because Internet writers accept that popularity will come to them before an appropriate price, they may be looking for recognition over remuneration. In any case, the government is not the authority to determine the mode of remuneration for a writer on the Internet. Also, filtering fake news would be difficult if not impossible, because of the widening content of “news.” This is because news comprises of opinions, of accounts and of facts. While facts can be checked through software but opinions are not always so clear that the distinction between science and speculation may be apparent.

The cases below are from the jurisdictions of New Delhi and the United States that work to demonstrate how the Court has already encountered the problem of balancing the freedom of speech against the business of giant social networks. However, the approach that the Court takes almost always comes across as tether and tackle rather than a preferential imposition of laws as the above Articles 11 and 13 of the Parliament surfaced. In spite of this, the Court has sometimes handed over the baton to the beast rather than analyzed the side of the less powerful.

From New Delhi

Myspace v. Super Cassettes Industries Limited¹²

Myspace, a social networking sit allowed users to share and upload media files. Super Cassettes discovered its own content being shared without authorization and consequently, sued Myspace for primary as well as secondary infringement. Myspace was held liable although it showed no knowledge about any specific infringement. In 2012, a lot of criticism emerged because this order was not in line with the developments in technology. Also, it cast bottomless burden on Myspace to regulate content. This also had free speech limitations. In the appeal to the above order, the judgment was reversed where it was held that even if Myspace had to be held secondarily liable, it was imperative that Myspace was in knowledge of such infringing

¹² 2011 (48) PTC 49 (Del)

material being on its portal. In the absence of such information, Myspace was not liable. The judgment appreciated how the virtual world has boundaries different from the physical world and hence, the flow of information and knowledge cannot be restricted in the same way for the Internet as is in the physical premise. The Court ruled the existence of a User Agreement, which prohibits users from uploading unauthorized content as a preventive step and not constructive knowledge of the existence of such material. The insertion of ads in videos to generate revenue was also an automated process and so, did not amount to knowledge. Super Cassettes was then asked to find the infringing content on Myspace and send a catalogue of the same to Myspace so that Myspace could ask the user to take the same down within thirty-six hours. The impact of this case can be assessed from the development of deterrence where networks “such as YouTube, Myspace etc. may be held liable for copyright infringement caused due to infringing material posted on such websites, provided it may be established that intermediaries had control over the material posted, had the opportunity to exercise due diligence in preventing infringement and derived profits out of such infringing activities in consonance with Section 79 of the Information Technology Act read with Information Technology Rules, 2011.”¹³

The solution here lies not in limiting the avenues to upload content for users or creating a hierarchy around such content by imposing a tax. This in fact would lead to a chilling effect where only the big giants would be able to create and share content and the small start-ups would lose incentive to innovate. The reason behind this is that the muster for internet content would rise to a level where not only should the content be entertaining but also engaging enough that it compels someone to pay a tax to be able to view the same. While our first instinct then would be to target intermediaries and expect them to create a filtering mechanism of sorts, but then two questions emerge. Firstly, who must bear the cost of such a content monitor? And secondly, can software be so intelligent so as to be able to distinguish between a lawful upload such as a parody from an unauthorized one?

¹³ Chatterjee Payal. ‘What’s in a name’... John Doe arrives in India. *Journal of Intellectual Property Rights*, Vol 12, September 2007, pp 488-496

From the United States of America***(1) Perfect 10, Inc. v. Amazon.com, Inc¹⁴***

Perfect 10 is a subscription website for images of nude models. In 2010, it alleged that Google and Amazon had infringed its copyright. The allegation for infringement was based on the availability of thumbnail images of those nude models when a Google search was done and a consequent in-line linking to the full size images. The second part of the allegation was based on the business agreement between Google and Amazon. Under this, Google would send its search engine results including Perfect 10's images of the nude models to Amazon. The Court applied the Four Factor test where it found that firstly, the use of these thumbnails was highly transformative where Google was acting as an electronic reference tool. As a result of this, not only was Perfect 10 more visible and accessible, but also there was a new use to the original work. Although Perfect 10's images were creative in nature and so required copyright protection but then it is vital to see that Google and Amazon only used low-resolution thumbnails of the same. The amount and substantiality used by Google and Amazon was found to be reasonable viewing Google as a search engine. The effect of use on the market was seen as increasing profits for Perfect 10 by increasing its viewership instead of Google or Amazon or some third party appropriating profits from Perfect 10's credit. And therefore, Google's use of thumbnail images and sending of those results to Amazon was not found to be an infringement on Perfect 10's copyright. "The Perfect 10 decision sets a favourable standard for internet search engines on the "transformative" nature of an appropriation of a copy-righted work."¹⁵

(2) Authors Guild v. Google, Inc.¹⁶

When Google started amassing books to create an unrivalled digital library in the form of Google Books, it approaches several libraries- some of whom agreed to make copies of the books they owned and let Google digitize the same. In September 2005, Authors Guild that is a group of individual writers sued Google for Copyright infringement. In October, the

¹⁴ 508 F.3d 1146

¹⁵ Ding Meng. Perfect 10 v. Amazon.com: A Step Toward Copyright's Tort Law Roots. 23 Berkeley Tech. L.J. 373 (2008)

¹⁶ 770 F. Supp. 2d 666

Association of American Publishers brought a case against Google of its own. Google argued the defense of “fair use” since its digitization offered great public benefit. The plaintiffs however felt that Google should not be allowed to do so, without compensating the authors who had a copyright over such books. In the same month, Google agreed to a 125 million dollar settlement where it created a Google Book Settlement that would allow authors and other rights holders to submit a claim and receive their due. Authors and copyright holders were to be given sixty three percent of all revenue associated with advertising and e-commerce. Soon, everything changed when Ursula K. Le Guin, an American author, filed a petition against the above settlement demanding higher compensation. Judge Chin “balanced the social benefits flowing from the Google Book project in education, research, disability access and to rights-holders against the absence of any significant harm to rights-holders’ interests, and concluded that the Google Book project came within the fair use doctrine.”¹⁷ Based on this he ruled in favour of Google Inc. On appeal, the Second Circuit, found in favour of fair use. The Supreme Court declined to review the petition against the Second Circuit’s order.

The judgments in Perfect 10’s case and in the Google Books case are in consonance with the outcome received by the EU Copyright Directive. Both these responses show how the Internet demands a certain freedom where it overweighs accessibility over profit.

The scary thing about these outcomes is that they legitimize a certain amount of copying- for example, Google Books can digitize a book and so researchers may not feel the need to buy a book anymore, or the search result thumbnails could also function as the first reason as to why someone might never actually visit Perfect 10’s website. But this ‘legitimized copying’ seems to resonate with the landmark cases decided on the basis of Doctrine of Sweat of the Brow where the Court showed a tendency to rule in favour of the infringing party so long as some effort and diligence were exhibited in creating the literary expression.

¹⁷ Harpur Paul. *Discrimination, Copyright and Equality*. Cambridge Disability Law and Policy. Cambridge University Press. United Kingdom, 2017.

The solution is two-fold:

First, a balance needs to be struck between freedom of speech and privatized censorship and secondly, there needs to be a systematized way through which infringing content can be taken down.

The following two cases are very similar since they question the reproduction of content by Google, as thumbnails in the first case and as digital books in the other. Although, the first outcome is reasoned and rational, the latter cases accidentally ends up following the same line thereby showing an emerging trend discussed in the conclusion.

'Originality shares the fate of a pink elephant, easy to recognize difficult to define'.

-Professor Franz van Isacker

