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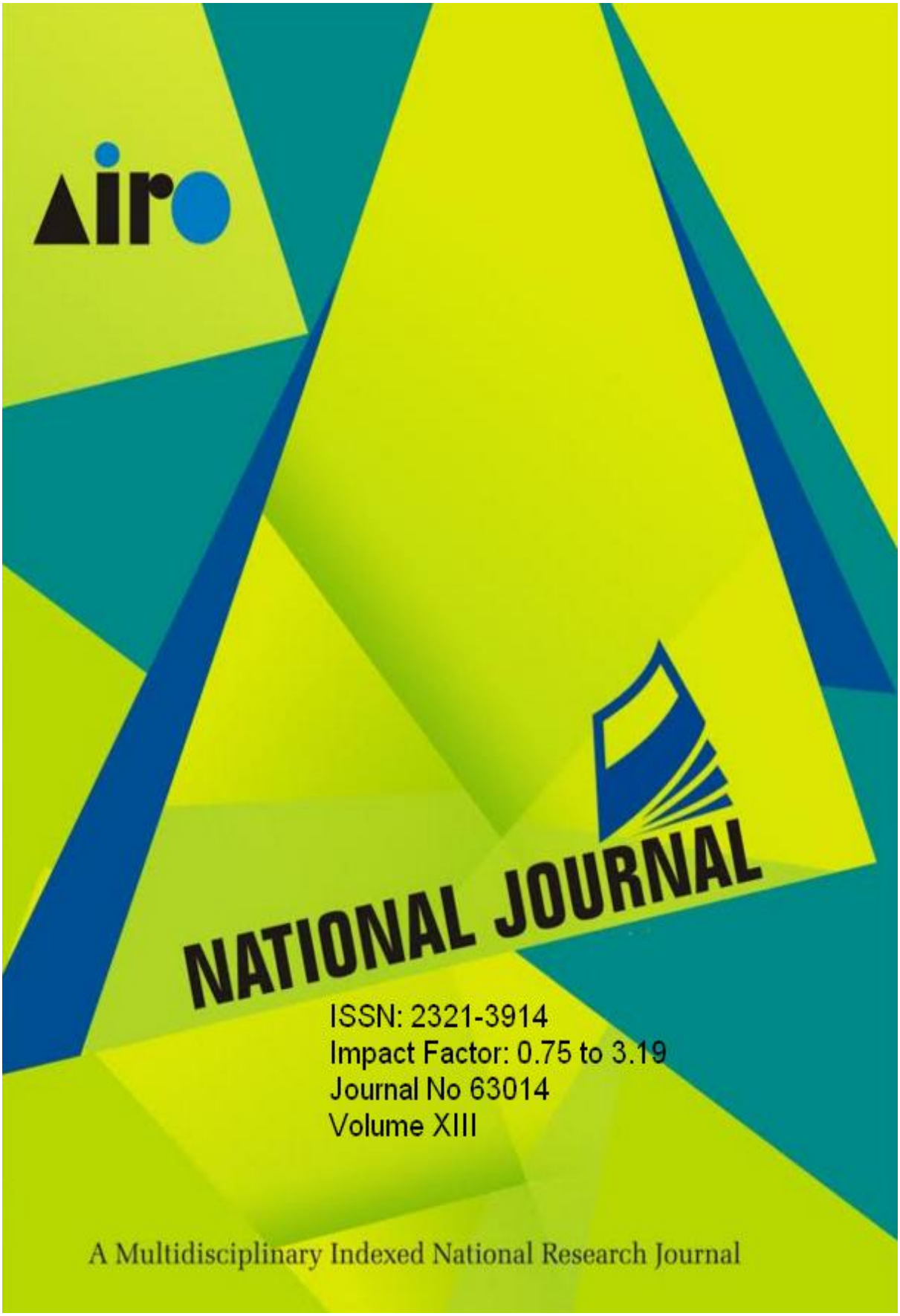

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JUSTIFICATION FOR INFRINGEMENT OF COPY RIGHTS WHICH CAN BE PROTECTED IN WORKS, NOT IN IDEAS, THEMES OR PLOTS

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ABSTRACT

Property has always fascinated human beings. The greater property a person possesses, the mightier he is in the eyes of society. Property of whatever nature is will always remain the symbol of power, strength and might of a civilized person. As persons in cluster form a nation, therefore, individual's property may also reflect the Nation's property.

The dimension of IPR protection has further increased because of increasing global economic activity. IPR are intangible in character and negative in operation; they are the rights to stop others doing certain things. They are the tools to check the activities of imitators, pirates, counterfeiters and thereby to protect the interest of those who are rightfully entitled to them. The current paper justifies the infringement of copy rights

KEYWORDS:

Property, copyright, infringement

INTRODUCTION

Salmond defined property in his own words whether it is Corporeal or Incorporeal. According to the Corporeal property is the right of ownership in material, tangible or physical things; incorporeal property is any other proprietary right *in rem*.

Incorporeal property is classified into two Categories:

(1) ***Jura in re aliena*** i.e., encumbrances like leases, mortgages, servitudes etc.
(2) ***Jura in re propria*** i.e. proprietary rights over immaterial things like, Copyright, patent, trademarks etc.

The **second category** of incorporeal property that is Jura *in re propria* which encompasses Copyrights, patents, trademarks etc. - all represents what is today known as **Intellectual property Rights** (IPRs)

Now it includes the following categories of rights:

1. Copyrights

2. Patents

3. Trademarks

4. Designs

5. Layout & integrated circuits

6. Geographical indications

7. E-Commerce, E-Banking and Internet has further added to it.

The term "**Intellectual Property**" has come to be internationally recognized as covering patents, industrial design, Copyrights, trademarks, know-how & confidential information. Patents, designs, & trademark used to be considered as different kinds of' Industrial Property'.

The term Copyrights and neighboring rights have assumed significance in the context of contemporary scientific, economic, social, political and legal environment not only in India, but also in the entire world. The scope of Copyright which was restricted only to the protection of literary and artistic works in the earlier days, has now been broadened to include not only literary and artistic work, but also dramatic and musical work, cinematograph film and sound recording.

The reason why scope of Copyright has become so vast is the technological innovation example: computers, audio recording, video recording, reprography, cable television, satellite broadcasting and most recently internet have posed challenges to Copyright laws from time to time and force the nation to amend their laws.

Copyright in the most basic terms can be defined as

"The exclusive rights given by the law for a certain term of year to an author, composer (or his assignee) to print publish and sell copy of his original work ".

Copyright subsists in work, not in idea is not a subject-matter of copyright. In **Donoghue v. Allied Newspaper, Ltd.,**[1] it was held by Farwell J. that:

If the idea, however brilliant and however clever it may be, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture or a play, then there is no such thing as copyright at all. It is not, until it is reduced into writing, or into some tangible form, that you get any right to copyright at all, and the copyright exists in the particular form of language in which, or, in the case of a picture, in the particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or to look at it.

Copyright in a work is not infringed, if someone takes the essential idea from it and develops his own work.[2] In **Harnam Pictures N.V. v. Osborn,**[3] it was held that there was no copyright in ideas, schemes or systems or method and the copyrights were confined only to the subject. In this connection **Goff, J.** observed as follows:

There is no copyright in ideas or schemes or systems or methods; it is confined to their expression… But there is a distinction between ideas (which are not copyright) and situations and incidents which may be….One must, however, be careful not to jump to the conclusion that there has been copying merely because of similarity of stock incidents or of incidents which are to be found in historical, semi-

[1] (1937) 3 Ch. D. 503.
[2] Cherian P. Joseph v. Prabhakaran, AIR 1967 Ker 234.
[3] (1967) 1 WLR 723: (1967) 2 All ER 324.

historical and fictional literature about characters in history. In such cases the plaintiffs, and that includes the plaintiffs in the present case, are in an obvious difficulty because of the existence of common sources.

In the case of **N.T. Raghunathan v. All India Reporter Ltd., Bombay,**[4] it was held that copyright law did not protect ideas but only the particular expression of ideas. In that case, the Bombay High Court, however, held that the defendant had copied not only the ideas but also the style of abridgement, the expression of ideas and the form in which they were expressed and thus held that a case for violation of copyright was made out. In **Oliver Wendell Holmes v. George D. Hurst,**[5] Justice Brown observed, "it is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes."

In **R.G. Anand v. Delux Films,**[6] the Supreme Court laid down following propositions after careful consideration and elucidation of the various authorities and the case law on the issue of infringement of copyright:

(1) There can be no copyright in an idea, subject-matter, themes, plots or historical or legendry facts and violation of the copyright in such cases is, confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

(2) Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case, the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there, it would amount to violation of the copyright. In other words, in order to be actionable, the copy must be substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

(3) One of the surest and safest test to determine whether or not there has been a violation of copyright is to see if, the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

(4) Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no

[4] AIR 1971 Bom 48.
[5] 174 US 82: 43 L ED 904 (1898).
[6] AIR 1978 SC 1613.

question of violation of copyright arises.

(5) Where, however, apart from the similarity appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental, no infringement of the copyright comes into existence.

(6) As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law.

(7) Where the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader perspective, wider field and a bigger back ground where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyright work has expressed the idea. Even so if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

The test laid down in **R.G. Anand v. Delux** Films was applied by Kerala High Court in **R. Madhavan v. S.K. Nayar.**[7] The court held that no prudent person who has seen the film and read the novel would form the impression that the film "**Avalute Ravukal"** and its theme, scenes or situations were copies from the novel "**Alayazhi.**" Not only was there no resemblance or similarity in the theme, scenes or situations of the film and the novel, the material incidents, situations and scenes portrayed in the film were substantially and materially different from the situations, incidents and scenes portrayed in the plaintiff's novel.

In **Chatrapathy Shanmugham v. S. Rangarajan,**[8] the Madras High Court held that it was settled position that an infringement of copyright would arise only when there was substantial reproduction of the plaintiff's work in the defendant's film. But, however, the law recognized that reproduction of ideas, system, information, matter in public domain did not form the subject-matter of infringement. Thus, there could not be a copyright in a theme.[9]

Need for the justification of copyright protection

A number of theories can be advanced to support why we have intellectual property protection. Not all intellectual property rights can be vindicated under each theory, but most theories can be manipulated in order to explain why copyright protection is needed. Most of the advocates of the

[7] AIR 1988 Ker 39.
[8] 2004 (29) PTC 702 (Mad).
[9] Id. at p. 714.

various theories rely on assertion rather than empirical evidence.

THEORIES OF JUSTIFICATION

To recap some of the theories, these include utilitarianism (which argues that authors should be given a limited monopoly either as an incentive to create or as a reward for having created something which enriches society), the labour (or natural law) theory (which argues that the product of a person's intellect belongs to them in like manner as many tangible artifact they have created out of 'the commons'), and the Hegelian theory that intellectual creations are an extension of the author's personality and should therefore be accorded property rights.

These arguments were summarized by **Sir Hugh Laddie** (in 'Copyright: Over-strength, Over-regulated, Over-rated' [1996] EIPR 253) as the 'three sacred principles' which underpin copyright law. His principles were: that one should not steal what belongs to another (which assumes that ideas are property, a point considered further below); that a person should be entitled to own the product of the intellect just as much as they might own a piece of furniture they have carved from a tree (the labour or desert theory, much influenced by the writings of John Locke); or that it is in society's interests to reward those who are inventive, or to encourage creativity, as this will in the long term improve everyone's standard of living. Sir Hugh further argued that these sacred principles do not justify the current width of copyright legislation. In particular, he highlighted the unwarranted expansion of copyright to provide three-dimensional protection for two-dimensional artistic works; the availability of additional **damages;** the extension to the term of protection; the low test of originality coupled with the ease of creation; the availability of criminal sanctions; and the narrow nature of the United Kingdom's fair dealing defence when compared with the fair use defense in the United States.

Landes & Posner (in 'An Economic Analysis of Copyright Law' (1989) 18 Journal of Legal Studies 325) consider in detail the economics of copyright as an incentive to create. They argue that the need for copyright protection has increased over time as modern technology has reduced the time needed to make copies as well as enabling more perfect copies to be made. Further, various rules of copyright can be regarded as attempts to promote economic efficiency by balancing the consequences of enhanced protection against the need to encourage greater creativity. By contrast, **Breyer** (in 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 Harv LR 281) argues that extensions to copyright protection are both unnecessary and harmful. Having reviewed both the moral rights and incentive theories, he questions whether it is necessary to attribute property rights to creativity. Further, he states that the non-economic goals served by copyright law are not an adequate justification for the copyright system, as other arrangements could be made to protect an author's dignitary rights. It must be stressed that both of these seminal

pieces were written before the advent of the digital age, which has reduced to almost zero the cost of making perfect copies of a work. More recently, **Rahmatian** (in 'Copyright and commodification' [2005] EIPR 371) has argued that to suppose that the world would be a better place if copyright were not treated as a property right and if creativity were not treated as a commodity ignores the real issue. The problem, he says, is that lawmakers, under pressure from the international entertainment industry, forget that there is a need for restrictions on the power which flows from the proprietary nature of copyright.

THEORY VERSUS REALITY

The justifications for copyright can be measured against the rules of United Kingdom copyright law. In many instances there is a conflict between the theory and what statute and case law say. For example, if copyright law is justified under utilitarianism, why does the period of protection now last until 70 years after the author's death, so that those who benefit are the author's successors? If copyright law is justified under Locke's labour theory, why is the threshold for copyright protection set so low that items like professional directories (Water low v Rose [1995] FSR 207) and lists of television programmes (Independent Television Publications v Time Out [1984] FSR 64) are protected? If Hegelian personality theory is the justification, why does United Kingdom law treat copyright as an economic right which can be bought and sold like any other commodity, with freedom of contract the guiding principle, rather than treating it as a dignitary right unique to its author?

Sir Hugh Laddie accepted that copyrights itself can be justified, but his concern is its overexpansion. As **Vaver** (in 'Rejuvenating Copyright' (1996) 75 Can BR 69) points out, there are many detractors who argue that copyright itself should no longer be recognized, perhaps influenced by the fact that, economically speaking, copyright is dominated by large corporations (such s Microsoft, Sony, or Walt Disney) rather than individual creators. He says that it is its very attractiveness which threatens it as an institution: 'everyone wants their activity protected under copyright because it is by far the best game in town'. whilst not arguing for copyright's abolition, Vaver suggests that it is time to re-evaluate the activities which society wishes to encourage, what degree of incentive should be offered as encouragement, and who should benefit from that incentive.

Gervais suggests (in The Compatibility of the Skill and Labour Originality Standard with the Berne Convention and the TRIPs Agreement' [2004] EIPR 75) that the real problem lies in the approach of common law countries to the meaning of the word **'original',** a key requirement for protection. If 'original' were to be interpreted to mean the author's intellectual creativity, rather than 'not copied', this would accord with the intention of the drafters of the Berne Convention and bring the United Kingdom into line with civil law jurisdictions. It would also have the benefit of leaving those cases where the defendant

misappropriates the **claimant's** investment to be dealt with under **unfair competition** law, rather than devaluing copyright.

POINTS TO RETHINK ON COPYRIGHT FOR JUSTIFICATION

Three of the writers mentioned above (Laddie, Vaver, and Gervais) all paper to agree that copyright needs rethinking and should be formulated so as to match more closely its perceived justifications. Do you think that it is possible to turn back the clock in the way they suggest?

We need more clear laws to protect the copyrights and to Justify the infringement one must have genuine reason in the eye of law and it should not violate any other existing law which creates inconvenience to the others.

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