THE DOCTRINE OF SCÈNE À FAIRE IN COPYRIGHT LAW

Written by ***Ritvik Jha***

3rd Year BA LLB Student, ILNU, Ahmedabad, India

ABSTRACT

"There is nothing new under the Sun; that certain patterns are bound to occur no matter how creative you are"

The "Book of Ecclesiastes" the author complained about the monotony of life.

The Doctrine of ***Scène À Faire*** is a concept in Copyright Law which holds that certain creative works of a genre aren't copyrightable as certain patterns are so recurring and ingrained in a particular genre that they can't be copyrighted, as they are mandatory or customary to that particular genre. The term *"Scène À Faire"* means *"Elements of an original work those are so trite or common that they are not captured by copyright."* As stated in the Duhaime's Law Dictionary[i].

Scènes à faire is a term in French language which translates to "scene to be made" or "scene that must be done". It is a scene in a book or film which is almost obligatory for a genre of its type, again signifying the recurring pattern.

When it comes to Indian Courts, they have applied a reductionist, dissection and filtration approach in their consideration of infringement of visual works that is driven by an expanded view of Scène À Faire. Although the courts have from time to time acknowledged that the standards for originality and creativity required for copyright are intentionally low, and that there are myriad of ways to express themes and ideas visually.

In this article the authors are going to explore the doctrine in depth along with the complimentary ***merger doctrine*** that is supportive of the ***Doctrine of Scène À Faire*** in sense that it highlights where the idea and expression are inseparable or merged.

TRANSFORMATION OF THE DOCTRINE

The term saw first use in the court of district of California by **Judge Leon Yankwich** of the Southern District of California, the case involving this case was the landmark judgement **of Cain v. Universal Pictures**[ii].

In this case, James M. Cain, had sold the film rights of one of his books, "Current Cinderella," to Universal for the movie "When Tomorrow Comes." When the film was publicly released, be that as it may, it contained a new scene wherein the scene included lead characters looking for asylum in a little church during a tempest. Cain imagined that the scene was excessively like one in another of his short stories, "Serenade," which he had not authorized to Universal.

The judge while examining the case, came to the conclusion that *"it was inevitable that incidents like these and others which are, necessarily, associated with such a situation should force themselves upon the writer in developing the theme."*[iii]

In 1930, **Judge Learned Hand** gave his views on the impossibility of a universally generalisable solution. According to him there has to be distinction made between the general idea and a unique expression of it, basically explaining how there exists a dichotomy where the general idea is uncopyrightable and but its unique expression is. i.e. Where the recurring patterns of a story might not be copyrightable but the various Arcs, name of places and title will be[iv]. This dichotomy can be best explained by the fact that the use of magic in **Harry Potter** might not be copyrightable but its characters unique to the story will be.

The well-known doctrines of merger and scènes à faire emerged from the difficulty in managing this dichotomy. Which led to the creation merger and scenes doctrine therefore once all components have been shifted out through the filtration analysis utilizing scènes à faire and merger doctrine, then the substantial similarity inquiry determining whether any aspect of the plaintiff's program was copied by the defendant will be proved.

DOCTRINE OF SCÈNES À FAIRE IN INDIA

The doctrine of Scène à faire has not been expressly stated in the Copyright Act in India. The doctrine is American in nature and the Indian courts have not deviated much from what is the

established law in the US. The Act remains silent even on the aforementioned dichotomy. The policy rationale of the doctrine of scènes à faire is that granting a first comer exclusivity over scènes à faire would greatly hinder others in the subsequent creation of other expressive works meaning copyrighting of recurring patterns in particular genres will affect future creative works in the said genre. This principle stems from the principal that "ideas are free to the world". The doctrines similar to USA is applied as defence to infringement.

Indian Courts have indeed appreciated and applied the concept of the idea-expression dichotomy under copyright law. The doctrine was first discussed in India in the case of **RG Anand v. M/s Deluxe Films**:

That case dealt with the so-called alleged infringement of the script of a play, arising from the adaption of the same into a movie. As Infringement was not established, the Court held that copyright cannot be established over an idea. The plaintiff wanted to copyright the theme of the provincialism of New Delhi which the court came to the conclusion would be going to be a recurring pattern in past and future works, thus a copyright on the same cannot be applicable.

The principles established in this case form part of the law of the land and hold good even today.

DOCTRINE OF MERGER AND COPYRIGHT LAW

The Doctrine of ***Scène À Faire*** is generally complemented by the merger Doctrine in situations where the idea and expression are inseparable or merged, only then doctrine of merger is applied by the Courts.[v]

This doctrine explains that where the idea and expression are integrated/connected, and that the expression is indistinguishable from the idea presented, copyright protection cannot be granted. Therefore, if the idea and expression are so well merged/connected that the idea itself becomes copyrightable, it would hinder the growth of creativity in that particular field which is against the very tenets of copyright law.

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Important judgement for the same-

In ***Herbert Rosenthal Jewellery Corporation v. Kalpakian***[vi], (1971), the plaintiffs alleged that the defendants asked them to stop manufacturing bee shaped jewel pins. The Court held that the jewel shaped bee pin was an idea that anyone was free to copy, the expression of which could be possible only in a very few ways; that is why no copyright could subsist on it.[vii]

CONCLUSION

The doctrine of Scène à faire makes harmony & balance between freedom of expression and copyright law. From one viewpoint, it secures the rights of the creator though then again, it gives another individual the freedom to make on a specific theme or pattern which has been utilized before by another creator/author. This doctrine has been made by keeping both law and equity as a priority.

This can be best summed up by Nimmer "this doctrine does not restrict the essence of copyright; instead, it defines the facets of infringing conduct."[viii]

ENDNOTES

[i] Available at http://www.duhaime.org/LegalDictionary/S/ScenesAFaire.aspx
[ii] 47 F.Supp. 1013 (1942)
[iii]Cain v. Universal Pictures
[iv] Best, Stephen Michael (2004-04-02). *The Fugitive's Properties: Law and the Poetics of Possession*. University of Chicago Press.
[v]Available at https://www.mondaq.com/india/copyright/365210/the-relevance-of-doctrine-of-scne-faire-in-copyright-law
[vi] 446 F.2d 738 (9th Cir. 1971)
[vii]*Herbert Rosenthal Jewelry Corporation v. Kalpakian*
[viii]*Nimmer on Copyright, Vol. III, 1993*