Chapter - IV

JUDICIAL PRONOUNCEMENTS ON INFRINGEMENT OF COPYRIGHTS OF INDIAN AS WELL AS FOREIGN COURT’S DECISIONS.

IV.0. Introduction.

A copyright confers exclusive right on the copyright owner, inter-alia, to the reproduction of the work in a material form, storing the work in any medium by electronic means, publication of the work, performance of the work in public, making of its adaptations and translations.

These rights are conferred on the owner of the copyright to enable him to reap monetary benefits. If any of the above acts are carried out by a person other than the owner of the copyright, without licence from the owner, it constitutes infringement of the copyright. Copyright is granted for a specific period of time. Whether an act is an infringement or not would depend on the fact whether copyright is subsisting in the work or not. In case the copyright in the work has expired, the work falls in the ‘public domain’ and any act of reproduction of the work by any person other than the author would not amount to infringement. For instance a poem was written by a poet in 1820. The poet expired in 1888. Thereafter the poem was copied verbatim by another author in a chapter of his book in the year 1970. There is no infringement of copyright in such a case because the term of copyright for literary work subsists for a period of sixty years after the death of the author.

Hence, a series of infringement have been discussed with the help of Judicial-Pronouncement, categorically from pre-independence era;

IV. 1. Pre-independence;

IV. 2. Post-independence;

**IV. 1. Pre-independence.**

(i) **Works.**

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Thus for subsistence of copyright, it must qualify as a “work”. Section 2(Y) of the copyright Act 1957 defines “work” to mean any of the following works,¹ namely –

(i) Literary, dramatic, musical or artistic work;

(ii) a cinematograph film;

(iii) a sound recording.

Now question arises what is the way of determining whether it is a “work” or not? It is well recognised theory to determine a “work” for the copyright protection is that there must be some amount of skill, labour or judgment which has gone into its creation. Again question arises whether factual information in table containing information such as sunrise and sunset is “work” for copyright protection? This issue has been resolved Cramp (GA) Sons Ltd. v. Frank Smithson Ltd.² the court considered the similar issue and said that the sun does in fact rise, and the moon set, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is no room for judgment. The creation of a new table or compilation containing exclusively factual information may require a significant amount of work and effort in deriving that information, for example, by scientific

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² (1944) AC 329 at 336.
observation and measurement. It seems unduly harsh to deny protection against another wishing to copy the information to save himself the trouble and expense of deriving the same information independently, particularly if his purpose is to produce a competing work of course, there may be copyright in the manner in which the information is presented, for example, in the design and layout of the table itself or in annotations, but that does not protect the information.

(ii) “Works” of Joint Authorship.

Again, the question which may arise that whether a work of joint authorship is a “work” for the purpose of copyright protection? The term “work of joint authorship” has been defined under Section 2(2) of the Copyright Act 1957 to mean “a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors”. Thus, if there is intellectual contribution by two or more persons, pursuant to a pre-concerned joint design, to the composition of a literary work then those person who have to be regarded as joint author. The works of joint authors are protectable under the Act. The said issue has been discussed at length in a leading case of Macmillan v. Suresh Chander Ded, the Privy Council held that a work containing particular selections and a particular arrangement on special lines from the work of an author whose works were open to all was entitled to protection, as such a work involved the expenditure of skill, labour, judgment and learning by the compiler. Apart from the fact therefore whether the collective work is entirely original (in the sense that nothing in it was produced in the same form and works before) or is a mere compilation being a collection of the works of several authors specially selected and arranged on special lines such work will always have a copyright of its own. But the owner of such a work must himself not have infringed the copyrights of any other owner whose works or part of whose works are included in such a collective work. That is to say the various works or parts whereof have been

3 AIR 1924 PC 75.
reproduced must be either such as have no copyright attached to them or the copyright of them must be secured by the owner.

In case of Levy v. Rutley,⁴ it was held to constitute joint authorship, it is necessary that there should be a common design and co-operation in carrying on the design. If two persons undertake jointly a write a play, agreeing on the general outline and design and sharing the labour of working it out, each would be contributing to the whole production and they might be said to be the joint authors of it, but to constitute joint authorship, there must be a common design.

In the case of Tate v. Fullubrook,⁵ it was held that a person who only suggested the idea or subject-matter of the work cannot be considered a joint author.

(iii) Literary Works.

A literary work means any work, other than a dramatic or musical work, which is written, spoken or sung. A literary work should provide some element of either information and instruction or pleasure in the form of literary enjoyment. But to qualify as a literary work, there is certainty no need for the work to have any intrinsic literary merits. For copyright to subsist in a literary work, it must be more than de minimis. Single words will not attract copyright protection. It has been highlighted in Macmillan v. Copper,⁶ it was held that copyright could exist in notes to North’s translation of Plutarch’s Life of Alexander. The Privy Council held that there was not a sufficient investment of knowledge, judgment, labour or literary skill to entitle the appellants to copyright in the text. At the same time, the Privy council also refused to characterise both the appellant’s and respondent’s work as “abridgements”. Copying of certain passages or reduction of bulk would not, by itself, constitute abridgement. Much

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⁴ (1871) LR6 CP523.
⁵ (1908)1 KB 821.
⁶ AIR 1924, PC 75.
before that above decision, this has been said in a earlier case in *Macmillan v. Suresh Chandra Deb*,\(^7\) it was decided that there existed copyright in selection of songs and poems in Palgrave’s Golden Treasury copyright in selection may exist when there is evidence that the author has done “extensive reading, careful study and comparison” and has exercised“taste and judgment in selection.” This is a more certain test than the other also enunciated in this case, namely, that two men may make same selection but that it “must be by resorting to the original author”. Indian courts have held that a compilation which may be derived from “a common source falls within the ambit of literary work”. Mere similarly between two compilations would not automatically constitute infringement.

(iv) **Dramatic works.**

A dramatic work includes any piece for recitation, choreographics work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film.\(^8\)

In *Tate v. Fullbrook*,\(^9\) it was held that a visual skit for a music hall sketch involving the use of a fire work was not the subject matter of copyright because it had not been reduced to writing.

(v) **Musical work.**

“Musical Works” means a work consisting of music and includes any graphic notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music”.

In *Redwood Music v. Chapell*,\(^10\) it was held that if a musical arranger so decorates; develops, transfer to a different medium or otherwise changes the

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\(^7\) ILR (1890) 17 Cal 951.

\(^8\) Intellectual Property Rights by Dr. J.K. Das 2008 Pages 147-148.

\(^9\) (1908) 1KB 821.
simple music of a popular song so as to make his arrangement fall within the
description of a original musical work, such arrangement or adaptation is
capable of attracting an independent copyright. There is no need for the ideas
embodied in the arrangement to be novel.

A musical work in order to enjoy copyright must be original, to determine
the originality, the degree of skill and innovativeness is to be considered.


The judgment or order of court, tribunal or other judicial authority is
exempted from copyright protection. Any person can reproduce or publish them
unless such reproduction or publication has been prohibited by the judicial
authority concerned.

Judgment of courts published in Law reports are collected by lawyers
practising in various courts. It the reporters or lawyers, alongwith the judgment
also supply head notes prepared by them as part of their report, copyright in the
heed notes will vest in them.

In Jagdish Chandra v. Mohim Chandra, it was held that in the reports of
judgments the reporter has no copyright but it cannot be said that in the
selection of cases and in the arrangement of the reporting, the reporter does
not have the protection of copyright law.

The law reports which contain head notes are entitled to copyright
protection.

(vii) Lecture.

A lecture includes address, speech and sermon. Delivery of lecture
includes delivery by means of any mechanical instrument or by broadcast. A

10 1938 RPC 109 (119).
11 AIR 1915 Cal 112.
lecture will be entitled to copyright only if it is reduced to writing before it is delivered.

The question of copyright was brought out in the case of *Eaird v. Sime*, in this case, the question of copyright in lectures delivered in a classroom was contested. It was contended by the Professor that he had put in labour and skills in compiling it.

The court held that although the lecture delivered in a classroom is seldom written out, the retains his right of property in those lectures, otherwise he will be hesitant in giving his original views to the students.

**(viii) Indirect Copying.**

There can be infringement by indirect copying also. A work may be copied by making a copy from pre-existing copy of the same work. For instance in *Schlesinger v. Turner*, it was held that plays based upon novels which in turn were based upon original play amounted to infringement of the original play. It has been reiterated in *Manfstaengal v. Empire Palace*, it was held that not recognizing indirect copying as infringement would open the door to indirect piracies. If a defendant makes a two dimensional copy of the plaintiff’s three dimensional architectural play, he is guilty of infringement by indirect copying.

It is infringement of copyright to produce a work similar to the original copyrighted work even if the defendant has never seen the plaintiff’s work, but was copied an intermediate copy.

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12 1887 GLP 526.
13 (1890) 63 LT 764.
14 (1894)3 Ch 109 (127).
(ix) **Performance in Public.**

Performance in public of a musical work will constitute infringement. In the case of Performing Right Society v. Hawthorns Hotel,\(^ {15} \) the performance was open to any member of the public who was prepared to be the guest of the hotel by either sleeping or dinning there. Infringement was established. It was held that infringement occurs when the defendant’s action interferes with the author’s proprietary rights and causes him injury. The defendant infringes the copyright when the public performance is made on a payment.\(^ {16} \)

(x) **Music played in a factory or restaurant.**

In the case of performing Rights society v. Cameo,\(^ {17} \) it was held playing music through a loudspeaker in a private room adjoining a public restaurant in such a manner that the music was audible to the public in the restaurant was held performance in public and constituted infringement of copyright. Earnest Turner Electrical Instruments v. Performing Rights Society,\(^ {18} \) it was held that programmes of music and gramophone records played at the factory using loudspeakers for the benefit of the workers and playing of records over loudspeakers more or less continuously in a record shop to increase the shop owner’s profit were performances in public which may be infringing, if done without the consent of the composer.

(xi) **Artistic Work.**

Any reproduction is infringement held in the case of King Features syndicate v. Kleeman,\(^ {19} \) found that a reproduction copied not directly from the original artistic work or a sketch of it but copied from a reproduction in material

\[^{15}\](1933) Ch. 855.


\[^{17}\](1936) 3 All ER 557.

\[^{18}\](1943) Ch. 167.

\[^{19}\](1941) 58 RPC 207.
form derived directly or indirectly from the original work is an infringement of the original artistic work.

(xii) Test of infringement.

The general principle is that there is no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result. But the ultimate test is: Has there been a reproduction in the defendant's work of a substantial part of the plaintiff's work.

*Glyn v. Weston*,\(^{20}\) the plaintiff's song began with the line “we got Sunlight on the said". The defendant's song began with the words “we got coffee, we got tea". The plaintiff had filed a petition before the court for claiming injunction against defendant. Interim injunction granted.

(xii) Copying from intermediate copy.

The fact that the defendant acted innocently is no defence, for copyright is a proprietary right, and, if it is invaded, the element of motive or intention on the part of the defendant is wholly irrelevant.

In *Murray v. Bogue*,\(^{21}\) the court has held that, if an English book was translated into German, and some, without knowing of the English book, retranslated into English, that would be an infringement of the copyright in the original English book.

In *Hanfstaengl v. Baines Co.*,\(^{22}\) Lord shand stated, in this case an artist made sketches of what he saw on a stage, the plaintiff's copyright pictures represented in the form of tableaux vivants. The sketches were reproduced in a newspaper. The real merit in the plaintiff's pictures, based on hackneyed

\(^{20}\) (1916) 1 Ch. 261 at p. 268.

\(^{21}\) (1853) 1 Drew 353.

\(^{22}\) (1895) AC 20, at p. 30.
thems, consisted in their details, most of which had been lost in the tableaux and in the sketches. It was held that there was no infringement.

(xiv) **Idea created by original – copying salient or principal features.**

A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original. In comparing the works keeping in view the idea and general affect created by original, it may be found there was “such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design having adopted its essential features and substance. For instance in Lord Maugham in King Features Syndicate v. Kleeman,\(^{23}\) the case was concerned with the cartoon character of Popeye the sailorman in which what was alleged infringement of copyright in certain sketches of the character Popeye, the reproductions being reproductions of this character in the form of brooches. Infringement was found.

(xv) **Quantum of copying necessary.**

For constituting infringement there must be substantial appropriation of the work. But what constitutes substantial part will depend upon the circumstances of the case.

In Leslie v. J. Young & Songs,\(^{24}\) the defendant had taken only a small portion of the plaintiff’s work, four pages out of forty, but still it was held an infringement of the copyright.

(xvi) **Authorisation of Infringement.**

An authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possible, assists or even encourages another to do that act, but

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\(^{23}\) (1941) 58 RPC 207.

\(^{24}\) (1894)AC 335.
does not purport to have any authority which he can grant or justify the doing of the act.

In Film Service v. Wolverhampton, walshall & District Cinemas,\(^{25}\) it was held that the mere fact of authorising a breach of copyright is the commission of a breach of the owner's rights. Again -

In performing Rights Ltd. v. Ciryl Theatrical Syndicate Limited,\(^{26}\) the defendant was alleged to have authorised the performance of a musical work. He was the managing director of the company which employed a band who gave an infringing performance. The company was held liable for authorising it. The question was whether the managing director was liable, he not being privy, as the court of Appeal found to the tortuous act. He gave no instructions to the band, and he was not indeed in the country. There was no evidence that he either knew or had reason to anticipate or suspect that the band in his absence were likely to give performance which would be infringement of copyright. It was held that he had not authorised the performance of the musical work. It has been reiterated.

In Falcon v. Famous Players Film Company,\(^{27}\) Mr. Falcon owned the motion picture rights so far as performance in the U.K. was concerned in a particular film. The defendants purported to let the right to exhibit the film to a cinema proprietor. It was held that in so doing they had authorised what would amount to an infringement of Mr. Falcon's performing right in the film.

**(xvii)Compilations.**

The test of infringement depends on the worth of the part taken, not the quantity. Once the idea is committed to writing, no one is entitled to copy it on the basis that it is merely an idea.

\(^{25}\) (1914)3 KB 1171.
\(^{26}\) (1924) 1 KB 1.
\(^{27}\) (1926)2 KB 474 at pp. 498-499
William Hill (Football) v. Ladbroke (Football), In this case the defendants had infringed the plaintiff’s copyright in the compilation by reproducing a substantial part of it, ever though large parts of it had not been copied.

(xviii) Articles made by following written instruction in a literary work.

In Boosey v. Wright, it was held that perforated rolls used to produce particular melodies did not infringe the copyright in the sheets of music on which the score of those melodies was written.

(xix) Fair dealing.

A fair dealing of the work for research or private use, criticism or review, whether of that work or of any other work, or for reporting current events in a newspaper, or other periodical or broadcast or in a cinematograph film or by means of photographs is permitted.

Lord Denning has observed, “there is very little in our law books to help on this. Some cases can be used to illustrate what is not “fair dealing”. It is not fair dealing for a rival in the trade to take copyright material and use it to his own benefit, such as when the times published a letter on America by Rudyard Kipling. The St. Jame’s Gazette took but half-a-dozen passage and published as extracts. This was held to be an infringement. Walter v. Stein Kopff,

(xx) Performance in Public.

Performance in public of a musical work will constitute infringement.

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28 (1980) RPC 539 affirmed by HL (1964) all ER 465.
29 (1900) 1 Ch. 122.
31 (1892)3 Ch. 489.
In *Mellor v. Australian Broadcasting Corporation*,\textsuperscript{32} Viscount Maughan said, the sole right of the owner of the musical work is to perform it in public and that anyone may perform the work in private. The original performance in the studio may be and generally will be a performance in private. In such a case the broadcast performance at the receiving end, if in public and unlicenced, will be an infringement of copyright at that place.

Any portion of the public means that public who would go either with or without payment – the class of persons who would be likely to go to a performance if there was a performance at a public for profit. In *Harms v. Martins Club*,\textsuperscript{33} Lord Hanworth Mr. observed, there was an invitation to members of the public to become members of the club upon the terms of getting in return for their subscription the performance of music – infringement established.

In performing *Rights Society v. Hawthorns Hotel*,\textsuperscript{34} the court has held that the performance was open to any member of the public who was prepared to be the guests of the hotel by either sleeping or dining there infringement established.

In *Jennings v. Stephens*,\textsuperscript{35} a play was performed at a village institute holding monthly meetings of a social or educational nature. Although no fee was charged there was a fee charged for membership in the institute. The performance was held to be in public and constituted infringement.\textsuperscript{36}

\textsuperscript{32} (1940) C 491 at p. 500.
\textsuperscript{33} (1927)1 Ch. 526.
\textsuperscript{34} (1933)1 Ch. 855.
\textsuperscript{35} (1936) 1 All ER 409.
(xxi) Reproduction of artistic work.

Infringing copy of an artistic work means a reproduction of the work otherwise than in the form of a cinematograph film made contrary to the provision of the Act.

A reproduction copied not directly from the original artistic work or a sketch of it but copied from a reproduction in material form derived directly or indirectly from the original work is an infringement of the original artistic work.

In King Features syndicate v. Kleeman,37 in this case the plaintiff claimed an injunction to restrain infringement of their copyright by the importation of dolls, brooches and toys. The H.L. held that the defendant’s dolls, brooches were reproduction in a material form of the plaintiff’s original artistic work though they were copied, not directly from any sketch of the plaintiffs, but from a reproduction in material form derived directly or indirectly from the original work.38

(xxii) The feeling and artistic character taken.

The question whether the feeling and artistic character have been taken is relevant to the question whether a substantial portion of the plaintiff’s work has been copied or reproduced.

In Brooks v. Religious Tract Society,39 the defendants had copied part of the engraving, a collie dog, and part altered. Romer, LJ said, it was not only the dog which was taken, but also the feeling and artistic character of the plaintiff’s work. They had taken/the design while substituting cats and a tortoise for the child.

37 (1941) AC 417.
39 (1897) 45 WR 476.
(xxiii) Painting and Pictures.

Copyright in a painting is infringed from a person copies from the original painting or a picture of the painting. Infringement of painting or a picture may be detected by a close comparison of the two weeks to see whether minute details in the original work have been reproduced in the alleged infringing copy.

In Lallubhai v. Laxmishankar, the defendants had reproduced certain substantial details in the original including certain measurements which were mathematically exact amounting to conscious copying and infringement. Held that the defence under section 52(1)(t) aid not apply as the original work was not kept in the temple, but only a copy kept.

(xxiv) Three-dimensional article made from two dimensional drawing.

A three dimensional article made by reproducing any substantial part of a drawing would constitute infringement of the copyright in the drawing. Where the copy of the reproduction is not exact, the court must examine the degree for resemblance and the question becomes one of fact. Infringement of copyright by three dimensional copying is restricted to artistic copyright.

In King Features Syndicate Inc. v. O.&M. Kleeman Ltd., a large number of drawing or cartoons depicting as the central figure, a grotesque and fictitious character known as “Popeye, the Sailor”, had appeared in the form of ‘comic strips’ which appeared in newspapers and journals in the U.S.A., Canada and the U.K. The plaintiffs in whom the copyright in such drawings or cartoons were vested granted licences to certain persons to manufacture and sell in the UK dolls, mechanical toys and brooches simulating the figure of ‘Popeye’. The plaintiff’s terms for a licence were not acceptable to defendants who subsequently obtained delivery of large quantities of figures dolls, and brooches, under the name of ‘Popeye brooches’ etc. It was held by the House

40 AIR 1945, Bom. 51.
41 (1941) AC 417.
of Lords that the defendant’s dolls and brooches were infringements of the plaintiff’s copyright.

(xxv) Making of dresses based on drawing or sketch or dress-design.

In Burke and Margot Burke Ltd. v. Spicers Dress Designs,\(^{42}\) the plaintiffs alleged that the defendants had infringed the copyright in a sketch described as “a froek being worn by a Young Lady”. It was also alleged that there had been infringement of artistic copyright in dresses made by the plaintiffs in accordance with those sketches, which dresses themselves were said to be works of artistic craftsmanship. It was held that there was no infringement of the sketch by a frock. Clauson J. pointed out that there was sketch of a lady with a particularly slim figure dressed in a red frock of a certain style, arranged in a particular way, and when he looked at the frock which it was alleged was an infringement either spread out on the table or held up, he was quite unable to reach the conclusion that frock was a reproduction of the sketch of the young lady wearing a frock.\(^{43}\)

(xxvi) Architectural drawings and plans.

Copyright subsists in original architectural drawings or plans which come within the definition of an artistic work. This copyright is infringed not only by the reproduction of the drawing or plan itself but by the construction of a building or structure in accordance with such drawings or plans without the consent of the owner of the copyright. According to section 52(1)(x), it is not an infringement of the copyright in the architectural drawings or plans to reconstruct a building or structure in accordance with plans by reference to which the building or structure was originally constructed if the original construction was made with the consent or licence of the owner of the copyright in such drawing or plan.

\(^{42}\) (1936) Ch. D. 400.

This can be done even by engaging another architect to supervise the construction.

In *Meikle v. Manfe*, the defendants got erected certain buildings engaging certain architects. Twenty years later they employed another architect in connection with extension of the original building in which he repeated certain important features of the original building. It was held that the copyright in the original design and plans was infringed.

*(xxvii) Copyright is protection in form and not in idea.*

Copyright is a right given to or derived from works and it is not a right in novelty only of ideas. It is based on the right of an author, artist, or composer to prevent another person from copying his original work, whether it is a book, a tune or a picture, which he created himself.

There is no copyright in ideas. Copyright subsists only in the material form to which the ideas are translated. A person may have a brilliant idea for a story or for a picture but if he communicates that idea to an artistic or play writer then the production which is the result of the communication of the idea is the copyright of the person who has clothed the idea in a form (Whether by means of a picture or play) and the owner of the idea has no rights in that product. In *Donoghue v. Allied Newspaper Ltd.*, it was declared, since there is no copyright in ideas or information, it is no infringement of copyright to adopt the ideas of another or to publish information derived from another, provided there is no copying of the language in which those ideas have or that information has been previously embodied.

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44 (1941)3All ER 144.

45 (1937)3 All ER 503.
(xxviii) Letter.

Copyright subsists in private letters, commercial letters and government letters as they are original literary works. The author of the letter is the owner of copyright in the case of private letters. When a person sends a letter to a newspaper, the newspaper gets an implied licence to publish it and also a right to edit or alter it so long as it does not affect the literary reputation of the writer.

In Walter v. Lane,\(^{46}\) it was held that letters addressed by one person to another are original literary work entitled to copyright and when a letter is dictated to a stenographer or a typist the copyright in the letter belongs to the person who has dictated the letter.\(^{47}\)

(xxix) Shorthand writer's transcripts.

The transcript taken down by a shorthand writers involves sufficient skill and labour. A copyright subsists in only the shorthand transcript prepared by the stenographers from shorthand notes taken by them. A person who only writes down (not in shorthand) verbatim the words dictated by another is not entitled to copyright in the written book.

In Donoghue v. Allied Newspaper Ltd.,\(^{48}\) it was held that mere transcribing and typing does not make anyone entitled to own a copy right in respect of what he has typed or transcribed word by word. The owner of copyright is the author of the work who dictates. Therefore, if an author employs a shorthand writer to takedown a story which the author is composing word for word in shorthand, and the shorthand writer then transcribes it, and the author has it published, the author is the owner of the copyright and not the shorthand writer. The explanation for that is that there exists copyright in the form of language in which the idea is expressed.

\(^{46}\) (1900) AC 539.


\(^{48}\) (1937)3 All England Reporter 503.
(xxx) **Question papers set for examination.**

The person who sets the question paper invests labour, skill and time on the preparation. He is the author of the question paper and the copyright vests in him. This opinion has been reiterated in different judgments of the courts.

The landmark case in determination of the question of copyright in the question paper was *University of London Press v. University Tutorial Press.*

In 1915, the senate of the University of London passed a resolution that it be made a condition precedent for the appointment of every examiner that any copyright possessed by him in examination papers prepared by him of the university shall be vested in the university.

(xxxi) **Test to determine whether copyright exists.**

A work is threatened by copiers only if the work is worth copying. In *University of London Press v. University Tutorial Press,* it was held that whatever is worth coping is prima facie worth protecting.

The copyright protection to extended to a work is to be determined on the basis of the test that is the originality of the work in question and considering the work as a whole. It is not proper to dissect the work into parts and then show that each part by itself is not entitled to copyright protection and then to extend the justification to deny the whole work, the protection of copyright.

The law of copyright cannot be extended to cover events which have actually taken place or live events, e.g., sporting events, news events, processions. Copyright is a right recognized to subsist on its own.

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49 (1916)2 Ch. 601.
50 (1916) 2 Ch. 609.
(xxxii) Originality in thought.

The copyright Act does not require that the thought or the intellectual investment input into the work must necessarily be original or novel. In University of London Press v. University Tutorial Press, it was reiterated that the work must not be copied from another work, the manner of expression of the thought must be original. The expenditure of skill and labour in the manner of expression must be original point originating in thought.

(xxxiii) Contract for service.

If a person employs another to do certain work but leaves it to the other to decide how that work shall be done, what steps shall be taken to produce that desired effect, then it is a contract for service. His status is that of an independent contractor who himself decides about the manner of doing work, in such cases the copyright vests in him and not the employer. For example, an architect who is hired by the company to construct a plan for their new building. In such a case the copyright vests in the architect himself.

In the case of University of London Press v. Tutorial Press, it was declared that the services of an independent contractor are hired for creating or doing a work on a given subject. It was held the examiner who prepares question papers for a university or college was free to prepare his questions at his convenience so long as they were ready by the time appointed for the examination, and it was left to his skill and judgment to decide what questions should be asked, having regard to the syllabus, the book work and the standard of knowledge to be expected at the matriculation examination and in view of this aspect of the matter, the examiner was not acting under the “contract for service”. Hence he was an independent contractor owning a copyright over the question paper.

51 (1916) 2 Ch. 609.
52 (1916) 2 Ch. 601.
IV. 2. Post-Independence.

(i) Works.

A question arises whether the application of sheer effort along is sufficient to bestow copyright upon the resulting work. The U.S. Supreme Court held “no” in *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*,\(^5^3\) in denying copyright protection to purely factual compilations, laying to rest the “sweet of the blow” doctrines. In that case it was held that the white pages in a telephone directory were not protected by copyright because that section of directory was the result of effort only and did not require the application of skill and judgment.\(^5^4\)

In *Bell South Advertising and Publishing Corporation v. Donnelly Information Publishing*,\(^5^5\) it was held that copying factual information from Yellow Pages did not infringe copyright. “Yellow Pages” in telephone directories could be copyright material because of the skill and judgment expended in selecting the classification system and the fact that other copyright materials such as advertisements were also included.

(ii) “Works” of Joint Authorship.

The works of joint authors are protectable under the Act. In *Nazma Heptulla v. Orient Longman Ltd., and Others*,\(^5^6\) the plaintiff, Maulana Azad, during his life time wrote the book India wins Freedom. It is clear that Prof. Humanyun Kabir, father of the defendant no. 6 was associated with the writing of the said book. According to defendant no. 6, the said book was composed and written by her father and he is the author thereof. The nearest relatives of Maulana Azad signed two documents which are identical, purported have given

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\(^{5^3}\) (1991) 111 S.Ct. 1282.


\(^{5^5}\) Inc. 11th Cir. 2 Sept. 1993.

\(^{5^6}\) AIR 1989, Del. 63.
their consent to the arrangement which has been arrived at for the publication of the book, excluding 30 pages which were lying in sealed cover with Orient Longmen Ltd. On September 2, 1958, an arrangement was entered into between Professor Humayan Kabir and Orient Longman for the publication of the aforesaid book excluding thirty pages. In the said arrangement, Prof. Kabir was stated to be the composer of the aforesaid book and it was mentioned that Maulana Azad had during his life time, dictated book and given certain notes to Prof. Kabir and out of that material, Prof. Kabir had composed the book which had been approved by the Late Maulana Azad. The Delhi High Court observed that where there was active and close intellectual collaboration and co-operation between narrator and the writer which resulted in the book. There was a pre-concerted join design between the two in the writing of the book. The material for the book was supplied by the narrator with a clear understanding that the writer will describe those thought and conversation and write the same in English language and in fact the writer had categorically stated in the preface of the book that his function was only to record narrator’s findings and it would have been highly improper to let his views colour the narrative. The preface itself show that Maulana Azad, alongwith Prof. Kabir read every word of the manuscript and made alterations, additions, omissions and corrections.

It is Maulana Azad who decided as to which thirty pages of the book were not to be published and it is he who decided as to which of his views should be contained in the book. The court further observed that Professor Kabir was not the sole author as fifty percent of the royalty of the book has been paid to the representative of Maulana Azad. The court thereafter held that Maulana Azad and Prof. Kabir were the joint authors of the said book.

(iii) Literary quality.

A literary work need not be of literary quality. Even so prosaic a work as an index of railway stations or a railway guide or a list of stock exchange quotations qualifies as literary work if a sufficient effort has been expended in compiling it, to give it a new and original character.
In *Gleeson v. Denne*, it was held that if one works had enough, walking down the street, taking down the names of people who live at houses and makes a street directory as a result of that labour this has been held to be exercise sufficient to justify in making claim to copyright in the work which is ultimately produced.

(iv) **Abridgement of literary work.**

A genuine abridgement of a literary work is an original work and can be subject of copyright. An abridgement of a literary work is entitled to copyright if it is new and original and the author has bestowed sufficient skill and labour upon it. To copy certain passages and omit others so as to reduce the volume in bulk is not such an abridgement as would entitle an author of the abridged version, a copyright in the same.

In *Govindan v. Gopalakrishnan*, the view expressed on Abridgement was that abridgement is the reproduction of an original work in a much more precise and concise way. So a genuine abridgement of a literary work is an ‘original work and is the subject matter of copyright. A digest of a literary work is an abridgement. An abridgement of a literary work is entitled to protection if it is original and the author has bestowed sufficient skill and labour upon it. It does not matter if the amount of originality is very small.

(v) **Translation.**

Translation means the reproduction in one language of a book, document or speech in another language.

In *Blackwood v. Parasuraman*, it was held that a translation of a literary work is itself a literary work and is entitled to copyright protection if it is original

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57 1975 RPC 471.
58  AIR 1955 Mad. 391.
and the author has expended sufficient labour and skill on it. It was further held that if copyright subsists in the original work, then reproduction or publication of the translation without the consent or licence of the owner of the copyright in the original will constitute infringement.

(vi) Historical work.

Historical facts are not copyrightable per se. A book on history is designed to convey information to the readers. There can be no copyright in the information as such but if the manner of its presentation is unique to its author, it is an original literary work.

In *Ravencraft v. Herbert*,\(^6^1\) it was held that a historical work is not to be judged by precisely the same standards as a work of fiction. Also that the purpose of novel is usually to interest the reader and to contribute to his enjoyment and leisure. Historical work would have another purpose as well to add to the knowledge possessed by the reader and in the process to increase the sum total of human experience and understanding. The author of a historical work must have attributed to him an intention that the information thereby imparted may be used by the reader, because knowledge would become sterile if it could not be applied. Therefore, it is reasonable to suppose that the law of copyright will prohibit the wider use to be made of a historical work. The knowledge built upon an historical work can, however, be extracted. Such an extraction of knowledge from historical work can claim copyrighting itself.

(vii) Titles of books, cartoons or other literary matters, pseudonyms.

Titles of books or literary articles are not protected under the copyright law. Titles of books can be protected only under the law of passing off. Pseudonym can be protected only under the law of passing off.

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\(^6^0\) AIR 1959 Madras 410.

\(^6^1\) 1980 RPC 193 at p. 206.
There is no copyright in titles of cartoons as such. A newspaper publisher who employs a cartoonist to produce cartoons for him of characters created by the cartoonist does not acquire a property right in the names of such characters even though he becomes the owner of the copyright in the cartoons published during the term of the employment of the cartoonist.

In *Forbes v. Kensley Newspapers*,\(^2\) it was held that the title of a periodical publication or a book may be protected by an action for passing off if the plaintiff establishes that the title in question, i.e., the defendant’s title, indicates to the public the plaintiff’s book or publication and that the use by the defendant of the same title or a colourable imitation thereof would be calculated to lead to deception.

(viii) **Catalogues.**

A catalogues of items sold by a trader, or catalogue of manufacturers listing their products, is also capable of copyright protection.

In *Lamba Brothers Pvt. Ltd., v. Lamba Brothers*,\(^3\) the plaintiffs filed a suit for infringement of copyright against defendants on the basis of their alleged claim of copyright in their catalogue / brochure. The plaintiffs had not caused particulars of the catalogue / brochure, to be entered on the ‘catalogue of books’ under section 18(4) of the Press Registration of Books Act, 1867 nor had they indicated their claim of copyright in the catalogue/ brochure by the symbol ‘C’ and the name of the author and the year of publication. It was held that the suit was not sustainable.

(ix) **Dictionaries.**

Copyright would subsist in a dictionary for the arrangement, sequence or idiom format of a dictionary which cannot be appropriated by another.

\(^2\) (1951)2 TLR 656.

\(^3\) AIR 1993 Del. 347.
In *Chappel v. Redwood Music*,\(^{64}\) it was held that the collective works like encyclopedia or a dictionary constitute works written in distinct parts by different authors or in which works or parts of works of different authors are incorporated. Each such author has a copyright besides the compiler of the dictionary who also has a separate copyright in the work.

(x) **Pocket diaries, calendars.**

Pocket diaries containing besides usual pages, information of the kind found in calendars, postal information, a selection of days and dates for the year, tables of weight and measures are not considered literary works for the purpose of copyright.

In *Deepak Printers v. Forward Stationary Mart*,\(^{65}\) the Gujarat High Court ruled that no copyright subsists in a calendar even though certain pictures of deities and public personalities and some decorative features were in corporate in the calendar when no separate copyright in them was claimed.

(xi) **Single Word.**

A single word cannot be the subject of a copyright. The logic is that it is not a creation of labour, skill and capital. Also recognizing the copyright of a person owner a single word would eliminate the word from regular use, thus creating enormous hardship in the process.

In *Associated Electronics v. Sharp Tools*,\(^{66}\) it was held that though there can be no copyright in single word, there can, however, be a copyright in the artistic manner in which the word may be represented.

\(^{64}\) 1981 RPC 337.

\(^{65}\) 1981 PTC 186.

\(^{66}\) AIR 1991 Karn 406.
(xii) **Research thesis and dissertation.**


(xiii) **Film based on newspaper article.**

An interesting case camp up in *Indian Express v. Jagmohan,* where the defendants made a stage play and a movie based on the central theme of certain series of articles published by the plaintiff namely purchase of a woman by the name Kanta by a journalist to highlight the flesh trade flourishing in some parts of the country. The article published contained as autobiographical account of the part actually played by the author in the affair. In the film the emphasis was on human bondage particularly of Indian women. The court held that stage play on the movie was not an infringement of the copyright in the article.

(xiv) **Drawing.**

Drawing mean any kind of drawing whether mechanical or engineering drawing. It must satisfy only the condition of originality meaning thereby that it should originate from person who draws it.

In *Merchant Adventures v. M. Grew & Company,* it was been held that drawings for the purpose of copyright would include any legends or explanatory notes which describe in general terms what the drawing represents. Derivative drawings often used in mechanical and engineering drawings are original works

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67 (1990) IPR 69. Raj
68 AIR 1985 Bom. 229.
69 1973 RPC 1.
since they involve skill, labour even though they may be built upon the substratum of some pre-existing drawings. The question is not how much the derivative drawing is different from the earlier drawings but what is judgmental in determining whether a copyright is entitled to copyright protection or not is the degree of skill and labour involved.

(xv) **Industrial or Engineering Drawings.**

Engineering drawing are ‘Artistic Works’ within the broad meaning of the term but each individual case has to be judged accordingly, to prevent a situation where every industrial or engineering drawing would claim the protection of a copyright and be outside the realm of even fair use for instructing students or of any use of such a nature.

In *Allibert v. O’connor*, the court opined that copyright protection is given to the work and not to the idea and that it is not originality of thought that has to be established to obtain copyright protection but original skill and labour in execution. So a copyright would vest in a product drawing even though it may be based upon an earlier drawing. Sufficient performance of independent labour is the criteria for adjudging whether the drawing by itself qualified for grant of copyright.

(xvi) **Photograph.**

A photograph is an artistic work entitled to copyright. A photograph must be original, i.e. originally taken by the photographer to be entitled to protection and to be original, investment of some degree of skill and labour must be evident. A photographer of a public object, e.g. a public building when photographed in a particular manner by a particular individual is a subject matter of copyright, this does not prohibit another person from taking a photograph of the same object from same angle and claim an independent copyright. A photograph or a Xerox copy of a photograph itself cannot be a

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70 1982 FSR 317.
subject-matter of copyright since there is no involvement of original, skill and labour in making such copy.

In Associated Publishers v. Bashyan,\(^{71}\) where a portrait of Mahatma Gandhi was made based on two photographs, it was held that a portrait based on photograph will be entitled to copyright if it produced a result different from the photograph and the portrait itself is original.

(xvii) Test to determine whether copyright exists.

Copyright is a right recognised to subsist on its own. Registration is not a pre-condition for bringing an action against infringement of copyright. In Nav sahitya Prakashan v. Anand Kumar,\(^{72}\) it was held that registration is only – optional, registration serves the purpose of being a prima facie proof of possession of copyright by the reason.

(xviii) Level of originality in Literary works.

The question that would come to the mind of the reader is what should be the level of originality of a literary work in order to entitled itself to a copyright.

In Agarwala publishing House v. Board of H.S. and Intermediate Education. U.P.,\(^{73}\) it was held the literary merit of the work is immaterial, even a mundane rhyme would qualify for copyright protection if it originals from the intellectual exercise of an individual.

(xix) Originality in thought.

The copyright Act does not require that the thought or the intellectual investment input into the work must necessarily be original or novel.

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\(^{71}\) AIR 1961 Mad 114.

\(^{72}\) AIR 1981 All 200.

\(^{73}\) AIR 1967 All 91.
In *Govindan v. Gopalakrishna*, the opinion expressed was that in modern complex society provisions have to be made for protecting every man’s copyright whether big or small, whether involving a high degree of originality as in a new poem or picture or only originality at the vanishing point as is in a law report.

In *Jagdish Prasad v. Parmeshwar Prasad*, the court was of the view that no original thought or original research is required in order that a literary work may be deemed to be original. The standard of originality required for a copyright is low.

**(xx) Originality only in form not in idea.**

The Supreme Court in the case of *R.G. Anand v. Delux Films*, declared there can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts. There needs to be an originality only in the form of expression.

**(xxi) Ownership of copyright.**

In *Thomas v. Manorama*, it was held that in case of termination of the employment, the employee is entitled to the ownership of copyright in the works created subsequently and the former employer has no copyright over the subsequent works so created.

The copyright in a work done by an employee on his own time and not in the course of his employment belongs to him.

**(xxii) Apprenticeship.**

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74 AIR 1955 Mad 391.

75 AIR 1966 Pat 33.

76 AIR 1978 SC 1613.

77 AIR 1989 Ker 49.
An apprentice is a student.

In Dunk v. George Waller,\textsuperscript{78} it was held that an apprentice is a student bound to another for the purpose of learning his trade or calling, the contract being of such a nature that the master teaches and the other serves the master with the intention of learning. Hence, the work belongs to the teacher.

\textbf{(xxiii) Contract of Service.}

Where a man employs another to do work for him under his control so that he can direct the time when the work shall be done, the means to be adopted to being about the end, and the method in which the work shall be arrived at, then the contract is a contract of service.

In Beloff v. Pressdram,\textsuperscript{79} it was decided that the true test whether on one hand the employee is employed as part of the business and his work is an integral part of the business or whether his work is not integrated into the business but is only accessory to it or the work is done by him in business on his own account. In the former case, it is contract of service and in the later case, it is a contract for service.

In the case of contract of service, the status of the author is that of an employee. For example, whenever an employee of a solicitor’s firm drafts a document in the course of his employment, the employer is the first owner of copyright.

The decision, which distinguishes a contract of service with a contract for service based on the nature of control exercised by the employer upon the author has been followed by the Indian Courts too in Agarwala Publishing House v. Board of Higher Secondary Education\textsuperscript{80} and Jagdish Prasad Gupta v.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} (1970)2 WLR 241.
\item \textsuperscript{79} 1973 RPC 765.
\item \textsuperscript{80} AIR 1967 All 97.
\end{itemize}
\end{footnotesize}
In this case *Grama Prasad v. Nabashah*, this principle was extended to dramatic works too by the Assam High Court. Here the plaintiff was the office bearers of Nawgong Natya Samithy, an institution created with an objective of enriching Assamese literature and art, by encouraging authors to write and compile dramas in Assamese language. The defendants wrote a drama named Piyoli Phookan at the instance of samithy. The samithy printed and published the drama at its own expense. Late on when the defendants converted the drama into film, the plaintiff sued for infringement. The court upon pursuing the evidence could not find anything that underlined that the authors were in the course of employment or under a contract of service of the samithy while writing the drama. It held that the samithy, was a the owner of the copyright in the drama.

**(xxiv) Work of joint Authorship.**

A work may be created by a single author or by more than one author, a work of joint authorship can also claim copyright.

In *Luksenan v. Weiderfeld*, the court held that mere suggestion of idea which is embodied by author in a work written by him does not make the originator of the idea the author of the same. Contribution of some ideas, catch uses or words is not sufficient to claim joint authorship to the work written by another.

**(xxv) What copyright protects.**

Copyright protects the skill and labour employed by the author in the production of his work.

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81 AIR 1967,Pat 33.
82 AIR 1967, Ass. 91.
83 1985 FSR 525 (528-529).
84 Law Relating to Intellectual Property by Dr. B.L. Wadhera, fourth edition, Page 301.
In Elanco Products Ltd. V. Mandops (Agrochemicals Specialists Ltd.)\textsuperscript{85} in this case the plaintiffs marketed herbicide invented by them, in tins with which they included a leaflet compiled by them which set out detailed instructions on how the herbicide should be used, upon what crops and when, and what weeds it would best control. The plaintiffs claimed copyright in the leaflet and asserted that it was a compilation of what they regarded as relevant information extracted from all the available literature and especially from their own. After the patent had expired, the defendants began to sell the same herbicide with a leaflet which was alleged to be similar to the plaintiffs. The substantial defence raised by the defendants was that they were entitled to take any information available to the public including that contained in the plaintiff’s literature provided that they did not adopt the same form or the same language that is to say provided that they did not just copy the plaintiff’s literature. Interim injunction was granted.

\textbf{(xxvi) Test of infringement when subject-matter consists of well-known views.}

In\textit{ Krisarts v. Briartine},\textsuperscript{86} WHITFORD, J. observed as follows:

“When one is considering a view of a very well-known subject like the House of Parliament with Westminster Bridge and part of the Embankment in the foreground the features in which copyright is going to subsist are very often the choice of the view point, the exact balance of foreground features or features in the middle ground and features in the foreground, the figures which are introduced, possibly in the case of a river scene the craft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution.

\textbf{(xxvii) Was there copying.}

\textsuperscript{85} [1979] FSR 46.

\textsuperscript{86} (1977) FSR 555 at p. 562.
Where there was or not copying is a question of fact. To prove copying the plaintiff normally points out to bits of his work and the defendants work which are the same and prove an opportunity of access to his work. If the resemblance is sufficiently great then the court will draw an inference of copying. It may then be possible for the defendant to rebut the inference – to explain the similarities in some other way. For instance he may be able to show that both parties derived the similar bits from some third party or material in the public domain or he may be able to show that the similarity arises out of a functional necessity – that anyone doing this particular job would be likely to come up with similar bits. The concept of sufficient similarities shifting the onus on to the defendant to prove non-copying is well recognised in copyright law. Thus Lord Wilberforce in *L.B. Plastics v. Swish*,\(^87\) asked whether the inference of copying “could be displaced by evidence from the respondents showing how in fact they had arrived at their design and that they had not done so by copying?

In answering the question whether these was coping both the important and unimportant bits of the works being compared count. Very often it is the identity of trivial matter which traps a copyist. As HOFFMANN, J. observed in *Billhofer Maschinanfabrick v. Dixon & Co.*\(^88\)

It is the resemblance in essentials, the small, redundant, even mistaken elements of copyright work which carry the greatest weight. This is because they are least likely to have been the result of independent design. *Ibcos Computers v. Barclays*.\(^89\)

\(^{87}\) (1979) RPC 551 at p. 621.

\(^{88}\) (1990) FSR 105 at p. 123.

\(^{89}\) (1994) FSR 275 at pp. 296-297.
(xxviii) **Substantial copying.**

There must be substantial copying of the work. In deciding whether there has been substantial copying, four factors have taken into consideration. These are –

(i) The volume of the material borrowed by the defendant. Volume here does not mean only the quantity but also the quality (a short passage may be of vital significance in a work), which is borrowed by the defendant.

In Landbroke Ltd. v. William Hill,\(^90\) it was held that substantiality is a question of fact and degree determined on the basis of importance of the parts reproduced.

(ii) Whether the substantial copying on the part of the defendant has been intended for the purpose of saving himself of the labour?

(iii) The extent to which the plaintiff’s and defendant’s work are competing with each other.

In the case of D. Narayan Rao v. V. Prasad,\(^91\) the defendant had borrowed a part of speech which was only of two-and-a-half-minutes duration in a three hour film. Yet it was held that substantial part of speech had been copied.

(xxix) **Direct evidence of copying.**

In copyright infringement cases, the direct evidence of copying is generally difficult to furnish. Evidence of copying has to be deduced from surrounding circumstances. Evidence of copying, for instance, can be found when the defendant’s work contains the same error, mistakes as those present

\(^{90}\) (1964) 1 WLR 273.

\(^{91}\) (1979)2 APLJ 231.
in the plaintiff’s work. Similarity in the language and writing style also provides evidence copying.

In case where the similarities in the two works are due to coincidence and necessities inherent in the nature of the work (e.g., dictionaries, calendars, logarithmic tables, books on law containing similar provisions and case laws), the question of infringement by copying is irrelevant.

In Shyam Shah v. Gaya Prasad Gutpa, the Court held that a person is at liberty to draw upon ‘Common source of information’. But if he saves himself the trouble and labour requisite for collecting that information by adopting another’s work, with colourable variations, he is guilty of infringement of copyright even though the original work is based on material which are common property.

(xxx) Copying from intermediate copy.

Indirect copying is found in Dorling v. Honnor, there the court of Appeal found indirect copying where plaintiff’s plan of parts of a boat, and of the boat itself had been reproduced in three-dimensional form by photographs of those parts and of that boat.

(xxxi) Conscious, unconscious and sub-conscious copying.

Conscious copying is when the infringer is perceptually aware, i.e., he has self-knowledge that he is copying the work of another.

In case of un-conscious copying, the flow of idea and its expression from the mind of the author is spontaneous. He was self-knowledge that the work created by him is similar to the work of another. In such a case, definite causal connection has to be established to prove infringement.

92 AIR 1971, All 192.
93 (1965)1 Ch. 1; (1964) RPC 160.
Sub-conscious copying is when the another having already been familiar with the work of the first original author creates a work which bears marked similarity to the original work though the person himself does not consciously aim to imitate the first author.

In the case of Francis Day and Hunter v. Bron,\(^\text{94}\) it was held that sub-conscious copying is sufficient to constitute infringement of copyright provided substantial familiarity with the work alleged to be copied is shown.

\textbf{(xxxii) When copying and reproduction become an infringement.}

In case of literary and dramatic work, reproduction means coping a substantial part of the work and passages from the original work.

In musical work, when the bars of one musical work are borrowed substantially there would be copying.

Reproduction the work in a different medium in infringement. For instance, reproduction of a literary, dramatic or musical work in the form of a record or a cinematograph film and reproduction of an artistic work which is two dimensional into a three dimensional work would tantamount to infringement.

In Landbroke (Football) Ltd. v. William Hill (Football) Ltd.,\(^\text{95}\) it was held that broadly reproduction means copying and does not include case where an author or compiler produces a substantially similar result by independent work without copying. A copy is that which comes so near to the original so as to suggest the original to the mind of the persons seeing it.

\textbf{(xxxiii) Copying by taking substantial part.}

In order to constitute infringement it is necessary that a substantial (considerable) or material (importance) part of the work should be copied.

\footnote{94 1963 ch. 583 (613)}

\footnote{95 (1964)1 WLR 273.}
In Modern Law of Copyright by Laddie, Press lot and Victoria at p. 53, Para – 2.81; -it is said : “Copyright in a work is infringed by taking a substantial part of it : But what is the meaning of ‘substantial’ ? It is a question of fact and degree, a matter for the jury in those days when copyright actions were tried by injuries. Sheer arithmetical quantity alone is not the test; for a short extract may be a vital part of a work and the question where he had copied a substantial part depends much more on the quality than on the quantity of what he has taken. ‘One test may be whether the part taken is novel, or striking, or is merely a commonplace arrangement of ordinary works or well known data….The question is, therefore, bound up with that of originality; that is, not necessarily originality in the popular sense of that term, but whether the author has employed more than negligible skill or labour and the defendant has appropriated it”, and at P.51, para 2.78, the authors say : “The Act provides that any reference therein to a reproduction, adaptation or copy of a work shall be taken to include a reference to a reproduction, adaptation or coy of a substantial part of the work, as the case may be. In this kind of case it is a question fact and degree whether the bit that is significant enough to count as “substantial”.

In whom-o-Mfg. Co. v. Lincoln Industries,96 section 49(1) of U.K. Act of 1956 provided that, “the doing of an act in relation to a substantial-matter shall be taken to include a reference to the doing of that act in relation to a substantial part thereof. Accordingly, the doing of an infringing act in relation to a work protected by copyright will include the doing of that act in relation to a substantial part of the work. There is no such provision under the Indian Act.

In Ladbroke v. William Hill,97 Lord Pearce said, “Did the defendants reproduce a substantial part of it ? Whether a part is substantial must be decided by its quality rather than its quantity. The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright

97 (1961)1 WLR 273 at p. 293.
and therefore will not be protected. For that which would not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and, therefore, the courts will not hold its reproduction to be an infringement. It is this, I think, which is met by one or two judicial observations that “there is no copyright” in some unoriginal part of a whole that is copyright. They afford no justification, in my view, for holding that one starts the inquiry as to whether copying exists by dissecting the compilation into component parts instead of starting it by regarding the compilation as a whole and seeing whether the whole has copyright. It is when one is debating whether the part reproduced is substantial that one considers the pirated portion on its own. In the present case the learned judge found that there was deliberate copying, but he did not decide whether the part copied was substantial. The majority of the court of Appeal though that it was, I agree with them. There are many things which are common to many coupons. But the plaintiff’s coupon had an individuality. The defendants clearly modeled their coupon on the plaintiff’s coupon and copied many of the things that give it this individuality. I cannot regard these things taken together as other than substantial.

The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected. For that which will not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the court will not hold its reproduction to be an infringement.

In Merchandising Corporation v. Harpbond,\(^9\) it was held that two straight lines drawn with grease paint with another line in between then drawn with some other colouring matter by itself could not attract copyright protection.

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\(^9\) (1983) FSR 32.
(xxxiv) **Quantum of copying necessary.**

For constituting infringement there must be a substantial appropriation of the work. But what constitute, substantial part will depend upon the circumstances of the case.

In Elanco Products Ltd. v. Mandrops (Agrochemical Specialists) Ltd., the defendants had substantially copied the literature in the label and leaflets of the herbicide in their own herbicide labels and leaflets. An injunction was granted by the C.A. The information contained in the literature were in the public domain.

(xxxv) **Bootlegging.**

Unauthorised recording of live performance is called bootlegging and such unauthorized recording are called bootlegs. The copyright Act does not provide a remedy against bootlegging since there is not copyright in a live performance.

In the U.K. the performer’s Protection Acts 1958-1972 provide some protection to performers in respect of their five performances. Unauthorised recording is made a criminal offence under this Act. There is no similar statute in India. Unauthorised recording can be protected in India only by an action for breach of contract or confidence.

In Warner Bros. Recods Inc. v. Parr, plaintiffs had the exclusive right to record the musical performances of a number of artists. Defendants had dealt in ‘bootleg’ recording that is, records made without the permission of the performers concerned contrary to the performer’s Protection Acts 1958 to 1972. Plaintiffs sought an injunction to restrain the defendants from making, selling or

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100 (1982) FSR 383.
offering for public performance any such records and an inquiry as to damages. Defendants did not enter defence. Remedies sought were granted.

(***vi**) Importation into India of Copies of books lawfully published in a foreign country.

In any person without the licence of the copyright owner imports into India for the purpose of selling or distributing for the purposes of trade a literary work the copyright is infringed even if the work was lawfully published by the owner of the copyright or the exclusive licensee in the country from which it has been imported. This is clear from the definition of infringing copy in section 2(m) read with sections 51 and 53(1). It is also an infringement of copyright knowingly to import into India for sale or hire infringing copies of a work without the consent of the owner of the copyright though they may have been made by or with the consent of the owner of the copyright in the place where they were made.

In Time-life International (Nederland’s) v. Interstate Parcel Express Co. Pvt. Ltd.101 the HC of Australia under a similar provision held that an importer who purchased books in the USA from the America can Licensee of the copyright infringed the Australian Licensee. It was held that there was no licence, express or implied, that the buyer of a book subject to copyright obtained rights no more and no less than the buyer of any other chattel, and that the rights which flowed from the acquisition of ownership and possession did not involve any implied licence.

The law of the place of importation is the relevant system of law for the purpose of deciding whether the goods imported infringed copyright. Barson Computers v. John Gibert,102 Genuine goods purchased from U.K. and imported for sale in N.Z. without the consent of the copyright owner was held an

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102 (1985) FSR 489 (HC of NZ).
infringement in N.Z. according to section 10(2) of the Copyright Act 1962 (NZ) which is identical to section 5(2) of the Copyright Act 1956 (U.K.).

(xxvii) Authorisation of Infringement.

An authorisation can only come from somebody having or purporting to have authority and that an act is authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant or justify the doing of the act.

A person who authorises another to commit an infringement himself commits an infringement. A person who has actively directed, advised or assisted another in doing an act of infringement is himself liable for the infringement.

Sweet v. Parsley,¹⁰³ it was held that a person who has under his control the means by which an infringement of copyright may be – committed – such as a photocopying machine – and who makes it available to other persons, knowing or having reasons to suspect that it is likely to be used for the purpose of committing infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from it use.

In C.B.S. v Amstrad,¹⁰⁴ the defendants (Amstrad) manufactured, advertised and sold audio systems which incorporated a double cassette deck feature. The system offered the facility of recording from one tape-deck to the other at twice the normal playback speed. Their advertisements drew prominent attention to the recording, facility stating that it enabled duplicate recording to be made from one cassette to another, to record direct from any source and make a copy of your favourite cassette, but incorporating a warning that the recording and playback of certain material may only be possible by permission.

The plaintiffs alleged infringement copyright and sought an injunction to restrain the sale of the audio systems in question. Injunction was refused holding that the defendants by selling and advertising the system in question did not authorizes infringement of copyright.

**(xxxviii) Test of infringement.**

In order constitute infringement of copyright in any literary, dramatic or musical work, it is well established that there must be present two elements: First, there must be sufficient objective similarity between the infringing work and the copyright work, or substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter, secondly, the copyright work must be the source from which the infringing work is derived; but it need not be the direct source. [Francise Day & Hunter v. Bron].

The test does not depend upon how much of the whole work is taken. It all depends on the worth of the part taken.

William Hill (Football) v. Landbroke (Football), if you take a short poem out of entire volume, you may be infringing copyright; or if you take only 28 bars out of a piece of music, you may do so.

**(xxxix) Compilations.**

The test of infringement depends on the worth of the part taken, not the quality. Once the idea is committed to writing, no one is entitled to copy it on the basis that it is merely an idea.

William Hill (Football) v. Ladbroke (Football), in this case the defendants had infringed the plaintiff’s copyright in the compilation by

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105 (1963)1 Ch.D. 587.
106 (1980) RPC 539 at p. 546 (CA).
reproducing a substantial part of it, even though large parts of it had not been copied.

(xl) **Reproduction.**

To constitute infringement the defendant must have reproduced a substantial part of the plaintiff’s work.

In Warwick Film Production Ltd. v. Eisinger,\(^{108}\) in the alleged infringing copy of the book entitled “Three Times Tried” the author did a lot of editing, omitting and adding certain materials, verbal’s alterations, rearrangements of materials and transporting and abbreviation of materials. It was held that the relevant part of the original book were original only by reason of the collocation, and accordingly when robbed of that collocation, it did not represent a substantial part and so did not involve an infringement of it. In the result it was held that there was no reproduction of a substantial part of the book and no infringement of copyright.

(xli) **Parodies or burloques.**

In considering whether a parody or burloque of a literary work constituted an infringement of the copyright in that work the test to be applied is whether the writer has bestowed such mental labour upon the material he had taken and had subjected it to such revision and alteration as to produce an original work.

Joy Music v. Sunday Pictorial Newspapers,\(^{109}\) the plaintiff were the copyright owners in their rock ‘n’ roll song “Rock-a-Billy, Rock-a-Billy, Rock, Rock-a-Billy, Rock-a-Billy, Rock, Rock, Rock” and so on. The defendants in a newspaper article adopted as a parody the chorus: “Rock-a-Phillip, Rock-a-Phillip, Rock-a-Phillip, Rock” so on. No part of the plaintiff’s song was reproduced. It was held that this was original and not an infringement.

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\(^{108}\) (1967)3 All ER 367 at pp. 379, 395.

\(^{109}\) (1960)2 QB 60.
(xlii) **Research thesis/ dissertation.**

Copyright subsists in a research thesis or dissertation. Unauthorised copying of a student’s thesis for Master’s Degree by his guide for obtaining Ph.D. is an infringement of the copyright in the thesis.

Fateh Singh Mehta v. Singhal,\(^{110}\) interim injunction awarding Ph.D. to the guide granted. There was verbatim copying of several pages and summaries. Jodhpur University restrained from awarding Ph.D. degree. Held that plaintiff need not prove irreparable damage for getting injunction.\(^{111}\)

(xliii) **Fair dealing.**

A fair dealing of the work for research or private use, criticism or review, whether of that work or of any other work, or for reporting current events in a newspaper, magazine or other periodical or broadcast or in a cinematograph film or by means of photograph is permitted. In all these cases the reproduction of entracts of the work or its recitation or performance is involved.

In Prosieben Media A.G. v. Carlton U.K. Television Ltd.,\(^{112}\) the principles of fair dealing were summarized as follows:

The degree to which the challenged use competes with exploitation of copyright by the copyright owner is very important consideration, but not the only consideration. The extent of the use is also relevant, but its relevance depends very much on the particular circumstances. In Hubbard v. H. Vosper, Megan,\(^{113}\) contemplated a case in which the quotation of an entire short work might be fair dealing. If the fair dealing is for the purpose of criticism that criticism may be strongly expressed and unbalanced without forfeiting the fair

\(^{110}\) (1990) IPLR 69 at p. 75 (Rajasthan).


\(^{112}\) (1999) FSR 610 at pp. 619-620 (CA).

\(^{113}\) LJ (1992)2 QB 84, 94 at p. 98.
dealing defence. An author's remedy for malicious and unjustified criticism lies (If it lies anywhere) in the law of defamation, not copyright.

(xliv) Factors in favour of fair dealing.

In Habbard v. Vosper,\textsuperscript{114} it had been said that fair dealing is a question of fact and of impression to which factors that are relevant include the extent of the quotation and its proportion to comment (which may be justifiable, although the quotation is of the whole work), whether the work is unpublished; and the extent to which the work has been circulated, although not published within the meaning of the copyright Act.

(xlv) Disco arrangement of original song.

Copyright subsists in a disco arrangement of an original song. The author of such arrangement is the owner of the copyright in such work and is entitled to sue for infringement of copyright in his work even if it infringes the copyright in the original song. He is entitled to prevent others from infringing his work and claim damages subject to his obligation to account to the original author of the song for his due share of any recovery. ZYX Music GMBH v. Chris King.\textsuperscript{115}

(xlvi) Music Played in a factory or restaurant.

Playing music through loudspeaker in a private room adjoining a public restaurant in such a manner that the music was audible to the public in the Restaurant was held performance in public and constituted infringement of copyright.

In Performing Rights Society v. Harlequin,\textsuperscript{116} BROWN WILKISON J. observed: “In my judgement a performance given to an audience consisting of the persons present in a shop to which the public at large are permitted, and

\textsuperscript{114} (1972)2 WLR 389.

\textsuperscript{115} (1995) FSR 566; (1995) AIPC No. 4, P. xviii (U.K.H.C.)

\textsuperscript{116} (1979) FSR 233 at p. 239,
indeed encouraged, to enter without payment or invitation with a view to increasing the shop owner’s profit can only properly be described performance in public”.

(xlvii) Reproduction of artistic work.

A reproduction copied not directly from the original artistic work or a sketch of it but copied from a reproduction in material form derived directly or indirectly from the original work is an infringement of the original artistic work.

Dealing with the question of infringement of copyright of the applicant’s work by the respondent’s work, the court is to test on the visual appearance of the object and drawing, design, or artistic work in question and by applying the test viz, ‘lay observer test’ whether to persons who are not experts in relation to objects of that description, the object appears to be a reproduction. If to the ‘lay observer’, it would not appear to be reproduction, there is no infringement of the artistic copyright in the work.

In Martin v. Polylas Manufacturers,\textsuperscript{117} it was held that dies for certain plastic coins manufactured by the defendant by coping directly from specimen plastic coins made by the plaintiff himself was held an infringement of plaintiff’s copyright in their engravings or dies.

(xlviii) Colour combination and get-up.

Test of actual reproduction of the artistic work is not criterion, substantial similarity is sufficient. Minor variations are of no consequence.

In Frank Educaional Aids (P) Ltd. v. Fair Deal Marketing,\textsuperscript{118} the plaintiffs were exclusive licenses for producing a board game called “whatever next” of a British company who were copyright owners of the board game (artistic work). Defendants produced similar product under the name “Funster”. In Interim

\textsuperscript{117} (1969) NZLR 1046 (Australian case)

\textsuperscript{118} (1998) AIPC 169 (Del).
injunction restraining copyright infringement and passing off (plaintiff prior users) granted.

(xlix) The feeling and artistic character taken.

The question whether the feeling and artistic character have taken is relevant to the question whether a substantial portion of plaintiff’s work has been copied or reproduced.

Bakman v. Fussell,\(^{119}\) the defendants had copied part of the engraving, a collie do, and part altered. Romer L.J. said: It was not only the dog which was taken, but also the feeling and artistic character of the plaintiff’s work. They had taken the design while substituting cats and a tortoise for the child”.

(L) Material part taken.

When one is considering questions of infringement of copyright one is considering questions related not merely to the whole of the work, but to any material part of the work. In deciding whether what has been reproduced by an alleged infringer is a substantial part of the work allegedly infringe, one must regard the quality (that is to say the importance) rather than the quantity of the part reproduced.

Lerose v. Hawick Jersey,\(^{120}\) it was held that in that case the most material part of the point pattern drawings was the patterns which are going to enables knitters to produce on the fabrics ultimately made.

(Li) Paintings and Picture.

Copyright in a painting is infringed when a person copies from the original painting or a picture of the painting.

\(^{119}\) (1978) RPC 485 at p. 487.

\(^{120}\) (1974) RPC 42 p. 59.
In the case of artistic work, e.g. picture of a deity, there is no better way of detecting the piracy in an alleged infringing work than by making a careful examination of it to see whether any of the deviations and mistakes which artistic licence permits in the original have been reproduced into the alleged infringing copy.

In Cunnaiah v. Balraj,\textsuperscript{121} it was observed : ‘A copy is that which comes near to the mind of every person seeing it. Applying this test, where the question is whether the defendant’s picture is a copy or colourable imitation of the plaintiff’s picture the degree of resemblance between the two pictures which is to be judged by the eye must get the suggestion that it is the plaintiff’s picture. One picture said to be a copy of another picture finds a place in the reproduction”.

In Venugopala Sarma v. Sangu Ganesan,\textsuperscript{122} (infringement of copyright in a picture) the reproduction was not exact but the effect on the mind by a study of the two pictures was that the respondent’s picture was nothing but a copy of the plaintiff’s picture. It was observed : “Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye must be such that the person looking at the respondent’s picture must get the suggestion that it is the appellant’s picture ….. one picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction.

(Lii) Facial make-up.

A painting must be on the surface of some kind. A painting is not an idea, it is an object; and painting without a surface is not a painting. Make-up, as such, however, idiosyncratic it may be as an idea, cannot possibly be a painting for the purpose of the copyright Act.

\textsuperscript{121} AIR 1961 Mad 111
\textsuperscript{122} 1972 CrLJ 1098 (Mad)
Merchandising Corporation v. Harpbond, in this case plaintiff’s work consisted of portrait of the pop singer Goddard with Red Indian facial markings comprising two broad lines one in grease paint with a light blue line between, running diagonally from nose to jaw on one check, a heart over the left eyebrow, and a beauty spot by the left nostril. The hair style featured gold braid, a kiss curl, and valentine side burn. The plaintiffs subsequent to the suit got sketches of the photograph made. The defendants took an old photograph of Goddard wearing his old make-up, that is to say, the white line across his face and a different form of clothing on the upper part of the body. Then they caused the white line to be taken out from that old photograph and put on to the photograph the makeup which Goddard was using for his new look and got a coloured portrait made. The plaintiffs had no copyright in the said photograph. Plaintiffs alleged that the said portrait is an infringement of the copyright on the photograph and contended that copyright subsisted in the facial make-up. It was held (1) that the portrait was not a direct or indirect copy of the sketch, (2) that what has been copied was the two straight lines, which by themselves could not attract copyright, (3) that the reproduction of the straight lines is not a substantial part of the original and (4) that facial make up was not a painting within section 3 of the copyright Act 1956. Injunction was refused.

(Liii) Use of photograph to make a painting.

If a painter uses a copyright photograph only a source of inspiration or for reference purposes only there may be no infringement If, however, the ultimate painting is a copy of the photograph there could be infringement, especially if the photograph is an original one.

In Bauman v. Fussall, in this case, the plaintiff had taken a colour photograph of two cocks fighting which was published in a magazine. The defendant, an artist, painted a picture of two cocks fighting, the idea of which he

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123 (1983) FSR 32 at P. 46.
admitted having taken from the photograph. It was held that the painting was not an infringement of the copyright in the photograph. It was further held that the photographer did not arrange the position of the birds but waited for the moment to take the photograph when the birds were in a position he wanted them to be, and accordingly the relative position of the birds was of less importance in determining whether a substantial part of the photograph has been reproduced in the painting.

(Liv) Three dimensional representation of drawing.

Apart from the reproduction of such drawings which obviously constitute infringement there is another type of possible infringement by making a three dimensional object based on such drawing or making a two dimensional form of a three dimensional work.\(^\text{125}\)

The drawing is a team effort by the whole of the drafting and design body and all the information embodied in the drawing can, if a substantial part of the drawing be reproduced in a three dimensional form, be considered for the purpose of deciding whether the three dimensional form is an infringement.

In British Leyland v. Armstrong,\(^\text{126}\) it was held that the copyright in a drawing whose sole purpose was to serve as the blueprint for the construction of a three dimensional article of purely functional or utilitarian value and with no aesthetic or decorative element was capable of being infringed by copying of the three dimensional article.

(Lv) Indirect Copying.

Where there is copyright in the drawing of an article, copying of the article made in accordance with that drawing is indirect copying of the drawing constituting an infringement of the copyright.

\(^{126}\) (1986) RPC 279 (HL).
It has been observed that in the case of indirect copying infringement should only be found where what has been copied are features that are not purely functional.

In British Leyland v. Armstrong,\textsuperscript{127} it was held that the defendants did not infringe the copyright in the mechanical drawings by copying the exhaust pipe without seeing or receiving any assistance from the drawings. Lord Griffiths held that ‘reproducing’ in section 3(5) of the U.K. Act should not be given the extended meaning of indirect copying in cases in which the mechanical drawing or blue print is of a purely functional object.

(Lvi) **Difference between original and copy.**

If a part of a machine which admittedly fulfils the same function as a part manufactured by the plaintiffs from their copyright drawing has been manufactured by the defendants by copying the plaintiff’s part, the defendants cannot escape a claim for breach of copyright by asserting that there was differences between the original and the copy. It may be that adequate descriptions of the differences would suffice, although the production of the alleged infringing copy would, of course, be much better. In copyright proceedings, relating to drawings, which much will depend on the impression made upon the judge’s mind by the original and the alleged copy, a mere verbal description of differences is likely to prove most unsatisfactory.

British Northrop v. Tenteam Blackburn,\textsuperscript{128} in this case the defendants had manufactured certain spare parts of the plaintiff’s machiner for use in the plaintiff’s machinery but described such parts in a different way. It was held that defendants had infringed the copyright in the drawing of the plaintiff’s spare parts.

\textsuperscript{127} (1986) RPC 279 at pp. 374, 376 (HL).

\textsuperscript{128} (1974) RPC 57 at p. 73.
(Lvii) Repairs and replacement of worn out parts.

A purchaser of a machine has a right to repair the machine by replacement of parts made according to the design (drawings) of the original parts, the copyright of which was owned by the manufacturer of the machine. In the absence of any express conditions, the purchaser of the machine is entitled to recondition it by using new parts not of the plaintiff’s manufacture.

In British Leyland v. Armstrong, the plaintiffs were manufacturers of cars and their parts. The defendants manufactured and supplied components of motor parts to the plaintiffs. The manufactured exhaust pipes by copying original equipment manufactured by the plaintiffs by a process of reverse engineering. In an action for infringement of copyright in the drawing of the exhaust pipe, it was held that the defendants had the right to manufacture the exhaust pipe for sale as spare part for replacement. The action was dismissed.

(Lviii) Infringement by reverse engineering.

‘Reverse engineering’ means striping down and dismantling a machine, making sketches of the relevant parts and recording dimensions making working drawing from such sketches, plus the dimensions, and then making the machine from such working drawings. Reverse engineering may constitute infringement of copyright in drawings. (Weir Pumps v. CML Pumps)

(Lix) Copyright in Patent drawings.

A plaintiff in a copyright infringement must establish: (1) that he is the owner of the copyright in drawings, which were copied, either directly or indirectly by the defendant. He must also show that what was taken was a substantial part of the work sued upon. As a practical matter therefore a claim of copying from the work sued upon to the alleged infringement must be shown.

129 (1986) RPC 279 (HL).
In Catnic Components Ltd. v. Hills & Smith Ltd. WHITFORD, J. observed (Obiter), by applying for a patent and accepting the statutory obligation to describe and if necessary illustrate embodiments of his invention, a patentee necessarily makes an election accepting that, in return for a patented monopoly, upon publication, the material described by him in the specification must be deemed to be open to be used by the public, subject only to such monopoly rights as he may acquire on his application for the patent and during the period for which his monopoly remains in force, whatever be the reason for the determination of the monopoly rights. In such circumstances the patentee must be deemed to have abandoned his copyright in drawings the equivalent of the patent drawings”.

(Lx) Three dimensional article made from two dimensional drawing.

A three dimensional article made by reproducing any substantial part of a drawing would constitute infringement of the copyright in the drawing. Infringement of copyright by three dimensional copying is restricted to artistic copyright. There is infringement of drawings by a three dimensional reproduction of two dimensional drawings if they are sufficiently clear for a man of reasonable and average intelligence to be able to understand them from an inspection of them to such a degree that he would be able to visualize in his mind what a three dimensional object, if made from them, would look like.

In Guilford Kapwood Ltd. v. Embassy Fabrics, the plaintiffs claimed copyright in a lapping diagram showing how the guide bars of a warp knitting machine will move in order to produce a fabric of a particular pattern. Defendants deliberately copied the plaintiff’s diagram to produce a fabric identical to that of the plaintiffs. It was held that the fabric was a three dimensional form but that since as a non-experts in the particular field the judge was unable to deduce that the defendant’s material was a reproduction of the

whole of the artistic work in which copyright was claimed, interlocutory injunction was refused.

In Duriron Inc. v. Huge Jennings Ltd.\footnote{(1984) FSR 1 (CA).} the plaintiffs claimed copyright in drawings of tubular anodes for use in cathodic protection systems for the protection from corrosion of pipes laid in Seawater or deep underground. They alleged that the defendants had infringed their artistic copyright in the drawings by producing and selling almost identical tubular anodes. They did not allege that the defendants had seen the plaintiff’s drawings or products but contended that the near similarity in dimensions raised an inference of copying. The defendants said that the weights and dimensions were given them by their customers who might have got them from the plaintiff’s own catalogues and price lists. Both the plaintiffs and the defendants made their tubular anodes by centrifugal casting which could be done without any drawings. What they had used was the statistic of measurements and not the pictorial representation of a tube. Even the statistics were used not for making the anodes but for checking them after they have been made. Interlocutory injunction was refused as there was no triable issue of infringement of copyright.

\textbf{(Lxi) Sectional drawings – how to be looked at.}

In Temple Instruments Ltd. v. Hollis Heels Ltd.,\footnote{(1973) RPC 15 at p. 17.} GRAHAM. J. observed as follows: “their second points is that in looking at the drawings, and each of them, both the legend at the bottom ‘plastic divan leg’ and ‘scale full size’, and all the notations of the left hand drawings showing such matters as sizes, diameters and thickness of the relative part shown in the drawing must be ignored., They say that this is so because artistic copyright cannot exist in an idea and the legend and figures convey ideas and are not artistic in themselves. I find this entirely unreal and take the view that whereas here two sketches or drawings are included on a sheet and obviously relate to the same articles they
can both be looked at, both for the purpose of establishing the scope of the copyright and for the purposes of considering infringement. Equally, I think it is quite unreal when a section of an article is shown in the drawing to ignore the fact, as is clear from the wording, including the use of the word diameter; that it is a section of a circular article”.

(Lxii) Making of dresses based on drawing or sketch or dress design.

In J.C. Gleson v. H.R. Denne Ltd.\(^{135}\) the plaintiffs alleged that the defendants had infringed the copyright in certain drawings (Sketches) for a clerical shirt by the manufacture, distribution and sale of shirts which, it was said, reproduced these drawings in three dimensional form. Nobody concerned with the defendants had even seen these sketches. The question was whether the defendants had directly or indirectly copied the plaintiff’s rough drawings in producing shirts which embody the same idea – the tunnel collar, slip inset, fly-fronted clerical shirt. It was held that although a chain of causality was established between the drawings and the defendants shirts, it was not a chain of causation which could conceivably be said to lead to the conclusion that there had been a reproduction of the drawings, what had passed was only the idea. It was alleged that the defendant’s shirts were indirectly copied from the drawings, because consciously or unconsciously they were copied from Gleson Shirts based upon the drawings and being themselves copies thereof. The shirts manufactured by the defendants of which complaint was made were shirts copied from a shirt made and supplied by a well known firm of clerical outfitters, wippells, who asked the defendants to produce copies of that shirt. Evidence showed that wippells had not seen nor knew anything about the Gleson shirt but they made the shirt at the request of one Father Wilson who had worn a Gleson shirt and wanted to have made a similar shift with some alternations. Action failed.

\(^{135}\) (1975) RPC 471 (CA).
In J. Bernstein Ltd. v. Sydney Murray Ltd.,\textsuperscript{136} it was stated by Fox J. “These observations seem to me apply equally to the present case, and not the less so because the designs are drawings of girls wearing the garments. The question is one of degree. I see no reason why a three dimensional reproduction of a substantial part of that part of the relevant drawing which is the drawing of a dress, should not constitute a reproduction of a substantial part of the whole drawing. In the present case, drawings, it seems to me, are primarily drawings of dresses, the wearers, the depictions of whom are rudimentary, are not significant features of the drawings at all. I do not suggest that we can ignore the depiction of the wearer, merely that the matter is one of degree.

(Lxiii) **Copying of dresses in its finished form.**

The question whether copying of dresses where there is no copying from drawing or anything of that kind is considerable uncertainty.

In Brigid Foley Ltd., v. Elliott\textsuperscript{137}, it has been observed that there is a direct copying from a garment which one person has designed and produced by himself, doing all he cutting stitching and so on, there might be a case for saying that there would be a breach of doing that.

Where a garment is made by copying another garment made from some drawings it is an infringement of the copyright in the drawing although the copier may not have seen the drawings and no copyright is claimed in the garment originally made from the drawing.

Bernstein v. Sydney Murray,\textsuperscript{138} the plaintiffs were owners of copyright in certain sketches for ladies garments in which the garments were shown as worn by ladies. They had displayed garments made from such sketches in

\textsuperscript{136} (1981) RPC 303 at p. 329.
\textsuperscript{137} (1982) RPC 433.
\textsuperscript{138} (1981) RPC 303.
fashion shows and shop windows. Defendants had copied the dresses produced from plaintiff’s sketches. It was held that this constituted infringement of the copyright in the sketches.

(Lxiv) Architectural drawings and plans.

When an architect prepares a plan at the request of a client the copyright remain in the architect. The client cannot reproduce these plans or any substantive part of them either in the form of another plan or in the form of the building itself, unless he has the licence of the architect, express or implied but when the architect charges the full scale fee for the work that fee, in the ordinary way, must be taken to include permission to use the plans for the building of that very house. The client is, however, the owner of the plan.

LORD DENNING, MR. in Stovin Bradford v. Volpoint properties,\(^{139}\) in this case the plaintiffs in accordance with an agreement prepared certain plans for extending and rebuilding a factory. The plan included a diamond shaped feature which gave a very pleasing appearance to the building. Later the plaintiff withdrew from the project. The defendants incorporated into the building the distinctive diamond shaped feature of the plaintiff’s plan. This was held an infringement of copyright in the plans.

Blair v. Alan S. Thomas,\(^{140}\) where the architect were paid their full fees for preparing plans for erecting two houses on a plot of land. The owners of the plot later sold the land to the defendant to whom they handed over the plan. It was held that the plaintiff had impliedly licensed the owners to use the plans for the buildings on that site and the implied licence extended to another architect employed by the owners and also to a purchaser of the plot, but for no other purpose.

\(^{139}\) (1971) 3 All ER 570.

\(^{140}\) (1971) 1 All ER 464.
(Lxv) **Cinematograph film of a stage play.**

The owner of the copyright in a dramatic work has the exclusive right to make any cinematograph film or a record in respect of the same; or of a translation in any language or of an adaptation of the work. A clever film producer make take the central ideas from the work and make such alteration in the scenario, story, plot and incidents in making the film so as not to infringe the copyright. The case of R.G. Anand v. Delux Film,\(^\text{141}\) is an excellent illustration of the difficulties involved in establishing that a cinematograph film is an infringement of the dramatic work.

(Lxvi) **Infringement of copyright in cinematograph film through telecast without consent or licence.**

The plaintiffs Swati film who were engaged in the business of purchasing, selling, licensing and exhibiting cinematographic films sued the defendants for infringement of copyright in certain films by telecasting them through satellite transmission without consent or licence from the plaintiffs who were the owners of the copyright in the films. They also claimed damage of over 25 lakhs. Interim injunction was granted restraining the defendants from telecasting the films and from releasing the payments to any person for the telecast already made of two films. Swati Films v. National Film Development Corporation (NFDC).\(^\text{142}\)

(Lxvii) **Version recording.**

A version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and

\(^{141}\) AIR 1978 SC 1613.

\(^{142}\) (1991) AIPC No. 4, at p. xviii (Delhi H.C.).
arrangers version recording is thus neither copying nor reproduction of original recording. (Gramaphone Co. v. Super Cassettes Industries.\textsuperscript{143}

\textbf{(Lxviii) Infringement of copyright by Film Producers.}

The asymmetry between film producers and authors of other protected works becomes accentuated when the author of dramatic or literary work has established infringement. This is so also because of the fact that “a film has a much broader perspective, wider field and bigger background” and it is always possible for the film maker to give ‘a colour and complexion” which distinguishes in many ways the story or dramatic theme from the film. The Supreme Court of India testify to the considerable difficulties in this area, however, adopted in R.G. Anand v. Delux Films,\textsuperscript{144} the doctrine of dominant impact even as regards this question. The test was formulated thus : “If the viewer after seeing the film gets a total impression that the film is by and large a copy of the original play, violation of copyright may be said to have been proved. There were a large number of similarities between the play and the film but the court held that similarities do not constitute infringement. As regards thems, the court found that the film dealt with the themes of provincialism, evils of a caste-ridden society and the evils of dowry whereas the play only dealt with the first time.

\textbf{(Lxix) Infringement of copyright by Importation.}

Copyright in a work is infringed by anyone who imports into India any ‘infringing copies of the work. The only exception permitted is the importation of not more than one copy of the work for the private or domestic use of the importer. Infringing copy means in this content a copy or reproduction of the work made or imported in contravention of the provisions of the Act. The question that can arise, and has in the past infact arisen, is : can an exclusive

\begin{footnotesize}
\textsuperscript{143} [1996) PTC 252 (Del.) at. P. 254].  \\
\textsuperscript{144} AIR 1978 SC 1613.
\end{footnotesize}
licensee for publishing a copyright work in India prevent import of copies of the work lawfully made in any other country, say, by the owner of the copyright himself or by his assignee or licensee, on the ground that such importation would amount to an infringement of the copyright of the work? Does such import constitute an import of an ‘infringing copy’ and, as such, an infringement by importation? These questions have been answered in the affirmative by the Delhi High Court in Penguin Books Ltd., England v. M/s. India Book Distributors,\textsuperscript{145} while allowing an appeal from an interlocutory order denying interim injunction. This decision of the Delhi High Court accords with the Australian and English decisions in similar case, though the language of the Indian statute is not on all fours with the copyright statutes of those countries. It has been opined that the question of parallel imports has to viewed this judgment is not in the interest of Indian reader who must get booking at lower prices. The question must be considered by experts and a policy decision reached.

In state of Andhra Pradesh v. Nagoti Venkataraman,\textsuperscript{146} the Supreme Court held that keeping in view the object underlying sections 52A and 68A of the Act, it would be infringing of copyright, if particulars on video films etc. as mandated under Section 52A are missing. The absence of the evidence of the owner of the copyright does not constitute lack of essential elements of copyright. However, in the instant case, he Supreme Court after holding the accused guilty changed the sentence of six months imprisonment and fine of rupees three thousand imposed by the trial court as upheld by the sessions court to only fine of rupees ten thousand, as it felt that the punishment by way of fine only would meet the ends of justice.

\textsuperscript{145} AIR 1985 Del 29 (DB).

\textsuperscript{146} (1996)6 SCC 409.
IV. 3. JUDICIAL PRONOUNCEMENTS AFTER 1999 AMENDMENT AND IN 21ST CENTURY.

The Amendment Act 1994 provided for (i) performer’s right protection covering any visual or artistic presentation made live by one or more performer’s (ii) copyright societies, seeking to promote collective administration of the rights of authors, composes and other creative artists (iii) assignment of copyright by an author or artist to protect the interest of both assignor and assignee; and (iv) computer programmes, cinematograph films and sound recordings, protection.147

A large number of provisions in the amending legislation are self-explanatory and clarificatory in nature.

The copyright Act was again, amended in 1999 which amended definition of ‘literary’ work, meaning of copyright in respect of a computer programme, increased the term of copyright of performers from 25 to 50 years, inserted certain new provisions pertaining to power of the Central Government to apply the provisions relating to Broadcasting organizations and performers to broadcasting organisation and performers in certain other countries, and power to restrict rights of foreign broadcasting organizations and performers.

(i) What the plaintiff has to establish.

“In any case of infringement the plaintiff has to establish not only that the work in respect of which complaint is made in fact so nearly resembles his as to be capable of being an infringement, but also that it has in fact been produced by the use of those features of his work which by reason of the knowledge, skill and labour employed in their production constitute an original copyright work .......... There is no infringement unless it is established that the defendant has produced a work which both closely resembles the plaintiff’s work and has been produced by a direct or indirect use of those features of the plaintiff’s work in which copyright subsists.

To establish infringement two elements must be proved: (1) ownership of valid copyright and (2) copying of constitute elements of the work that are original.

In Eastern Book Co. v. Navin J. Desai;¹⁴⁸ Plaintiffs had published volumes of collection of judgement of courts with head notes. Defendants had published similar volumes of the same collection of judgments with head notes. Interim injunction was refused on the ground that the text of the judgments is in the public domain and there is no copyrightable matter in plaintiff’s head notes which the defendant was alleged to have copied.

(ii)  **Comparison of works.**

The question may be resolved by taking each of the works, comparing them as a whole, and determining whether there is not merely an identity or similarity or resemblance in some of the leading features or in certain of the details, but whether, keeping in view, the idea and general effect created by the original, there is such a degree of identity or similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original. Addition, omissions and modification do not avoid infringement of copyright.¹⁴⁹

In Pepsi Co. Inc. v. Hindustan Coca-cola¹⁵⁰ the defendants “use of ‘Yeh Dil Mange More” (used by the Plaintiff in their advertisement) in their advertisement was not in relation to their products. It was used in a mocking manner only in the course of comparative advertisement. This itself would not prima facie amount to infringement of copyright.

(iii)  **Infringement of computer programme.**

The architecture of a computer programme (which might be either the overall structure of the system at a high level of abstraction or the allocation of functions

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¹⁴⁸ (2001) ITC 57 (Del).
¹⁵⁰ 2001 AIPC 240 (Del).
between various programmes) was capable of protection is a substantial part of the programmer’s skill labour and judgment had gone into it. [Cantor Fitzgerald International v. Tradition (U.K.)].\(^{151}\)

The question whether the defendant ought to have been able to discover that a software was counterfeit not a suitable question for determination in an interlocutory proceeding. [Microsoft Corporation v. Plato Technology Ltd].\(^{152}\)

A trader, however honest, who purchased the plaintiff software otherwise from an authorized distributor owed the plaintiff a duty to take some steps to satisfy himself that the product was genuine a prior once this has already occurred. The plaintiff was therefore entitled to an injunction restraining the defendant from dealing in software which he knew or ought upon reasonable enquiry to know was counterfeit. [Microsoft Corporation v. Plato Technology Ltd.].\(^{153}\)

(iv) **Copyright rewards originality but not-efforts.**

A compilation is protected by copyright only to the extent of the material contributed by the author and two elements must be proved to establish infringement of a copyright in a compilation, namely (i) ownership of a valid copyright and (ii) copyright of constituent elements of the work which are original.

Further, the originality requirements means that the work have been independently created and that it possesses at least some minimal degree of creativity.

[Methew Bender & Co. Inc. v. West Publishing Co. 47]\(^ {154}\).

The presence of common errors is not probative of whether the portions of a directory copied by the defendant included the copyrightable elements of original selection, co-ordination and arrangement.

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\(^{151}\) (2000) RPC 95.

\(^{152}\) (1999) FSR 834.

\(^{153}\) (1999) FSR 834.

\(^{154}\) (1999-2000) IPR 228.
As a matter of law, the elements of selection co-ordination and arrangement said to be infringed display the originality required to merit copyright protection.

Techniques for the discovery of facts is not copyrightable. Copyright does not protect industrious collection and affords no shelter to the resourceful efficient or creative collector.

The Delhi High Court examined the requirement of ‘originality’ to claim copyright protection in a literary work. The plaintiff in this case was the publisher of the CD-ROM on SCC online – Supreme Court case – Finder and Supreme Court cases Full Text. The plaintiff has not only claimed copyright in these works as compilation, but also in head-notes of the cases and in the copy – edited full text of the case, published by them. The plea of the plaintiff was that judgments were copy – edited before they were published. Copy-editing included correcting typographic errors, paragraph numbering, inclusion of comas and full stops, adding creation of cases, footnotes etc. which involved skill, labour and judgment necessary to constitute original literary work.

The plaintiff alleged infringement of copyright in their work by their competitors – ‘THE LAWS’ and ‘GRAND JURIX’. According to the plaintiff, the defendants have copied the full text of the judgments and a number of head – notes from the plaintiff’s CD-ROM SCC online. The defendants contended that there was no copyright on the full text of the judgments of courts and the modification made by the plaintiff in the form of copy-editing was too trivial to claim copyright.

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155 33 IPR 587.
156 (2001) PTC 57 (Del) at pp. 83, 84.
The court held that there was no copyright in the judgments and they were in public domain once published. On the question the copyright in the copy-edited full text of the judgment, the court held -

Changes consisting of elimination, changes of spelling, elimination or addition of quotation and corrections of typographical mistakes or trivial and hence no copyright exists therein.

In respect of head-notes, the court was of the opinion that unlike copyediting there could be copyright protection if the plaintiff could show that there was originality and the intellectual input in the creation of head notes. Since the defendant undertook to ensure that the copyright in the headnotes of the plaintiff would not be infringed, the court did not pass any orders as to whether the defendants had infringed the copyright of the plaintiff in their head – notes.

(v) Copyright in Ideas or Plots.

Copyright subsists in expression, not in Ideas. Idea is not a subject-matter of copyright.

In Barbara Taylor Bradford v. Sahara Media Entertainment Ltd.\textsuperscript{157} the Calcutta High Court explained the idea/expression dichotomy. The Court pointed out that the law protected originality of expression and not originality of the central idea due to the balancing of two conflicting policies. The first policy was that the law must protect originality of work, thereby allowing the authors to reap the fruits of their labour and stopping unscrupulous pirates from enjoying those fruits. The second policy was that the protection must not become an over protection, thus, curbing future creativity. If mere plots and characters were to be protected by copyright, an author could not write anything ‘original’ at all, on a similar plot or on similar character. The court observed:

If plots and ordinary prototype characters were to be protected by the copyright law, then soon would come a time in the literary work, when no author would be able to

\textsuperscript{157} (2004) 28 PTC 474 (Cal).
write anything at all without infringing copyright ……… an intending author, instead of concentrating upon the literary merit of his expression, would be spending his life first determining whether he is infringing the copyright of the other authors who have written on his topic or that. The law of copyright was intended at granting protection and not intended for stopping all literary works altogether by its application.

The court observed that where a person copied a plot, be it consciously or unconsciously, he must also weave into the plot sufficient creations of his own imagination and literary skill, to make the work his own and not a copy of the work which might have inspired him in the first place.

(vi) Copyright in concept.

Whether copyright subsisted in a concept was an issue which came up before Delhi High Court in Anil Gupta v. Kunal Dasgupta.\textsuperscript{158} The plaintiff conceived the idea of producing a reality television programme containing the process of match making to the point of actual spouse selection in which ordinary person would participate before a TV audience. The plaintiff devised a unique and novel concept of leaving it to the prerogative of a woman to select a groom from a variety of suitors. The concept was named as “Swayamvar”. The plaintiff disclosed this concept to defendant under confidential agreement in 1998, and a concept note was sent to him for the purpose of the production of the TV serial. Subsequently, the plaintiff came to know about the defendant’s plans of launching a high reality show for matchmaking by the name of ‘Shubha Vivah’. The plaintiff filed a suit for copyright violation of the concept of reality show of matchmaking and violation of confidential information.

The defendant contended that the concept was in public domain and there was no copyright in ideas. It was also contended that information was given a broad, vague and rough preliminary note which could not have protection under confidential information. The Court held:

\textsuperscript{158} (2002)25 PTC 1.
As idea per se has no copyright. But if the idea is developed into a concept fledged with adequate details, the same is capable of registration under the copyright Act. The novelty and innovation of the concept of the plaintiff resides in combing reality TV show with a subject like match making for the purpose of marriage ………… Therefore originality lies in the concept of plaintiff by conceiving a reality TV programme of matchmaking and spouse selection by transposing mythological swayamvar to give prerogative to woman to select a groom from variety of suitors and making it presentable to audience and to explore it for commercial marketing : Therefore the very concept of matchmaking in view of concept of the plaintiff giving choice to the bride was a novel concept in original thought capable of being protected.

The court, for the very first time held that the concept might be subject matter of copyright protection. The judgment is a deviation from the well settled principle that copyright subsists in the expression.

(vii) Slogans.

The court has, however, refused to reconise copyright in slogans. The Delhi High Court in Pepsico Inc. v. Hindustan Cococola,\(^{159}\) examined the question as to whether copyright subsists in slogans and words. In this case, the plaintiff has registered the slogan ‘Yeh Dil Mange More’ under the Copyright act, 1957. The plaintiff argued, inter alia, that the use of the phrase by the defendant in their advertisements violated the copyright of the plaintiff. The court held that the advertising slogans were prima facie not protectable under the Copyright Act, 1957. They could be protected under the law of passing off in case the plaintiff has made out a case.

(viii) Version Recording.

Version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version recording is thus neither copy, nor reproduction of the original recording. In Super

\(^{159}\) (2001) PTC 699 (Del).
Cassette Industries Ltd. v. Bathla Cassette Industries Pvt. Ltd., the Delhi High Court observed that ‘version recording would really be such sound recordings where while being inspired by the original melody a distinct interpretation, different both in presentation, rhythm and orchestral arrangements emerges’. Such a sound recording may enjoy the benefit of section 52(1)(j) of the Copy Right Act 1957 subject to satisfaction of the requirements of the said provision.

On the issue of exclusive rights inversion recording, the court held: ……… by taking recourse to the traditional reservoir of Indian classical Raags and traditional folk music, compositions based thereon may result in a sound recordings. Such a derivative by a contemporary composer / performer may not refer to the original source in their sound recording. In such a situation, the current composer cannot claim exclusive rights to such a sound recording, which are assertable against any other performer/sound recording based on such traditional repertoire. Thus no enforceable rights can be acquired by any contemporary musician in rendering/recording traditional compositions. Consequently, the traditional repertoire of Indian music which may not now enjoy copyright protection due to passage of time and being in the public domain, cannot be appropriated by any individual by virtue of a later and current sound recording by excluding other performers and/or composers. The tradition of Indian classical and folk music is a valuable public heritage common to all adherents and cannot be purloined by a contemporary performer/composer by denying to others the benefit of the same.

(ix) Commissioned work.

Commissioned work is done under contract for services. In Gee Pee Film Pvt. Ltd. v. Pratik Chwodhury & others, on the basis of oral agreement, the plaintiff commissioned defendants 3 to 5 in 1999 to compose Bengali non-film lyrics and music. Defendant no. 1 had to sing the songs. The plaintiff published sound records that were based on commissioned work. Subsequently, defendants no. 1 and 2 released music cassettes containing eight songs from the plaintiff’s cassettes. The plaintiff filed a suit for


infringement of his copyright in the sound records mainly on two grounds. Firstly, since commission work fell under section 17(c) of the Copyright Act, 1957, copyright in the commissioned work was automatically transferred to the plaintiff. Secondly, being the producer of the sound records, he was entitled to copyright under section 17 as the first owner. On the other hand, it was contended by the defendants that there was no assignment of copyright and they are still the owners of the copyright in the work they created.

The Calcutta High Court while rejecting the first argument of the plaintiff, held that it was a clear case of contract for services, and not of contract of service. Section 17(b) of the Act specifies the only instances where an author, although engaged under contract for service loses copyright. Those are the cases of taking photograph, drawing painting or portrait, engraving and making cinematoraph film. In the present case, the defendants were not engaged for any of the aforesaid jobs.

The court also rejected the second contention of the plaintiff and held:

...... in order to be a producer, a person must take initiative as well as responsibility of the sound recording. I have already indicated that all that have been stated in the application as regards rights over sound recording is that the plaintiff paid all the expenses of recording including hire charges of studio and remuneration of the musician. Those averments, in my view, will not bring the plaintiff within the purview of ‘producer’ unless in addition of aforesaid statements, the plaintiffs aver that it has also taken responsibility of such recording. If a person bears all the expenses for recording and keep the master tape thereof, such facts do not imply that he has also taken responsibility of the recordings and thus cannot be held to be a producer. The word “responsibility” appearing in section 2 (UU) of the Act, in my view, does not refer to financial responsibility, but means “consequential legal responsibility” for such recording.

(x) Right of Reproduction.

The copyright in an artistic work is infringed by the reproduction of it, or any substantial part of it, in any material form without consent. It is further provided by
section 14 of the copyright Act, 1957 that this includes the making of a three-dimensional copy of a two dimensional work and the making of a two dimensional copy of a three dimensional work. Copyright does not subsist in idea. So, if the defendant copies the plaintiff’s idea and does not appropriate the plaintiff’s labour in putting that idea into practice, there shall be no infringement of the plaintiff’s copyright.

A drawing made from an object, i.e. a reproduction of two dimensional work from a three – dimensional work, without the consent of copyright owner of the drawing will constitute infringement of the two dimensional work.

In Camlin Pvt. Ltd. v. National Pencil Industries,\textsuperscript{162} the Division Bench of Delhi High Court held that a mechanically reproduced carton by printing process was capable of being subject matter of copyright.

It is also an infringement of the copyright in an artistic work to publish it without consent of the copyright owner. Publishing includes issuing reproduction to the public. According to section 3 of the Copyright Act, 1957, ‘publication’ means making a work to the public. Communication of the work to public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work, regardless of whether any member of the public actually sees, hears, or otherwise enjoys the words so made available.

(xi) Making of copies.

The Copyright Act 1957 provides that the owner of cinematograph film has the exclusive right to make a copy of the film, including a photograph of any image forming part thereof. The exclusive right available to the owner of copyright in cinematograph film is to copy the recording of a particular film. It is, therefore, clear that production by another person of the same film does not constitute infringement copyright, provided that it had not been reproduced by a process of duplication, i.e. by using mechanical contrivance. The expression ‘to make a copy of the film’ would mean to make a physical

\textsuperscript{162} (2002)24 PTC 34.
copy of the film itself, and not an another film which merely resembles the film. The Bombay High Court in Star India Private Limited v. Leo Burnett (India) Private Limited\(^{163}\) observed:

The making of another film is not included under section 14(d)(i) and such other film, even though it resembles completely the copyrighted film does not fall within the expression ‘to make a copy of the film’. Therefore, if the film has been filmed or shot separately by a person and it resembles the earlier film, subsequent film is not a copy of the first film and, therefore, does not amount to infringement of whole of the copyright of the first film. The position in the case of literary, dramatic or artistic works seems to be different. A narrow copyright protection is accorded to a film/sound recording than for literary, dramatic or artistic work. The reason perhaps could be that they have to be original to satisfy the test of copyrightability, whereas the requirement of originality is absent for claiming copyright in cinematograph films/sound recordings.

(xii) Moral rights.

Section 57 of the Copyright Act, 1957 recognises moral rights of the author. Section 57 provides that remedies are available to the author in respect of direction, mutilation, modification or other acts in respect of his work, where such acts would be prejudicial to his honour or reputation. The author’s moral rights shall subsist during the term of copyright only, which is generally author’s life plus sixty years. Thus, once the copyright in author’s work ceases to subsist, one can use his work in a way he likes. However, the authorship of the work will continue to remain with author, even after the expiry of copyright in his work.

The issue of author’s exercising his moral rights after the assignment of copyright came or consideration before Delhi High Court in Amar Nath Sehgal v. Union of India\(^{164}\). The plaintiff, a sculptor, created a mural cast in bronze to decorate vigyan Bhavan. The artistic work of the plaintiff was kept there from 1962 to 1979. In 1979, the Government

\(^{163}\) (2003) 27 PTC 81 (Bom),

\(^{164}\) (2002) 25 PTC 56.
removed the mural without his permission. In the process of removal, owning to mishandling the mural lost its aesthetic and market value. The plaintiff brought a suit for violation of moral rights, and prayed for an injunction to prevent the government from causing further harm to the mural. The court granted injunction.

The agreement on assignment of copyright contained arbitration clause. The Government argued that to settle the dispute, the injunction had to be vacated and the matter referred to an arbitrator. The court while rejecting this argument opined.

The Plaintiff seeks damages, for infringement of his special rights or moral rights, as embodied under section 57 of the Act owing to mutilation or damage of the mural. The plea relating to assignment of copyright bears no relevance to the issues involved. No express or implied assignment or waiver of his special right/moral rights, by the plaintiff in relation to the mural, in favour of the defendants is pleaded to continue the subject of the agreement containing the arbitration clause. The issues involved in the suit are, thus beyond the purview of the agreement, and therefore cannot be held to arise out of or in any way connected with the contract. As the issues involved in the suit travel beyond the scope of the agreement the same are held not referable to arbitration.

The judgment in Amar Nath Sehgal case gives a new dimension to the right of integrity. The right can now be exercised to protect an artistic work not only from distortion or mutilation, but also from outright destruction.

(xiii) Photograph.

If a person gets his photograph taken by a photographer on payment the copyright in the photograph belongs to the person. Accordingly the publication of the photograph or its exhibition at any place including the photographer’s shop window would constitute infringement of that copyright.165

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Publication without permission of the photographer a photo taken by him by copying it from another published material is infringement of the copyright in the photograph. Kesari Maratha Trust v. Devidas Tularam Bagul.\textsuperscript{166}

(xiv) Crucial dimensions of a product.

Where the defendants did not actually copy the drawing, which it had never seen, but had taken the crucial dimensions of the plaintiff’s product, which enabled them to manufacture this item, there is a clear nexus between the drawing and the defendant’s product. The defendants in such a case copied an artifact which was itself a three-dimensional version of a drawing and was derived directly and in detail from the drawing.

Where it was alleged adoption of drawing by breach of confidentiality, it was shown that the information was widely circulated, and the drawing was not produced interim injunctions refused. Dry Air India (P) Ltd. v. Western Engineering Co.\textsuperscript{167}

(xv) Extent of copyright protection to industrial drawings.

It has been observed that: “There is a very serious danger in constructing infringement of copyright in engineering drawings in too liberal a manner. These are not artistic works in the sense of that phrase as understood by a layman. They are engineering drawings, which, although artistic works, in accordance with the Act, depict not matters of beauty but matters of engineering precision. It is, of course, proper that drawings such as these should receive the full benefit of copyright protection, but one needs to look at such drawings with a certain degree of care.

In Escorts Construction Equipment v. Action Construction Equipment,\textsuperscript{168} interim injunction was granted on the ground that Pick-N-Carry Mobile cranes manufactured by defendant were infringement of plaintiff’s industrial designs. On appeal it was held that

\textsuperscript{166} (1999) PTC 751 (Bom).
\textsuperscript{167} (1999) PTC 408 (Del).
\textsuperscript{168} (1999) PTC 36(Del).
unless the industrial designs (copyright claimed) have been produced, direction to stop manufacturer or sale cannot issued. Defendants directed to maintain record of manufacturing and sale of cranes along with technical drawings and file the same in court.

(xvi) Copyright in patent drawings.

A plaintiff in a copyright infringement must establish: (1) that he is the owner of the copyright in drawings, which were copied, either directly or indirectly by the defendant. He must also show that what was taken was a substantial part of the work sued upon. As a practical matter therefore a claim of copying from the work sued upon to the alleged infringement must be shown. Visually trivial alternations to a drawing, no matter how technically important they were to the product in the drawing are not sufficient to entitle the drawing to be described as original.

Uni-continental Holdings Ltd. v. Eurobond Adhesives Ltd.169 In this case the differences between drawings and the alleged infringing article made it an article which was not sufficiently similar to the drawing to amount to a reproduction of it. It was held there was no infringement.

(xvii) Fair Dealing.

Fair dealing is a question of fact and impression. The court will take into consideration (1) the quantum and value of the matter taken in relation to the comments or cri, (2) the purpose for which it is taken, (3) whether the work is published or unpublished, circulated, and (4) the likelihood of competition between the two works.170

In Hyde Park Residence Ltd, v. Yelland,171 the question whether the publication of stills from films in a newspaper was fair dealing for the purpose of reporting current events and whether the defence of public interest was available and made out. This was

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an appeal from the decision of the lower court (1999) RPC 655. Appeal was allowed and judgment given to the claimants in relation not the claims for copyright infringement.

Ashdown v. Telegraph Group Ltd.\textsuperscript{172} In this case the question was whether the publication of certain extracts from a political leaders diary leaked to the defendant and published in the defendants newspaper was infringement of copyright in the extracts or whether it came within the scope of the defence of fair dealing or criticism or review or for the purpose of reporting current events. A summary judgment against the defendant was granted.

It has been held that criticism or review may relate not only to literary style but also to the doctrine or philosophy of the author as expounded in his books. A fair criticism of all ideas and events described in the book or documents would constitute fair dealing.

\textbf{(xviii) Musical work recorded – music copied.}

The acts constituting infringement of a musical work are the same as those for literary and dramatic work. Infringement of copyright in a musical work is not to be determined by a note for note comparison but should be determined by the ear as well as by the eye.

In Sulamangalam R. Jayalakshmi v. Metamusicals, Chennai\textsuperscript{173} the defendants copied the musical works composed by plaintiff and sung and recorded in cassettes. The copyright in which was owned by the plaintiff was infringed by the defendants by reproducing the recorded music from the cassettes. Interim injunction granted. The decision deals elaborately with the various aspects of musical works.

\textbf{(xix) Biscuit (design) wrapper (copyright).}

In the case of goods like biscuits which are brought by children; the eye of the children should be considered for determining the question of eye appeal and similarity.

\textsuperscript{172} (2001) RPC 659 (Ch.D).

\textsuperscript{173} (2000) PTC 681 (Mad).
The similarity of wrapper (artistic work) under the Copyright Act should also be judged from the viewpoint of children.\(^{174}\)

Britannia Industries Ltd. v. Sara Lee Bakery;\(^ {175}\) no infringement under the Design Act or Copyright Act.

\(\text{(xx)}\) **Infringement and passing off colours on pipes.**

Plaintiffs claimed ownership of double coloured bands on pipes. The use of colour bands on pipes was prescribed by ISI to indicate quality. Accordingly, there could be no infringement of the use of colours on pipes. Ex parte injunction granted-vacated [Surya Roshni Ltd. v. Metalman Industries Ltd.].\(^ {176}\)

\(\text{(xxi)}\) **Copyright infringement and passing off.**

Passing off-goods different. EENADU used as title of newspaper by plaintiffs. The same word used by defendants in relation to agarbathi. Goods different. Plaintiffs acquiesced in the use by defendant. Passing off action failed. Defendant’s label not a reproduction of plaintiffs artistic work in Eenadu. No infringement of copyright. [T.V. Venugopal v. Ushodaya Enterprise].\(^ {177}\)

\(\text{(xxii)}\) **Reproduction of artistic work.**

A reproduction copied not directly from the original artistic work or a sketch of it but copied from a reproduction in material form derived directly or indirectly from the original work, is an infringement of the original artistic work.

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\(^{175}\) (2001) PTC 23 at pp. 34-35 (Mad).

\(^{176}\) 2001 PTC 777 (Del).

\(^{177}\) 1 PLR 2001 Hyd.1.
There can be copyright in the artistic manner in which a word is represented. In such a case the reproduction of the work in ordinary types will not be an infringement of the copyright in the artistic work. [Hindustan Pencils Ltd. v. Alpna Cottage Industries].

Newspaper Licensing Agency Ltd., v. Marks & Spence Plc. Which allowed an appeal against the lower court's decision (1999) RPC 536. In this case the question arose as to whether repeated copying of small amounts from different newspapers amounted to infringement of the copyright in the typographical arrangement. It was held that it did not.

Under the Copyright Act of India, there is no provision relating to typographical arrangement of published edition.

(xxiii) Further episodes yet to be Produced.

In an agreement of assignment of copyright in a T.V. serial 'India Most Wanted' comprising episodes already produced and further episodes yet to be produced the agreement was held to be incapable of performance for want of definite or specific details of scripts, concepts or story given in the argument. Interim injunction restraining the telecast of T.V. serials by the producer was refused. Zee Telefilm Ltd. v. Asia Producers.

(xxiv) Right To TV serial Episodes.

Where the serial is not produced by the respondents as agents of appellants and for valuable consideration at the instance of the appellants, the appellants claim under section 17 of the Copyright Act is liable to be dismissed. [Vicco Laboratories v. Art Commercial Advertising (Pvt.).]

(xxv) Version Recording.

178 2001 PTC (CB) (Goa).
180 2000 PTC 382 (Bom).
181 2001 PTC 687 (SC).
A version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version recording is thus neither copying not reproduction of the original recording. The record so made do not fall within the definition of infringing copy. Gramophone Co. v. Mars Recording (P) Ltd.\(^\text{182}\)

**(xxvi) Substantial Taking.**

For an infringement to take place, there need not be an exact reproduction of the plaintiff’s work. Copyright in a work is infringed by taking a substantial part of it.

In Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.\(^\text{183}\) Having Considered two works involved in this case not hypocritically and with meticulous scrutiny but by the observations and impressions of the average viewer, we find that striking similarities in two works can not in the light of the material placed on record be said to constitute mere chance. We feel that the only inference that can be drawn from the material available on record is unlawful copying of the plaintiff’s original work. The learned counsel for the plaintiff’s submitted and not without sufficient force that if the concept of Lord Krishna in child form is removed from the serial of the defendants, their programmes would become meaningless. In order to find out similarity in the two concepts what is to be seen is the substances, the foundation, the Kernel and the test as to whether the reproduction is substantial is to see if the rest can stand without it. If it cannot, then even if many dissimilarities exit in the rest, it would nonetheless be a substantial reproduction liable to be restrained.

**(xxvii) Get-up colour scheme etc. of trade mark labels.**

Get-up, arrangement and colour scheme of labels used as trademarks or decoration of the containers of goods may constitute works of artistic craftsmanship and subject-matter of copyright protection. Such labels may also be considered as drawing or engraving. However, copyright does not subsist in mechanically reproduced labels

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\(^{182}\) (2000) PTC 117 (Kant) at p. 125.

\(^{183}\) (2003) 27 PTC 457 (Bom).
and cartoons because no skill or labour is involved in the production of such labels or cartons. Copyright can be claimed only the original artistic works produced by a natural person by the expenditure of his person skill and labour.

Defendant has copied the colour scheme, get-up and layout of plaintiff’s Castrol; Nobel tins of greases and oil products. Injunction granted under copyright and passing off, Castrol Ltd. v. V.O. Muralidhar Reddy.184

(xxviii) Trade mark label-copyright.

Plaintiff’s product super vasmol – 33 hair dye was sold in cartons in which copyright subsisted in the artistic work. Defendants almost entirely copied this artistic wok for their product super vasmol 33. Permanent injunction for copyright granted. Hygienic Research Institute v. Shobhas, Lal Jain.185

(xxix) Colours on Pipes.

Plaintiff claimed ownership of double coloured bands on pipes. The use of colour bands on pipes was prescribed by ISI to indicate quality. Accordingly, there could be no infringement of the use of colours on pipes. Ex-parte injunction granted vacated. Surya Roshni Ltd. v. Metalman Industries Ltd.186

.xxx) Commissioned works.

An author may create a work at the instance of another person for valuable consideration. Example are a person writing a report on a subject for a company, a composer composing a song for a film company, or a photographer taking a photo at the instance of another person or a painter drawing a portrait at the request of another person, all for valuable consideration. In such cases, in the absence of any agreement to the contrary the person at whose instance the work is made is the owner of the copyright in the work.

184 (2001) PTC 137 (Mad).
185 (2001) PTC 855 (Del).
186 (2001) PTC 777 (Del.).
Gee Pee Films Pvt. Ltd., v. Pratik Chowdhury.\textsuperscript{187} In this case the defendant were commissioned on remuneration for writing lyrics, composing and singing songs. Held that plaintiffs could not claim copyright in any of these works. Interim injunction was reused.

\textbf{(xxxii)} Artistic work.

Any colour scheme or get-up or layout or arrangement of any alphabets or features is undoubtedly an artistic work. The artistic work or the colour scheme get-up, layout of arrangement of distinctive features including the style of the letters or alphabets confer the copyright upon the owner and thereby entitles him to protect the same by way of statutory remedy provided under the Copyright Act. In Microfibres Inc. v. Gridhar and Co.\textsuperscript{188} it was held that no subsisting copyright can be in any design which registered under the Design Act or which is capable of being so registered but not so registered under the Designs Act, once the article has been reproduced more than 50 times. In this case the court held that copyright in upholstery fabrics cannot be claimed as an artistic work.

\textbf{(xxxii)} Advertising Catch Phrases.

In Pepsi Co., Inc. vs. Hindustan Coca Cola Ltd.\textsuperscript{189} the Delhi High Court held that advertising catch phrases are entitled to copyright protection. The court held that the phrase ‘Yeh Di Maange More’ of Pepsi is an original work of the company and therefore the copy of its theme of roller Coaster by Hindustan Coca Cola would be an infringement of Pepsi’s copyright.

\textbf{(xxxiii) Works in which copyright does not subsist.}

The copyright Act, 1957 not only provides the works in which copyright subsists, but also those works in which the copyright does not subsist.

\footnotesize
\textsuperscript{187} (2001) AIPC 224 (Cal) at pp. 228, 229.  
\textsuperscript{188} 2006(1) RAJ 301 (Del.).  
\textsuperscript{189} 2004(1) RAJ 570 (Delhi).
In M/s. Infoseek Solutions and another vs. Kerala Law Times and Others\textsuperscript{190} it is held – The judiciary is a limb of the state, as constitutionally conceived and provided. The preamble to the Indian constitution is its part and it declares India to be a sovereign, socialist, secular, Democratic, Republic. The constitution has been ‘given by the people to themselves’. This affirms the republican character of the polity and the sovereignty of the people. When the judiciary acts as the duly authorised societal agent of the state, it acts as the representative of the sovereign, namely, the people. The power to adjudicate, determine, apply the laws and to give the verdict is essentially the power of the Republic, being exercised through the judicial limb of the state and made available through the courts which are the institutions where the republic carries out its activities that it has to, through the judicial limb of the state. Hence, it is totally inconceivable that the judgments of the courts could be treated as documents over which there could be any copyright. The judgments belong to the state, to the sovereign Republic, to her people. There can be no copyright over them.

\textbf{(xxxiv) What is not infringement of copyright.}

A close intimation of an existing recording using alternate performers is not a copyright infringement. In case of musical record, it is only such record which embodies sound recording which amounts to version recording, it is not an infringement. Thus the use of the world “records embodying the record” or the “record embodying the same record” clearly mean that it is only when the same signal has been kept, would there be a violation.

Similarly frame or image which forms part of a film is not included in the Term ‘Photograph’. Thus using a theme/image similar to the popular T.V. serial ‘Kyunki Saas Bhi Khabi Bahu Thi’ produced by a telecast on star T.V., by the manufacturers of ‘Tide’ detergent powder for advertisement of a T.V. commercial with the title ‘Kyun Ki Bahu Bhi

\textsuperscript{190} AIR 2007, Ker. 1.
Kabhi Saas Banegi’ was held not to be an infringement of copyright star T.V. [In star India Pvt. Ltd. vs. Leo Burnett (India) Pvt. Ltd.].

(xxxv) Reproduction of an Idea.

There is no copyright in an Idea. Therefore, anyone can make use of an existing idea in creating his ‘original’ work. However, there is no infringement of copyright in using or copying something if such copying or use is the only way for putting a particular idea into practice.

In Mother Diary Fruit & Vegetable Pvt. Ltd. v. Mallikarjuna Dairy Products Pvt. Ltd. the Delhi High Court held that the defendant has every right to use the basic idea involved in the work of the plaintiff, but, he is not permitted to express that idea in the same form and the same manner in which it has been done by the plaintiff.

It has been held in a few cases decided by Delhi and Bombay High Courts that when a novel idea is converted into a concept note and submitted to television channels for making a TV programme then the concept note is protected under copyright law.

(xxxvi) Reproduction as pirate copy.

Any person who makes ‘pirate’ copy of literary, dramatic, musical work or of a film clearly copies by reproducing the work in a material form. The simplest example of a pirate copy is to produce an identical copy of a literary or dramatic work by photocopy or making illegitimate copies of sound recordings, cinematograph films and computer programmes.

Two kinds of piracy’ that affect the right of reproduction of the authors specially in software, film and music industry are:

(a) Counterfeiting: This refers to unauthorized copying of the original film, sound recording or computer software. The buyers of unauthorized recording of film are led to

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191 2003 (2) RAJ 518 (Bom).
192 2012 (49) PTC 346 (Del).
believe that they are purchasing genuine product. Use of counterfeit and duplicate sound recordings, films and software causes financial and reputational damages to the owners.\textsuperscript{193}

All products are required to display certain information on their covers for the benefit of the consumers. For example the video products by law must display the following information:

(i) A copy of the Film Censor Certificate;

(ii) Name and address of the person who has made the video film and a declaration by him that he has obtained the necessary license or consent from the copyright owner for making the copy;

(b) Piracy: This involves duplication from the legitimate recordings, compilation and distribution of illegitimate duplicates in the market for commercial gain. Piracy recording is very rampant in many developing countries including India. The International Intellectual Property Alliance Special Report 301 annually estimates the high levels of piracy and the consequent trade losses to the copyright owners and revenue losses to the government.

In \textit{Microsoft Corporation v. Nimesh}\textsuperscript{194} Defendants were loading software programmes of Microsoft on to the branded computers without taking any authorisation from them and selling the computers with the unauthorised computer programs to the customers. Held, the defendants infringed rights of owners of copyright under Sections 14(a)(i) and 51. Further held that the rights of plaintiff were protected under Section 40 of Copyright Act, 1957 as both India and US are members of Berne Convention and Universal Copyright Convention.

\textsuperscript{193} \textit{Adobe Systems, Inc. v P.Bhoominathan} 2009 (39) PTC 658 (Del).

\textsuperscript{194} 2012 (51) PTC 205 (Del), also see, \textit{Microsoft Corporation v. Dhiren Gopal}, 2010 (42) PTC 1 (Del).
In *Microsoft Corporation v. Rajendra Pawar*\(^{195}\) plaintiff was the owner of the copyright in its computer programme within the meaning of section 2(ffc) of the Copyright Act and owner of the registered trademark “Microsoft”. The defendants were preloading various software of the plaintiff, without any authorisation or licence from them on to the hard disk of the computers that were being assembled and sold by them. Held, this amounted to infringement.

In *SAP AG and Anr. Somaya kanti Dutta*,\(^{196}\) the plaintiff was a German Company that had developed SAP-RFI computer software which was an automatic accounting and transaction processing programme. Defendants used these software without any licence from the plaintiff. Held, that it was a case of infringement and plaintiff was also entitled to punitive damages.

In *SAP Akteingesellschaft and Anr. v. Sadiq Pasha Proprietors*,\(^{197}\) the plaintiff was a company incorporated in Germany. It developed and marketed computer programs for real time business. The defendants were engaged in providing training services to its clients including training programs in relation to plaintiffs software products. For this purpose the defendants were using unlicensed/pirated software of the plaintiff. The defendants did not also have any education licence agreement with the plaintiffs.\(^{198}\)

The court held that since Germany and India are party to Berne Convention and Universal Copyright Convention, sections 40, 14 and 51 of the 'Copyright Act read with International Copyright Order, 1999 will be applicable in respect of copyright registrations obtained by plaintiff for software found to be installed in the computers of the defendant. The defendants were restrained from

1. using any pirated/unlicensed software of the plaintiff company

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\(^{195}\) 2008 (36) PTC 697 (Del).
\(^{196}\) 2008(36)PTC 598 (Del).
\(^{197}\) 2011 (46) PTC 335 (Del).
2. from imparting training in the aforesaid software programs. The court further imposed punitive damages amounting to Rs. 1 lakh on the defendant.

In *Autodesk, Inc v. Prashant Deshmukh*, plaintiff, a registered company of USA designed and marketed software in India. The software was covered by the definition of computer programs within section 2(ffc) and literary work as per section 2(0) of the Copyright Act. The defendants had around forty computers in their office with pirated/unlicensed computer programmes of the plaintiff. Held, that the defendants were liable for infringement under section 51 read with section 14 and 40 of the Copyright Act and International Copyright Order, 1999. Punitive damages were also awarded to the plaintiff.

In *Super Cassettes Industries Ltd. v. Uttam Khan*, the plaintiff was engaged in business of manufacturing and marketing audio, video cassettes, CDs, CD players etc. It had a copyright licensing programme under its “T-Series Public Performance Licence Scheme” wherein it routinely granted licenses to restaurants, night clubs, hotels, airlines, radio stations, cable TV operators for the use of works in which it had copyright. Defendants were broadcasting the copyrighted works of plaintiff without any license from them. Court held that the defendants infringed the exclusive rights of plaintiff under section 14(a)(iii) and section 14(e)(iii) of the Copyright Act.

**(xxxvii) Reproduction “in any material form”**.

The reproduction of a literary, dramatic, musical or artistic work can be “in any material form” and so is not limited to ‘carbon copies’ of the copyrighted work in the same medium: copying a printed literary work by hand, or photographing a painting would constitute representations of the work in a material form. This would also include making a sound recording, cinematograph film and copies made by digital technology.

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199 2012 (51) PC 419 (Del).

200 2009 (41) PTC 545 (Del).

In *Public Trust of India Ltd. v. Navbharat Press (Bhopal Pvt. Ltd.) & Ors.*\(^{202}\) plaintiff was a premier news agency, which provided national and international news content to various newspapers, television or radio networks, web sites and others subscribing to its services. Defendants published verbatim copies and/or colourable imitation of works or news copyright in which vested with the plaintiff. Held that acts of defendants constituted infringement of copyright under section 14(a)(i) read with section 51.

**Reproduction by substantial copying.**

No difficulty arise in grant of an injunction where the defendant infringes copyright of the plaintiff by copying the whole of the work but difficulties arise when only extracts are taken from a copyright work. Section 14 of the Act specifically requires that making substantial use of the work is the right of the copyright owner. Similarly the United Kingdom courts have held that there will be infringement if the extracts comprise a “substantial part” of the work. The word substantial is not defined in the Act but it has been held at a number of occasions that substantiality relates not only to the quantity of the work but also its quality. The quality or importance of the part taken is at times more significant than the proportion which the borrowed part bears to the whole work. This can be explained by way of an example: A person photocopying one page from a report running into a hundred pages has not taken a “substantial part” of the report. But, if he copies one page of recommendations and suggestions of the report then it would certainly comprise a “substantial part” of the work.

In *Ram Sampath v. Rajesh Roshan* 2009\(^{203}\) the plaintiff was a music composer who created a music composition/theme tune called “The Thump”. Defendant produced a cinematograph film titled as “Krazzy 4”. The plaintiff alleged that four songs of the film were substantial reproduction and/or plagiarized version of the musical composition “The Thump”. The court applied the “lay hearer” and the “untrained ear test” and came to the conclusion that there was infringement music. It held that for considering whether

\(^{202}\) 2012 (50) PTC 316 (Del).

\(^{203}\) (40) PTC 78 (Bom).
a copy of a part of the former musical work into the latter musical work amounts to an actionable infringement, the following factors would be required to be taken into consideration:

1. Identify the similarities and differences between the two works.

2. Find out whether the latter can meaningfully exist without the copied part.

3. Find out the soul of the musical work. The soul cannot be determined merely by comparing the length of the part copied but whether the part copied is essential part of musical work. Though a musical work may have a length of several minutes, the listeners often remember a “catch part” or “hook part”. If the “catch or hook part” howsoever small, is copied, the whole of the latter work would amount to actionable infringement. It is necessary to remind oneself that the desire of an infringer is necessarily to copy “the attractive”, “the catchy”, “the grain and the leave of the chaff” for he would attract the audience only by the attractive and not the ordinary.

4. These factors are only illustrative and there would be many other factors which may be looked into depending upon the facts and circumstances of each case.

In the instant case, though the part which was copied was small and was only for six seconds but it was repeated five to six times in the defendant’s work. This was done so that the listener would be hooked to when he hears or re-hears the musical work. It was a case of substantial copying.

In *K.S. Gita v. Vision Time India Pvt. Ltd.* 204 Plaintiff alleged violation of her copyright in the literary work *Thangam/Bangaram/Ganga* by defendant telecasting the serial “Thangam”, She alleged that the defendant should be restrained from telecasting the serial and pay a sum of Rs. 10 lac per episode towards royalty to her. The court held that the violation of the copyright might be taken as proved if after seeing the serial the viewer gets a totality of impression that the serial was by and large a copy of the original script. Hence it would not be possible to make a comparison or find out whether there

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204 2011(45) PTC 393 (Mad) DB.
were any similarities, or whether the mega serial then being screened had emanated from the script of the plaintiff as alleged by her. It was admitted even by the plaintiff that the mega serial had crossed 100 episodes for the past one year. If it was restrained from being screened at this stage, neither of the parties would have the benefit out of the same.

From the decision of this case it is quite apparent that the serial maker stands in a far better position than the original writer author as the question of infringement will be determined only towards the end of the serial. By this time the author would have lost her royalty and also the right to restrain an infunger from continuing the infringing activity.

(iii) Change in medium. It is not possible to infringe copyright in works other than artistic works by reproducing them in another dimension.

Example: X has the literary copyright in a book which incorporates instructions on how to manufacture a product. Y manufactures the product in accordance with the instructions given by X. Although Y has indirectly reproduced in three dimensions the two dimensional literary instructions, this does not constitute a copyright infringement.” Therefore, the change of medium will not always result in infringement.

(iv) The test of skill, labour and judgment or “sweat of the brow” test. Defendant’s work will not infringe plaintiff’s right of reproduction if he produces an original work. The defendant, no doubt, is entitled to use the plaintiff’s work as a source of ideas or information if he takes it as a starting point for his own collation of information. But he is not entitled to copy what the plaintiff has done as a substitute for exercising his own labour, skill and judgment. This test plays a significant role in determining whether adaptation, abridgement, compilation etc. are original work.

(v) “Minimum of creativity” test. The Supreme Court in Eastern Book Company v. D.B. Modak case followed the Supreme Court of Canada in the matter of CCH Canadian Ltd. v. Law Society of Upper Canada.205 It was held in that case that creative works by

\[205 \text{ 2004 (1) SCR 339 (Canada).}\]
definition are original and are protected by copyright, but creativity is not required in order to render a work original. The original work should be the product of an exercise of skill and judgment and it is a workable yet fair standard. The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owners right, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy of the objectives of the Copyright Act. Thus, the Canadian Supreme Court was of the view that to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital. Further the court held that we make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of section 52 of the Act there is no copyright in the original text of the judgments. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author.

(vi) Reproduction in computer programme Abstraction, Filtration and Comparison test. In Whelan Associates the Third Circuit Court of Appeals of US was confronted


207 230 U.S.P.Q. 481 (3rd Circuit 1986); In Apple Computer Inc. v. Mackintosh Computers Ltd. 44 D.L.R. (4th) at p. 74 the court held that "it was an infringement of the copyright in a literary work to reproduce the work in a computer readable form, such as on magnetic tape etc". In UK the Copyright (Computer
with questions, whether, even if. There was no copying of object code or source code, there could be copyright infringement in copying the “overall” structure of the programme. The case was one where the alleged infringement was a rewrite of a programme written in one computer language in a different language. The court concluded that since computer software was classified as a literary work under the Copyright Act and since prior decisions had held that there could be infringement of copyright in a play or book by copying the plot or plot devices of the play or book when the, total “concept & feel” or “look and feel “of the alleged infringing work was substantially similar to that of the copyright work, the same test should apply to infringement of copyright in computer programs.

(xxxix) Right of issuing copies to the public.

The copyright owner has the exclusive right to issue copies of the work to the public not being copies already in circulation. Therefore, the right to bring the work to public for the first time vests with the author of the work. In some countries it is called moral right of divulgation and not the economic right of first publication. The moral right of divulgation augments the economic right in the sense that it insulates the unpublished work from exemptions and other limitations that are permitted under the economic right.

If anyone other than the copyright owner issues the work to the public without the authority of the owner, then he is an infringer of this right but if he reproduces the published work without the authority of the copyright owner then he violates other rights of copyright owner but not the right to issue copies to the public.

Example: A has already sold copies of his work in the market and B subsequently markets pirate copies of A’s work. B has infringed the right of reproduction of A but not the right to issue copies to the public.

Software) Amendment Act, 1985 provides that references in 1956 Act to the reproduction of any work in a material form should include references to the storage of that work in computer.

France, Intellectual Property Code, Art. L121-2; Germany, Copyright Act, Art. 12(2).
In *John Wiley & Sons Inc. & Ors. v. Prabhat Chander Kumar Jain & Ors.*, the plaintiffs were publishers in USA. They decided to expand their operations in India by introducing Low Price Edition (hereinafter referred to as LPE) of their books. For this purpose they authorized publishers in India for publishing and distributing their works subject to certain territorial restrictions. The grievance of the plaintiffs began when they discovered that the defendants, who were publishers and booksellers in Delhi started a website offering online sales and delivery worldwide of the LPE of the plaintiffs publications. Plaintiffs allege that these acts of defendants of diverting the LPE of books meant for sale in India and neighboring states to USA, UK and other countries amounts to infringement of the plaintiffs copyright in the said books. According to defendants, they had legally bought the books and then exported those. The defendants contend that the export of books does not amount to infringement of copyright. They also rely upon the rule of “exhaustion of rights” whereby the rights of the copyright holder are lost once the first sale of the article is affected.

The court after discussing sections 13, 14, 30, 51, 54 of the Copyright Act, 1957 gave the following legal propositions:

That the rights of the owner may be broader than the limited rights of the exclusive Licensee, although the exclusive licensee has the independent right to sue for infringement of the copyright.

That the rights of the owner and exclusive licensee may not be the same and the rights of the exclusive licensee shall also be subject to the fetters imposed by the agreement between the licensor and licensee.

Applying these principles to the present case, it can be seen that the plaintiffs are the worldwide owners of the books and their copyright. The acts of the defendants of purchase of the books from the exclusive licensee/licensees are legitimate in nature and do not hinder or take away anyone’s rights including the rights of exclusive

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licensee/licensees. But once the said defendant offers for sale the books or publications (which are fettered by territorial restrictions purchased from exclusive licensees) and puts them into circulation by selling or offering for sale or by taking orders for sale to the territories beyond the ones for which permission has been granted by the owners of the copyright, the said acts are prima facie tantamounting to putting into circulation or issuance of copies not being in circulation in other territories where the right to do so is of the owner to exercise and violates the rights of the owner of the copyright under section 14 read with section 51 of the Act, if not the rights of the exclusive licensee.

(xl) **Right to perform the work in public or communications to the public.**

A work can be reproduced before the public by way of performance or recitation of the work. If this is done without the authorization of the author, it may undermine the right of reproduction of the author; therefore a separate right in the form of public performance and right to communicate to public are given as exclusive economic rights to copyright owners. The Berne Convention; TRIPS, 1994; and WCT, 1996 provide for these rights as separate exclusive economic rights.

Public performance right applies only to performance in public; it has no application to private performances. However, the copyright conventions do not define what is meant by the term "public" and it is a matter for each member country to draw the dividing line between public performances for which the copyright owner’s consent is required and private performances for which consent is not necessary.

In *Garware Plastics & Polyster Ltd. v. Telelink* the question raised was whether showing a video film over a cable T.V. network amounted to infringement of the right to communicate to public. The court held that the video may be watched by a large section of the public in the privacy of their homes but this does not make it a private communication so as to take it out of the definition of “broadcast” under section 2(dd). The viewers of cable TV network are a portion of public and they cannot be considered domestic viewers of the owner of copyright and they in fact pay the cable TV network company for watching the film. Showing films over cable TV without proper authorization amounts to infringing of copyright.
In *NEO Sports Broadcast Pvt. Ltd. v. New Sanjay Cable Network*\textsuperscript{210} the plaintiff was a broadcaster having copyright over broadcasting of live test matches between India and other countries pursuant to an agreement entered into between the plaintiff and BCCI.

Defendant is a hotel which makes available the cricketing events broadcast through Neo Sports & Neo Cricket to its clients. According to the court this leads to unauthorized public performances as the hotel had not taken any permission or licence from the plaintiff channel. Therefore, placing a television set and making available the sports channel for viewing by its customers/clientele infringes the copyright as it amounts to communication to public.

Example. If A uploads copyright work of B without his permission or forwards the work of B to all his friends through an e-mail then A has infringed the right of communication of B.

In *Indian Performing Rights Society Ltd. v. R. Krishnamurthy*\textsuperscript{211} the court restrained defendants from infringing the plaintiffs copyright by communicating to the public the plaintiff’s repertoire comprising of works of all its members. The members had assigned their performing rights to the IPRS. The defendant hotelier was playing music by live or other means or by mechanical devices within its premises without obtaining licence from IPRS, a company registered under the Companies Act and also registered under section 33 of the Copyright Act. IPRS is a non-profit making body established to monitor, protect and enforce the rights, interests and privileges of its members which consist of authors, composers and publishers of literary and musical works. The court held that the defendants were liable under section 51 (a)(i) read with section 14(a)(iii) of the Copyright Act.

\textsuperscript{210} 2011 (45) PTC 402 (Del.).

\textsuperscript{211} 2012 (49) PTC 362 (Del.).
(xlii) Right to make cinematograph film or sound recording in respect of the work.

A literary, dramatic or musical work may be reproduced in the form of a cinematograph film or sound recording only with a license granted for the purpose by the owner of the copyright in the work. But if cinema or sound recording is made with such license, an independent copyright subsists in cinema or sound recording as a protected work under the Act.

Example. X makes a film based upon Y’s copyrighted play without any permission from Y. X’s film, if substantially similar to the play infringes the right to make cinematograph of Y. If X makes a film with the license from Y then X has not infringed the right to make cinematograph film of Y. In-fact X has a separate copyright as producer in the film made by him.

In Twentieth Century Fox Film Corporation v. Sohail Maklai Entertainment Pvt. Ltd.,\(^{212}\) the plaintiff claimed that copyright in the literary and artistic work being the script and screenplay of its film “Phone Booth” was assigned to it under certain agreement. It claims that the defendant has infringed copyright in the script, screen, storyline and dialogues in their film “Knock Out”. - The court held that the defendant shall not exhibit, elease for exhibition or broadcast their film “Knock Out” in any jurisdiction in the present form so as to infringe the plaintiff’s copyright in the script, screenplay, story and dialogues so as to pass off the suit film as that of the plaintiff’s film “Phone Booth” without the consent of the plaintiff.

(xlii) Infringement by rogue websites.

In Super Cassette Industries v. Myspace Inc. and anr.\(^{213}\) The plaintiff was the owner of copyright in repertoire of songs, cinematograph films and sound recordings. The defendant was a social networking and entertainment website which offered a variety of entertainment applications including sharing, viewing of music, images,

\(^{212}\) 2010 (44) PTC 647 (Bom.)

\(^{213}\) 2011 (47) PTC 49 (Del).
cinematograph films, having its base in USA. The website provided country-specific content. The plaintiff alleged that free sharing of music and films provided by MySpace.com affected the business of the plaintiff and also resulted in the violation of their copyright as they had not taken licence to exhibit the infringing material on their website from the plaintiff. The plaintiff further contended that the acts of providing the space over the Internet and thereafter continuously doing the same even after coming to know about the plaintiff’s proprietary interests amounted to ‘authorization’ as the defendants were aware that the space was going to be used for infringement purposes.

The court held, the acts of defendants of providing the space on the Internet or webspace for profit are prima facie infringing in nature. The provision of section 51(a)(i) and section 51(a)(ii) of the Act were disjunctive in nature in as much as the word “or” between the two makes it clear that even on satisfaction of one provision, there would be an infringement of copyright. The infringement by way of authorization would fall within section 51 (a) (i) read with section 14 of the Act as against the act of permitting the place for profit which is separately provided under section 51 (a)(ii) of the Act.

The acts of the defendants whereby they were offering the space over the Internet, getting the works uploaded through users, thereafter saving in their own database with the limited licence to add, amend, or delete the content and thereafter communicating the said work to the public by providing some advertisements alongside the work or in the alternative gaining advertisements or sponsorship on the said basis thereafter would prima facie tantamount to permitting the place profit for infringement as envisaged under section 51 (a)(ii) of the Act.

(xliii) Moral rights in India.

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

[(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

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(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work \(214^*\) 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 or 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, \(215^{**}\) may be exercised by the legal representatives of the author.

In Amar Nath Sehgal v. Union of India,\(^216\) the plaintiff in 1957 created a bronze mural for one of the walls of Vigyan Bhawan at the request of the Government of India. The copyright in the artistic work, the bronze mural was assigned to the Government. Later, in 1979, Vigyan Bhawan was renovated whereby the 140 feet long and 40 feet in height bronze mural was removed and kept in the store in a dismantled and damaged condition. The plaintiff contended that his moral right of integrity was infringed by the defendant.

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 held 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. Sehgal’s work had attained the status of modern national treasure and had become the cultural heritage of the nation. The court ran

\(^{214}\) The words “which is done before the expiration of the term of copyright” omitted by Act 27 of 2012, section 36 (w.e.f. 21.6.2012).

\(^{215}\) The words “other than the right to claim authorship of the word” omitted by Act 27 of 2012, section 36 (w.e.f. 21.6.2012).

through various international conventions that stressed the need for respecting, protecting and preserving the cultural heritage and rights of the people.

The Delhi High Court held that plaintiff had a cause to maintain action under section 57 notwithstanding that the copyright in the mural was assigned to the defendant. It not only violated the plaintiff’s moral right of integrity in the mural but had also violated the integrity of the work in relation to the cultural heritage of the nation.