SWEAT OF BROW TO MODICUM OF CREATIVITY; COMPARING ORIGINALITY WITH INVENTIVE STEP

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Abstract

To entitle copyright protection something must be original that term in copyright entails two-fold requirements first independent creation of an author and second modest of creativity. But this originality word creates the wonder across various jurisdictions and not let the harmonisation of copyright law across globe, so this article critique lockes theory which set standards for sweat of brow theory. In light of this, the leitmotif of this article is to project the various threshold of originality across different jurisdiction and about the inventive step with its TSM test; The Article aims to identify the loopholes that perpetrate the need of harmonisation of copyright law. The Article substantially argues that the various creativity standards across different jurisdiction leads to overlapping of inventive step in patent law with that of high threshold of copyright as because of technological advancement the works relating to software, databases etc made it overlaps between both through the work and functional test approach.

Introduction

Something must be original that term in copyright entails two-fold requirements first independent creation of an author and second modest of creativity. As independent creation of an author as we are using word independent it means something which owes its origin from the author or maker for example if I read a poem and memorise it then if I write it down verbatim I cannot insert copyright protection over that work because that work not belongs to me secondly, creativity we required not much but some creativity but before moving head what is needed for originality we need to know what is not required for originality.

Not required for originality?

First of all, Copyright law in contrast with patent law not required Novelty concept as with reference to classic case of Sheldon vs. MGM [1] decided by second circuit Court of Appeals judge hands language is involutes

"*Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an 'author'; but if by some magic a man who had never known it were to compose anew Keats's Ode on a*

[1] 309 U.S. 390 (1940)

Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's."

In simple words if you creation is identical to an already existing work but you are in genuinely unaware of that existing work your creation is original, to be sure Professor Goldstein observes lack of novelty though not itself fatal it can used in copyright litigation to undermine other aspects of a plaintiff case for example it can be used to rebut the presumption that the plaintiff work was independently created which as we have seen is required for copyright protection or defendant can sometimes use the fact that plaintiff work is not novel to argue that defendant did not copy the plaintiff work but instead copied from the existing work it is evident from the last clause.

Another thing is Intent to be original to get copyright protection it is not necessary that the author try to create something of your own it's only necessary that you do so classic statement comes in an opinion by Judge Frank in 1951 Alfred case where court held that even if mezzotint engraving of old public domain painting different from the originality only inadvertently they were still copyrightable.

Now If for example, my creation is bad or not an art at all I still get copyright in it. The classic statement comes in 1903 Bleistein v. Donaldson Lithographing Company, [2]which involved a copyright claim regarding 3rd Circus poster in its famous passage Justice Holmes was rejected defendant argument as they did not constitute fine arts and it stand as principal of aesthetic neutrality. so a child finger painting are deserving of copyright protection as of Monalisa Painting.

The rationale

First of all Judges lacks expertise to do so which was emphasized by Justice Holmes in Bleistein case[3].Also fear of elitism where worry that upper class was used opportunity to assess the artistic quality to import their taste on the rest of population,Fear of paternalism where basic idea that government should not impose on their citizens any particular conception of good , Last one is In order to decide what a good art is one needs to know what the art is. So again there is Deep disagreement on that question Professor Fred yen has pointed out different conception meaning of art in widespread circulation formalism, intentionalism, and institutionalism. The principle of aesthetic reality is violated tacitly. Advertisements also copyrightable, obscene fraudulent material libellous material also enjoy copyright protection as it different from Trademark law

Creativity standards

So what constitutes modest of creativity and how much creativity is required for copyright protection is one of the slippery test as we can see in the US it is too low after Feist Publications,

[2] 188 U.S. 239 (1903)
[3] Supra at 2

Inc v. Rural Telephone Service Co[4],But all stared in 1884,Burrow Giles Lithographic Co. v. Sarony[5] case where Supreme Court ruled the photo of Oscar Wilde enjoyed copyright protection emphasising the many forms of creativity that went into setting up and producing photo today it's clear that nothing so elaborate is necessary for United States a snapshot taken with an automatic pointed camera contain creativity in deciding what to point the camera at and when to activate the shutter is enough. This creativity requirement to work from entering conventional even into required lots of efforts and skill to create at one point of time court protect the work under auspices of so-called sweat of brow theory, since after feist case [6]in 1991 that doctrine is formally rejected by the US Court. Meanwhile harmonizing in the European Union has resulted in a modest softening of requirements that some of the member countries previously in a series of decision the European Court of Justice has announced and then we find a new general definition of originality under the new approach to related things can be added to the independent creation since both necessary and sufficient the creation reflects the author's personality the author when creating the work was able to express creative ability by making an unconstrained choices and thus impressing her personal touch on the work the European Court has caused in several member countries of EU to adjust the originality thresholds in most cases downwards.

Position in India

Two leading cases changes the whole paradigm of copyright jurisprudence in india as with refermce to CCH Canadian Ltd v Law Society of Upper Canada[7], appraoch we are adopting middle gorun or we can say path so inn R.G Anand vs M/S. Delux Films & Ors [8]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 a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy. One of the surest and the 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.

Eastern Book Company & Ors vs D.B. Modak & Anr [9]where court observes that Sec 52 (q) of copyright Act excludes the reproduction or publication of any judgment or order of a Court, Tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the Court, the Tribunal or other judicial authority from copyright.The

[4] 499 U.S. 340 (1991)
[5] 111 U.S. 53 (1884
[6] Supra at 3
[7] [2004] 1 SCR 339
[8] AIR 1978 SC 1613
[9] (2008) 1 SCC 1

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copyright has nothing to do with originality or literary merit. creativity is not required in order to render original the original work should be the product of an exercise of skill and judgement and it is a workable yet fair standard

Critique of Locke's Theory

Western democratic societies most people tacitly subscribe to what the psychologist sometimes call equity theory the central principle of equity theory that justice entails giving each in our collective enterprise share of the products of that enterprise proportional to his or her contribution to it, and controversial variant of this general theory is that person who works hard deserves to control the fruits of her labour in other words Author should not only be compensated appropriately he is entitled to do what he wants as of property right in her creation the right to do with them what is he wishes, for seeking support on that Idea the lawmakers and Scholars worked at Political Theory of 17th century British philosopher John locke's

John locke's writing is attractive for at least two reasons that ideas have been only influential in Anglo-American political culture although to a lesser extent in continental Europe political culture,I did not offer an unqualified defence of property rights he offered an influential justification of private ownership balanced by various analytical devices meant to ensure that the interest of public at large would not import by private property rights chapter 5 of second treatise of government most locks theory is distilled in chapter 5 of his second treatise of government the heart of the chapter is generative and positive story where a person comes upon a parcel of land that no one yet owns or more precisely that is sold in common the man works hard to make land productive and plants seeds which grow into plants which properly intended to produce fruits and vegetables engaging in these activities ,locks argued that person acquired the natural property right not merely to the crops but also to the land used to grow them the key Passage i.e section 27 of second treatise of government:

"*Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others*." [10]

All of this happen in state of nature former right is natural right, now this right is natural right not dependent state recognition but if state formed it is duty of state to protect it.

There are some ambiguities in Locke's theory, first let's take up the threshold difficulty, Proportionality that is how much labour and how much reward a person will get where it seems to me some flaws are there as Locke theory not giving proper direction so proportionally test

[10] John Locke & Thomas Preston Peardon, The second treatise of government (1952).

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one of the practical example is of Dr. Scott Lieberman cardiologist he is along with fascinated by space programme and is an amateur photographer on February 1, 2003 Dr. Scott Lieberman figured out that space shuttle Columbia would pass over his home in East Texas around 9 o'clock in the morning on its way to a landing in Florida he went out into the yard pointed out there ,it happened this was just the moment when Columbia begin to break a part one of the images captured by Dr. Scott Lieberman that horrible incident the submitted photo to local newspaper which forwarded it to the associated press by afternoon photo in Time Magazine. What is may be appropriate and proportional report to which that Dr. Scott Lieberman is in title locks theory that does not give much guidance what proportional means in cases like this putting aside important aspects its Apparent that largest source of the value of Dr. Scott Lieberman photo arises from luck that is in the right place at right time ,another difficulty is regarding "the commons" as we discussed aforesaid about story, here commons is idea/facts most jurisdiction excludes Idea and facts from copyright protection as it is evident from the story in chapter v for second treaties of the government, when the person put is labour on the land held in common he gets natural right over the crops and the land itself but in this case when author expenses lot of labour on the facts and idea as he did, he did not get the ownership over that facts and ideas so what we conclude here, in short, Locke's theory does not fit well the way the Copyright law is currently organised

Inventive step/Non-Obviousness

Inventive step is defined in section 2(ja) [11]of the Indian Patent Act,1970 it entails to fold criteria, first that there should be Technical advance or economic significance or both and the invention should not be obvious to the person skilled in the Art, for the matter of discussion in this article inventive step is equivalent to non-obviousness ,as it is evident from plain reading of footnote to the article 27 of TRIPS agreement [12]and also from rule 65.2 PCT regulations[13], this of obviousness concept start from 1880 case of Hotchkiss versus Greenwood [14]this case was regarding the mechanic of speech on private and non material thing which is easily available to the inventor used in on material for the metallic notes that is used play for the metal in place of metal for the door knobs the same holes and there the court first time in introduced the concept of business as the creative Spark of genius is required so for thereafter for upcoming hundred years the code is uncertain about the non obviousness concept then comes Graham v. John Deere Co[15]., case where the code first time apply the Section 103 of US 1952 Patent Act.

[11] (ja) "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;

[12] For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively

[13] Relevant Date: For the purposes of Article 33(3), the relevant date for the consideration of inventive step (non-obviousness) is the date prescribed in Rule 64.1.

[14] 52 U.S. (11 How.) 248 (1850)

[15] 383 U.S. 1 (1966)

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Inventive step or non obviousness ?

Inventive step refers to that feature of the invention which satisfies the following twin criteria: The feature involves a technical advance or must have economic significance or both; and the feature must be non-obvious to a person skilled in the art. Internationally, it has been agreed that the term “non-obvious” used in the United States statute and possession of an “inventive step” as required by the laws of many other countries are “synonymous” (footnote to Article 27 of TRIPs). Rule 65.2 of the PCT Regulations draws a similar parallel.

The concept of non-obviousness part-time introduce in case of Hotchkiss v. Greenwood16, this is regarding the use of clay etc material for the door knobs prior to the that invention of metallic door knobs were used and there is no such alteration in the design also regarding keyhole etc. in the invention at issue. the court held that a patent requires "more ingenuity and skill" than that of a "simple mechanic" so Subsequent tests adopted by court was “requirement for invention" i.e.," flash of creative genius" requirement, From 1850 to 1966 court is uncertain about the criteria of non obviousness. Then in case of Graham vs. John Deere [17]court first time apply standard of section 103 of 1952 Patent Act ,as we know statue entails the key difference between claim invention and scope and content of prior art and whether those difference are always right it is still leave something of vacuum and how are both supposed to analyse this Sec 103 tenders that is an important question and one that was not answer until 1966,so first time Supreme Court apply section 103 where Supreme Court set out what we understand to be or Graham Framework for obviousness and where the ultimate question of patent validity is one of law, the sec 103 condition each of which must be satisfied lends itself to several basics factual increase height which of three conditions will we typically think of you. we had Sec 112 disclosure requirements as well and really think of it ,4 major requirements but at that time there was not thinking so much about disclose your but so there's a Sec 103 condition lend itself to several basic enquiries under section 103 the scope and content of the prior art to be determined secondly the difference between product and claiming at issue are to be ascertained , level of ordinary skill in the art, Resort against this background of business or not or business of the subject matter is determined ,secondary consideration of commercial success long field but unresolved needs of others as, gram framework in simple words the ultimate question of our business is one of law for the court, well it mean that the end of judges get to decide questions of business right the analysis required and length actual findings In grahams case the

Patent at issue is Graham 798 fig no 2 and prior art 811 fig no 1 patent the invention here was this new type of system for fastening the shank Rock On 2 inch plate right and the idea where was basically you can see from fig below that what the difference this let's run through our analyses right here so what is scope and content for prior art well for a purpose and scope and content of prior art is shown at bottom in figure, secondly what is difference between prior art and patent at issue, you can see highlighted with the difference are they have left the shank attachment from the top of each plate to bottom of each plate and the idea is it that It provides more flexing of the shank away from the interplay during use when there an upward force

[16] Supra at 13
[17] Supra at 14

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applied during operation when dragged through field right ,so what is person of ordinary skill in the art will here is this probably an individual with experience in mechanical engineering and designing the implements and so there are three factual increases and now left to the court to determine whether or in the light of three factual increase it is a invention or non-obvious invention court decided that this is obvious invention, court did not believe that flexing feature is especially significant and therefore it was obvious to simply the flip the plate attack to shank from the top of same attachment top of implant plate to bottom and therefore it was an obvious invention contention raised by patentee that the invention is very significant because it can reduce the breakage of shanks in Real world challenge and on other hand defendants contended that it is really a trivial change which any simple mechanic figure out so what is significant

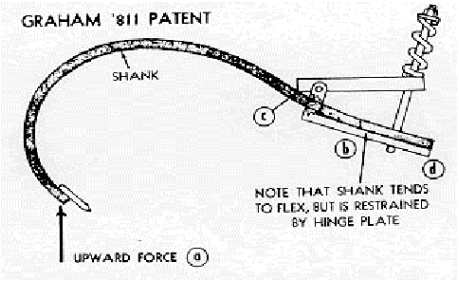

Fig no 1

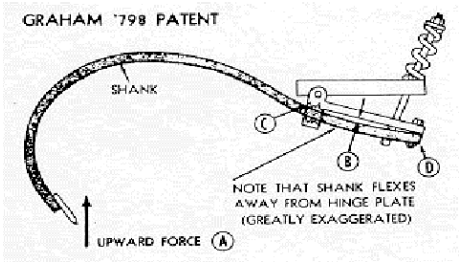

Fig no 2

TSM (Teaching, suggestion or motivation) Test

it is a straight forward test that once a person beside what references are available for analysis, you can only combine rows references are used to find each element of the claim in prior art, you can only include them on the list if would be combined if there is a teaching, a suggestion or motivation for the purpose of person of skill in the art, so that combination now teaching the situation of motivation can from a lot of place it would come from the prior art itself that from document -oh! could say by the way you could combine the invention with some other invention , it could do that relatively easy, it could be that a person of skilled in the art would naturally know like combined water and boiling together two references because people still there would understand that combination exist, it might be that the problem itself would tell you to combine the references and there several cases about where there particular problem to be solved in the very nature of the problem would tell the person of ordinary skill in the earth how the combination should be done so this goes on until the mid-2000 and then starts to become quite controversial because one of the drawback against the TSM test is that it has the potential of allowing too many patents to be declared non obvious because it can be literally stringent almost that you have to find evidence of TSM ,how that the federal circuit had mixed cases on how much evidence of TSM was actually required to make this combination but the sticking point both with the patent office and with the people who thought they simply too

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many patents out thereafter this KSR Int'l Co. v. Teleflex, Inc [18]where Supreme Court decided in 2007 the technology in key as is electronic sensor for a mechanical accelerator pedals in cars and basically replaces all mechanical sensors,

very old Quote is like “standing on the shoulders of Giants” the problem of combination of patents is there new inventions are creating new combinations of old elements and so then the question become from the new invention figure out jurisprudential tools to combat in side business as well as bring predictability, analysis take Graham framework and infuse it with various test analysis ,this is basically a combination patent right because it taking things that are well known mechanical Apparatus that control throttle in an automobile as well as electronic sensor combining those two things together in a way people agreed is normal at all right nobody done this before now question it is nonetheless obvious, it is to put electronic sensor in arrangement such that you can use mechanical paddle that people are used to and still get nonetheless gets sensing benefits that you also went so I mean let's talk for a minute under TSM it is obvious, it that the problem that was desire to be solved which is to combine electronic sensor with traditional accelerator pedals essentially tells you have to combine those references of the electronic sensor and in the mechanical pedal and that should be then combined those references all elements. at present in prior art it's obvious and ok story end of story unfortunately Federal circuit decision was not good as TSM test was not made because there was no evidence that a person skilled in art would find TSM right and so Federal circuit had decided that there was non-obvious invention and so it got appeal to Supreme Court and extension was granted so Supreme Court set down it is impressed so what the court says in that flows in the analysis needed for most part of the court reflected in its application in then they go on and this is where we get to sort of analytics of what they think the analysis should be right in determining whether subject matter of patent because it did the problem of having electronic sensor with mechanical controls was obviously come in come past by patent claims that.

How the convergence happening between copyright and patent because of technical evolution especially taking example in software industries like Originality is subjective novelty under copyright law, meaning by every work requires a minimum of independent creativity. This Originality is however different from objective novelty and other patent restrictions, such as inventive step or industrial application, under patent law which look at the functional side of creativity. The so-called function of products is a field for patents, even if the product is also a work. For example, software-related inventions have been patented and Copyrights exclude functionality and even non-functionality. It is irrelevant that works, or the object incorporating the work, can be end-used if one or the other is regarded to be functional or non-functional. Instead, copyrights ask whether a work can be used. A theory has generally prevailed that works are non-functional because they are aesthetic, do not serve any functional purpose, and are unnecessary for performing useful activities19. In principle, works have been classified as classical arts. In modern times, less traditional works have been added to the list, for example

[18] 550 U.S. 398(2007)
[19] The loss of rights after Dastar, The loss of rights after Dastar | Managing Intellectual Property, http://www.managingip.com/Article/1254901/The-loss-of-rights-after-Dastar.html (last visited Jan 21, 2018)

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software, databases and videogames, despite the fact that they serve a function, and software has been regarded as useful or functional. Protecting functional works like software does not mean that protection shall be expanded to the function of software as a product. Software is authored expression, as classical works are. However, software is functional in the sense that software can ultimately do things like writing, calculating, collecting or playing. Software can be used for functional purposes in addition to or instead of the non-functional capacities of being read, viewed or heard. Someone is the end user of software works when reading, viewing or listening, and of software products when writing or calculating at the same time, but end-using, as explained, has no copyright effect.20

Only using a software work by means of copying, distributing, and so on, has any copyright significance. The scope of copyright protection of a software work is quite narrow. It is restricted to literal codes expressed in writing under a program language, which instructs computers to perform functional activities or services. Software can represent words, sounds or images of writing, music, arts or audiovisuals. Experts have said that traditional copyright principles apply chiefly to software works despite their functional nature; copyrights cannot be extended to cover the functionality of works. This is true considering that end use, service, and function, are concepts clearly beyond the scope of copyright law. but the Courts of different countries have rendered decisions addressing the look and feel of software. The question has been whether software can be copyrighted in virtue of the look and feel that it depicts. Since look and feel are within the scope of copyright law. Viewing software, in particular video games, is like viewing or listening to other works that can be perceived by sight or ear. Video games have been a challenge, since the pattern is constantly changing as the game is played, but they have been protected without incurring copyright contradictions or disproportions.21

Conclusion

There is overlapping between originality and inventive step approach in patent as the threshold of originality is different in different jurisdiction and the approach of courts in context of so called functionality test in software's and industrial design substantiate it, technology advancement now transformed the traditional works and also the approach of the courts with dynamic society, so on one hand originality requirement is for limited number of works as stated in section 13 of copyright act whereas inventive step is essential criteria in order to qualify the work of inventor as patentable, not only that originality in some jurisdiction demand higher level of creativity where it overlaps with inventive step, so main purpose of copyright is dissemination of knowledge but now it becoming ore sort of incentivize tool for author like the very idea is to maintain balance but it is becoming more commercialize as patent law which vitiates the very idea of copyright law another aspect and we can say recent development is witten group work which give away with very idea of originality as the code they drafts is to

[20] When IP systems collide, When IP systems collide | Managing Intellectual Property, http://www.managingip.com/Article/1255994/When-IP-systems-collide.html (last visited Jan 21, 2018).
[21] Luis C. Schmidt, When copyrights and patents collide Lexology (2012), https://www.lexology.com/library/detail.aspx?g=262abe14-0d01-4c01-be8f-4cb535c06bdb (last visited Jan 23, 2018).

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harmonize the copyright law and minimize the dependence on originality in simple words they are trying to undermine the concept of originality but still code is not exhaustive.

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