Chapter 5

Authorship and Ownership under the Domestic Copyright Regulatory Framework – India, UK, EU and USA

Copyright is an exclusive right which empowers the holder to restrict others from copying literary, artistic, dramatic or cinematographic works without authorization. This right is independent of any material substance. For example, the purchaser of a book becomes the owner of the physical item but does not become the owner of the intrinsic copyright which remains exclusively with the original owner. To understand the true nature of copyright, an insight into the historical evolution of the concept is imperative.

5.1 Historical Evolution

In ancient Greece, during 600 B.C., there arose an idea of a person's self, which included individual notions, aspirations, and creativity. The personal self is generally considered pivotal in copyright because it demarcates the creativity generated by the person from the remaining portion of the community. In the Jewish Talmudic code, an explicit mention can be seen in relation to the moral rights of the creator and financial or proprietary entitlement of an author. As opposed to the modern copyright law, initially rights were seen as a type of municipal privilege, and a carve out to the existing regulatory framework instead of the recognition of the author's intrinsic entitlements. Such a favour assumed different forms like printing privileges conferring upon the copyright holders with the sole right to print and distribute the protected creations.[251]

As far as back in 1223, the 'Statute of the University of Paris' legitimised reproduction of literary works for the utilization in the university, and a charge had to be paid for making notes and proofreading. In a manner similar to that of the rest of Europe, all books required approval by regulatory censors, creator or other copyright holders had to seek a royal privilege prior to publication

[251] Edward W. Ploman, and L. Clark Hamilton, Copyright: Intellectual Property in the Information Age 5-7 (1980).

of the book. There was a nationwide discussion over the determination of the Royal Council to award the right to the successor instead of the publishers which appeared to be fundamental type of literary property like that of Britain.[252]

The sanction of copyright in the French territory was attributed to the publication of the works rather instead of the author's basic entitlement. The initial privilege was granted by Henri II in 1551.24 These rights were conferred upon particular editors and for a lesser time, and then the creation would return to the public repository.[253]

The French Revolution, led to conflicts regarding the monopoly right in the public performance of all works conferred upon 'comedy-Française'. These rights were discontinued in 1791. A fresh set of regulations were promulgated in 1793 in which the creators, composers, and performers were provided exclusive entitlements to transfer and disseminate their creations. It further extends the right to their successors and assignees for ten years after the author dies. Due to the significance of protecting copyright, the National Assembly kept this law securely on a natural right pedestal, terming it as 'Declaration of the Rights of Genius' and thus renders itself to the often quoted 'Declaration of the Rights of Man and of the Citizen' in 1789.[254]

In England, by the turn of early fifteenth century, stationers in London constituted a working body, which led to the inculcation of fresh printing technology. The British Crown via 'letter patents' conferred upon the publisher the sole entitlement to publish the creation of the author. Through an Act of 1529, Henry VII, created a mechanism of rights and the act printing came to be regulated by the Stationers' Company with the support of the notorious Court of Star Chamber. The Stationers' Company were empowered to register members, control different facets of publishing, levy penalties, provide orders with respect damages, and seize and destroy infringing articles. After the collapse of this mechanism, copyright was implemented primarily by the 'Court of Common Pleas'. The Royal Charter

[252] David Bainbridge, Intellectual Property 33 (2009)
[253] Anne Latournerie, Petite histoire des batailles du droit d'auteur, Multitudes n°5, May 2001.
[254] *Ibid*

sanctioned by King Philip and Queen Mary in 1557 formally ratified the rights belonging the stationers. The objective of promulgating the charter was

"*…to make due provision for the protection of their loyal subjects against divers Books, Pamphlets and Broadsheets which have gravely endangered both the spiritual welfare of the people and the peace of this realm*."[255]

King Charles II was apprehensive of the rampant illegal reproduction of books and promulgated the 'Licensing of the Press Act 1662' through the Parliament. This law made the censorship brought into existence by the charter of Philip and Mary even more stringent. The Statute of Anne gave people the rights of the artist. It stated,

"*Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of printing... Books, and other Writings, without the Consent of the Authors... to their very great Detriment, and too often to the Ruin of them and their Families*…"

This law mandated the printer to submit reproductions of every treatise printed in the relevant libraries in England and Scotland. Law enabled importing treatises available overseas, on the condition that they were written in Greek or Latin. The law also established a process for maintaining a moderate check on the prices.[256]

In the United States of America, the legislature had no power to promulgate any legislative Acts with respect to copyright. However, on account of several complaints from a number of authors, the US ended up securing a resolution asking the states to come forward and protect the rights and interests of the publishers and authors for a duration up to 14 years from their date of publication.[257]

Three states passed copyright Acts in 1783 before the 'Continental Congress Resolution', and eventually, all the residual states with the exception of Delaware enacted copyright laws. Seven provinces also took the lead from the 'Statute of Anne' and the 'Continental Congress Resolution' by

[255] Julien Hoffman, Introducing Copyright: A Plain Language Guide to Copyright in the 21st Century 2 (2009)
[256] Peter K. Yu, Intellectual property and Information Wealth: Copyright and related Rights 142 (2007)
[257] Lyman Ray Patterson, Copyright in the Historical Perspective 180 (1968)

giving two terms spanning 14 years. Five states issued copyright for either fourteen years, or twenty or twenty-one years, without the option of renewal.[258]

In 1787, Madison and Pinckney sent a proposal that would empower the legislature to offer copyright protection for a limited time. The copyright clause of the US Constitution owed its origin to this proposal.[259] The evolution of copyright became famous during the development of American Constitution under which the 'Copyright Clause' authorized the legitimacy of any copyright legislation in the following words:

"*To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*."[260]

The provision elucidates upon the Constitutional basis of the intellectual property rights in particular Clause 8.67. Although a few authors were of the view that the British Statute of Anne was redundant in the US, George Washington executed the bill proposed by the legislature into a landmark copyright law. This law was a near replication of the Statute of Anne requiring the author to demand copyright protection, unless the work fell in the public domain.[261]

This law was amended in 1802 to incorporate 'engravings, etchings, prints, or pictures' for a period of 14 years – no extension was granted in this regard. In 1831, Andrew Jackson, signed the Copyright Act of 1831. It is generally considered as the first comprehensive attempt to amend the 1790 Act to which USA would never revert. The law extended the copyright tenure to 28 years with an option of renewal by 14 years. Musical works were incorporated into the burgeoning list of copyrightable articles and copyright could be conferred upon the dependents after the author died. In 1909 Copyright Act was passed and this law was responsible for providing a tenure of 28 years with an additional twenty-eight

[258] *Ibid*
[259] *Ibid*
[260] Marci Hamilton, The Historical and Philosophical Underpinnings of the Copyright Clause 30 (1999)
[261] Ronan Deazley, On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain 33 (2004)

pertaining to renewal.[262]

The dual scheme of copyright protection i.e. under the federal and state system however was brought to an end after the passing of the Copyright act of 1976.

5.2 Copyright as a Concept and Underlying Principles

At the international level, the Berne Convention of 1886 on Protection of Literary and Artistic Works (as modified in Paris in 1971) was instrumental in shaping the nature of copyright. It was based on three fundamental principles:

(a) **National Treatment -** Works of the foreign authors must be given the same level of protection at par with the national authors.

(b) **Automatic Protection -** Protection must not be based on adherence to any legal formality. Copyright should subsist as soon as the relevant work comes into existence.

(c) **Independence of Protection -** Protection is independent of the existence of protection in the country of origin of the work. The only exception to this rule is that if the member State provides for a longer tenure than the minimum period and the work ceases to be protected in the State of origin, protection may be refused in the foreign country thereafter.[263]

The following observations of the Bombay High Court in the case of *Burroughs Wellcome (India) Ltd. v. Uni-sole Pvt. Ltd. and Another*[264] perfectly captures the rationale for copyright protection:

"Copyright it is a form of intellectual property. With advancement in technology, it is very easy to copy. The basic test in actions based on the infringement of the copyright is that if a thing fetches a price, it can always be copied and therefore, it needs adequate protection."

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[262] United States Congress, Congressional Record Proceedings and Debates of the Congress, Volume 48, Part 4, 4115 (1912)

[263] *Sanjay Soya Private Limited v. Narayani Trading Company*, Interim Application (L) No. 5011 of 2020 in Commercial IP Suit No. 2 of 2021

[264] 1999 PTC Vol. 19 p 188

The following portion of Statement of Objects and Reasons of the Copyright (Amendment) Act, 1994, in India gives a fair indication of the main objective of copyright protection:

"*Effective copyright protection promotes and rewards human creativity and is, in modern society, an indispensable support for intellectual, cultural and economic activity. Copyright law promotes the creation of literary, artistic, dramatic and musical works, cinematograph films and sound recordings by providing certain exclusive rights to their authors and creators*."[265]

The following remarks of the Honourable Supreme Court in *Eastern Book Company and Ors. v. D.B. Modak and Anr*.[266] perfectly capture the essence of copyright law:

"*Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity*."

Equally illuminating are the remarks of the Delhi High Court in *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*.[267] as reproduced below:

"*Copyright…is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public*."

The Supreme Court in *R.G. Anand v. M/s. Deluxe Films and Ors*. identified the following propositions which would help us determine an action of copyright infringement:[268]

i. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts. Copyrightability in such cases would be simply restricted to the form,

[265] *MRF Limited v. Metro Tyres Limited*, 2019 (79) PTC 368 (Del)
[266] AIR 2008 SC 809
[267] (CS(OS) 2439/2012, I.A. Nos. 14632/2012, 430 and 3455/2013
[268] (1978) 4 SCC 118

manner and arrangement and expression of the idea by the author. (***Scène à faire* doctrine**)

ii. Where the same idea is being developed in a different way, some similarities are inevitable. Then the courts should determine whether the similarities are on fundamental or substantial aspects of the mode of expression. If the defendant's work is a literal imitation of the copyrighted work with minor variations, it would violate copyright.

iii. A copyright infringement can be said to have occurred if the reader, spectator or the viewer after having read or seen both the works gets an unmistakable impression that the subsequent work appears to be a copy of the original. (**Ordinary/lay observer test**.)[269]

iv. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a different product altogether, no copyright is infringed.

v. If there are material and broad dissimilarities which negate the intention to copy and the similarities are clearly incidental, no infringement has happened.

vi. Violation of copyright must be proved by clear and cogent evidence.

vii. Commenting specifically on the copyrightability of films, the court observed that unlike a stage play, a film enjoys a broader prospective. Defendants may introduce a variety of incidents to give a different colour and complexion to the end product. Even so, if the viewer after seeing the film feels that the film is by and large a copy of the original play, copyright may be said to have been infringed.

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[269] See *M. Radhakrishnan v. Surabhi Publications and Ors*. (2016) 3 KLJ 321, "*One of the surest 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 would be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first. In other words, 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*." See also See also *Associated Electronics & Electrical Industries (Bangalore) Pvt. Ltd. v. M/s. Sharp Tools, Kalapatti,* AIR 1991 Kar. 406

Applying the above principles, the apex court concluded with respect to the facts of the case at hand, that the film produced by the defendants was not a substantial copy of the plaintiff's play. There were considerable differences in the story, theme, characterization and climaxes. Copyright could not be acquired in the idea of provincialism.

The *RG Anand* principles have been affirmed by the Supreme Court in *Eastern Book Company & Ors. v. D.B. Modak & Anr*.[270]. The apex court observed that the word 'original' does not mean that the work must be the expression of original or inventive thought. Copyright does not protect ideas but original expression of thought. Originality has nothing to do with the intrinsic quality of the work. It will be treated as original as long as it is not copied from another work i.e. it must originate from the author. Originality would depend on the amount of skill, judgment or labour that has been involved in compiling the work. A commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill will not earn copyright. Accordingly, it was held that copy edited judgments would not be protected by copyright simply by establishing amount of skill, labour and capital put in the inputs of the copy-edited judgments as the original or innovative thoughts for the creativity are completely excluded.

Approving the principles enunciated by the Chancery Division Court in *University of London Press Ltd. v. University Tutorial Press Ltd*[271] the apex court observed that:

"*…the word 'original' does not demand original or inventive thought, but only that the work should not be copied but should originate from the author*."

The apex court also relied on the Canadian Supreme Court's decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*[272] to hold that an original work must be a product of exercise of skill and judgment. It was observed that:

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[270] (2008) 1 SCC 1
[271] (1916) 2 Ch 601
[272] (2004) 1 SCR 339

i. **'Skill'** would mean the utilization of one's knowledge, acquired aptitude or practiced ability in producing the work, and

ii. **'Judgment'** would denote the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.

The skill and judgment exercised could not be so trivial to be classified as a purely mechanical exercise. It must be more than a mere copy of another person's work. The idea/expression dichotomy in the United States traces back to their Federal Supreme Court's decision in *Baker v. Selden*[273]. Selden had written and obtained copyrights on books setting out a new system of bookkeeping. The books explained the system and the blank forms with ruled lines and headings designed for use with that system. Baker published account books using a system with similar forms, and Selden filed a copyright infringement suit. Selden contended that no one could make or use similar ruled lines and headings or ruled lines and headings using substantially the same system, without his authorization. The Supreme Court held that the copyright of a book on book-keeping could not claim the exclusive right to make, sell, and use account-books. Although copyright protects the way Selden explained and described a peculiar system of book-keeping, it did not prevent others from using the same system described therein. If it is inevitably necessary to use the forms Selden included to make use of the accounting system, such use would not amount to copyright infringement.

In 1942, Judge Yankwich, introduced the concept of *Scène à faire* into the American copyright law. In *Cain v. Universal Pictures Co*.[274], the plaintiff claimed that a church sequence appearing in the movie 'When Tomorrow Comes" was an infringement of his novel 'Serenade' which contained a similar scene. In both the film and the novel, two lovers spent a night in a church loft, taking shelter from a storm. Judge Yankwich observed that the small details such as playing the piano, prayer, and hunger, were inherent in the situation itself. Once two persons were placed in a church during a big storm, such

[273] 101 U.S. 99, 101 (1879)
[274] 47 F. Supp. 1013 (S.D. Cal. 1942)

incidents were inevitable and would force themselves upon the writer in developing the theme. Such similarities and details are not material for determining copyright infringement.[275]

Facts therefore fall outside the realm of copyright. In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc*.[276], the US Supreme Court held that Feist did not infringe any copyright by copying Rural's white pages listings. O'Connor J observed that facts and data were not copyrightable because they were not original works. An original work must be independently created by the author and possess a 'modicum of creativity'. Compilation of facts, selection or arrangement of the facts in particular, may be entitled to copyright protection but such protection would be very thin.

The concept of originality in copyright law is not used universally in a completely uniform manner. Under the common law tradition, it is sufficient that the work is the result of skill and labour or the 'sweat of the brow', while civil law tradition applies a more demanding originality test where the work must be an individual creation, reflecting the personality of the author. The Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms attempts to converge these two contrasting schools of thought by stating that mere sweat of the brow is not sufficient for a production to qualify as a copyrightable work. To earn a copyright, it must qualify as an 'intellectual creation'. The guide however does not explain whether a higher level of creativity, or some reflection of the personality of the author would be required for a work to qualify as an intellectual creation.[277]

The use of artificial intelligence ("AI") has generated plenty of controversies in the domain of copyright. In the initial stages, the role of this technology was more mechanical and based on human input. The best example of a similar venture in recent times has been the completion of Beethoven's 10th Symphony under the initiative of the Karajan Institute in Salzburg, Austria, where a team comprising of AI experts, musicians and historians was able to feed enough information into the AI

[275] See Leslie A. Kurtz, Copyright: The Scenes a Faire Doctrine, 41 FLA. L. REV. 79 (1989).
[276] 499 US 340 (1991)
[277] *MRF Limited v. Metro Tyres Limited*, 2019 (79) PTC 368(Del)

programme for a seamless completion of the symphony in October, 2021. AI in music has witnessed a steady evolution worldwide with pop stars like Yona and Lil Miquela and the band Yacht coming up with the album 'I Thought the Future Would be Cooler'. Though none of these projects generated much popularity, AI as a recording technique has become immensely popular in having a near identical effect to what Youtube had on mass video production. Anil Srinivasan, a popular pianist based in Chennai, India, has warned that if human creators of music do not reinvent their styles with sufficient individuality, AI could overwhelm the music industry with more aesthetic compositions in tune with timeless classic scores. These developments clearly call for a robust and enforceable intellectual property regime for AI generated works which address the issues of authorship and ownership with clarity at the international level itself. Before undertaking a critical analysis, this research would highlight the domestic legal requirements of copyright authorship and ownership in India, UK, EU and US.

5.3 Position in India

5.3.1 Authorship

Section 2(d) of the Copyright Act, 1957, defines 'Author' as-

i. author of a literary or dramatic work; or

ii. composer of a musical work; or

iii. artist of an artistic work except photograph; or

iv. photographer of a photograph; or

v. producer of a cinematograph film or sound recording; or

vi. person who causes any computer generated literary, dramatic, musical or artistic work to be created.

Originality is an indispensable requirement for authorship. Different jurisdictions adopt different approaches in assessing originality. Certain common law countries consider skill or labour in creating

the work to be sufficient, while the civil law jurisdictions may apply a stricter originality test. Civil law countries typically demand that the work "*must be an individual creation, reflecting the personality of the author*".[278]

In India, the Supreme Court has held in *Eastern Book Company & Ors. v. D.B. Modak & Anr*.[279] that:

"*The word "original" does not mean that the work must be the expression of original or inventive thought. The Copyright Acts are not concerned with the originality of ideas, but with the expression of thought…The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work--that it should originate from the author*."

Three important points emerge from a perusal of the above paragraph:

1. The work represents the original expression of thought of the author
2. An author creates the work independently
3. The work must originate from the author

5.3.2 Ownership

Section 17 of Copyright Act, 1957, further states that the author of a work shall be the first owner of the copyright therein.[280] This rule is however subject to two exceptions:

i. Proprietor of a newspaper, magazine or similar periodical who employs an author under a contract of service or apprenticeship, shall be the first owner of the copyright for works created by the author. Though the author would hold rights to those works for every other purpose which do not relate to publication. For instance, the if the author

[278] *MRF Limited v. Metro Tyres Limited* (01.07.2019 - DELHC) : MANU/DE/2037/2019

[279] (2008) 1 SCC 1

[280] *Music Broadcast Private Ltd. v. Indian Performing Right Society Ltd*. (25.07.2011 - BOMHC) Suit No. 2401 of 2006, "*The author of a literary work is the author of the work [Section 2(d)(i)]. The composer is the author of a musical work [Section 2(d)(ii)]. Section 17 provides "subject to other provisions of this Act, the author of a work shall be the first owner of the copyright therein." Thus, the first owner of the copyright in a literary work and a musical work are the author of the literary work and the composer of the musical work respectively*." See also VK Ahuja, Law of Copyright and Neighbouring Rights, National and International Perspectives 53 (2015)

writes a poem for a newspaper and he wants to sell it to a recording company for conversion into a song and the recording of that song, then the author cannot be restrained by the newspaper proprietor.

ii. Employer shall be treated as the first owner of a work made in the course of the author's employment under a contract of service or apprenticeship.[281]

The following paragraph from the Bombay High Court judgement of *Pidilite Industries Limited v. Poma-Ex Products*[282] provides a concise explanation of the basic copyright ownership principle under the Indian law:

"*Section 17 of the Copyright Act, 1957 provides for Ownership of Copyright and the Rights of the Owner of such copyrights. A perusal of Section 17 of the Copyright Act, 1957 indicates that in absence of any agreement to the contrary, an employer would be the first owner of the copyright in the work in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical*."

On March 2, 2021, a three-judge Bench of the Supreme Court in *Engineering Analysis Centre of Excellence Pvt. Ltd. v. Commissioner of Income Tax & Anr.*[283] came up with some insightful observations on the nature of copyright ownership. Rohinton Fali Nariman J. noted that though the Copyright Act does not expressly define 'Copyright', section 14 of the Act clarifies that 'copyright' means the exclusive right to do or authorise the commission of certain acts in relation to the protected work. The creator/author has the exclusive right, subject to the relevant statutory exceptions, to do or authorise these listed acts. For example, section 14(b) of the Act specifically speaks of selling or giving

[281] See also *Saregama Ltd. v. The New Digital Media and Ors*. (2018)1WBLR(Cal)329, "*The copyright law accords special treatment to works made for hire. The work made in course of employment or on hire is the major exception to the fundamental principle that copyright ownership vests initially in the individual who creates the work. If the work is a "work made for hire" the employer under the copyright law will be considered both the author and copyright owner of the work*."

[282] Notice of Motion No. 2695 of 2016 in Suit No. 653 of 2014

[283] 2021 SCC Online SC 159

on commercial rental or offering for sale or for commercial rental any copy of the protected work. Section 14(b) of the Act also covers the rights under section 14(a) of the Act that is to

a. reproduce the work in any material form,
b. issue copies of the work to the public not already in circulation,
c. perform the work in public or communicate it to the public,
d. make any cinematograph film or sound recording,

make any translation or adaptation of the work or related acts.

5.4 Position in the UK and EU

5.4.1 Authorship

A detailed discussion on the concept of 'author' can be found in the decision of the England and Wales Court of Appeal (Civil Division) in *Kogan v. Martin and Ors*[284]. The dispute arose regarding the authorship of a screenplay written about the last few years in the life of Florence Foster Jenkins, the celebrated American figure who was known for her love of music. The court looked into the definition of 'author' under Section 9(1) of the Copyright, Designs and Patents Act, 1988, which explained the concept as a person who creates the copyrighted work. Section 10(3) of this Act creates the fiction that all references to 'author' in case of such collaborative works would be considered as references to each 'joint author'. The observations of Laddie J. in *Cala Homes (South) Limited v. Alfred McAlpine Homes East Limited*[285] were relied upon by the court to identify the essential ingredients of authorship. Laddie J. in turn had cited a passage from Laddie, Prescott & Vitoria, The Modern Law of Copyright, to conclude that an author should:

a. significant amount of the skill and labour, and
b. take responsibility for the contents.

[284] [2019]EWCA Civ 1645
[285] [1995] FSR 818

Laddie J. however remarked that the second limb of the above test overstepped the mark and it was sufficient if the concerned person satisfied the first limb. This approach was also approved by Floyd LJ in *Kogan*. Floyd LJ observed that an author should expend skill and effort in creating, selecting or gathering together the detailed concepts or emotions affixed by the words in writing. Ability to accept responsibility for the work was not an essential requirement under the statute. The focus should be on who contributed to the creation of the work.

The other aspect of authorship is the nature of contribution. The contribution must be an authorial one. Simply doing some work or expending labour would not turn a non-author into an author.[286] In the words of Prof. Ginsburg,

"*Author is a human being who exercises subjective judgment in composing the work and who controls its execution*."[287]

In *Painer v. Standard Verlags GmbH*[288] the Court of Justice for the European Union ("CJEU") further explained that according to Recital 17 in the Preamble to Directive 93/98, the intellectual creation should be traceable to the author's personality. The work must reflect this personality. During the process of making the protectable work, the author must have freely exercised a wide range of creative choices.[289] It is this element of choice which adds the author's 'personal touch' to the his or her creation. For instance, in *Funke Medien NRW GmbH v. Bundesrepublik Deutschlandan*[290] the CJEU held that authorship had to be determined by answering:

a. Whether the authors exercised free and expressive choices?
b. Whether these choices resulted in conveying 'original' content to the consumers of the work?

[286] See also *Fylde Microsystems Ltd. v. Key Radio Systems Ltd*. [1998] FSR 449 at 455 (per Laddie J.)
[287] JC Ginsburg, *The Concept of Authorship in Comparative Copyright Law* (2003) 52 DePaul L. Rev. 1064, 1067.
[288] [2012] ECDR 6
[289] See also *Football Association Premier League and Others* [2011] ECR I-0000
[290] Case C-479-17

c. Whether the choices resulted in an 'intellectual creation' of the author?[291]

5.4.2 Ownership

The observations of Lord Phillips MR in *Ashdown v. Telegraph Group Ltd* provide the clearest insight on the nature of copyright ownership. His Lordship noted:

"*Copyright is essentially not a positive but a negative right…The Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to do*."[292]

This principle has been affirmed in *British American Tobacco UK Ltd and Ors v. The Secretary of State for Health*.[293]

In *Wheat v. Alphabet Inc / Google LLC and Anr*.[294]the court observed that Section 16(1) of Copyright, Designs and Patents Act, 1988, ("CDPA") provides the copyright owner the exclusive right to do the prescribed acts including the exclusive right to copy or communicate to the public. Section 17 clarifies that 'copying' means reproducing in any material form and including electronic storage.

Section 90 of the CDPA allows transmission of such right by assignment. Section 92(1) enables the owner to grant an exclusive license to the licensee to exercise a right usually exercisable by the lawful copyright owner.[295]

In *Luksan v. Van Der Let*[296] it was observed that Directive 2001/29/EC provided for exclusive rights to authorize or prohibit unauthorized reproduction or communication of works to the public. Austrian national law, the court noted, described these rights as 'exploitation rights'.

The observations of the UK Supreme Court in *Public Relations Consultants Association Ltd v. The*

[291] *Martin and Ors. v. Kogan* [2021] EWHC 24 (Ch) (Para. 37)
[292] See also *Telegraph Group Ltd v. The Right Honourable Paddy Ashdown, Mp Pc* [2001]EWCA Civ 1142
[293] [2017] 2 All ER 691
[294] MANU/UKCH/0103/2018
[295] See also *JHP Limited v. BBC Worldwide Limited and Trustees of the Estate of Terry Nation* [2008] EWHC 757 (Ch)
[296] [2013] ECDR 5

Newspaper Licensing Agency Ltd and Ors.[297] also shed considerable light on the importance of the rights granted to the copyright holder under the European framework and Berne Convention. The apex court observed that based on a collective reading of Article 5.5 of Directive 2001/29/EC read with Article 9(2) of the Berne Convention, a three-fold classification of rights belonging to the copyright owner may be created:

a. reproduction rights,
b. communication rights, and
c. distribution rights.

5.5 Position in USA

5.5.1 Authorship

While the US Copyright Act of 1976 codified under 17 U.S.C. § 102 et seq. does not spell out a specific definition for 'author', 17 U.S.C. § 102(a) makes it clear that copyright protection could only subsist on an original work of authorship where the expression has been affixed on a tangible medium.

An accurate explanation of the concept of 'author' under the US copyright law can be found in *Community for Creative Non-Violence v. Reid*[298], where Justice Thurgood Marshall observed that:

"*…the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection*."[299]

In other words, an author is a person who should contribute something which is capable of being protected under the law of copyright. It refers to the creator of the copyrighted work. It may also be a person who records the ideas of mind or supplies those ideas. The author is solely responsible and therefore deserves exclusive credit for the creation of a unique work.[300] The Court of Appeals for the

[297] [2013] UKSC 18
[298] 490 U.S. 730, 737 (1989)
[299] See also Paul Goldstein, Copyright: Principles, Law, And Practice § 4.2.1.2, at 379 (1989)
[300] Woodmansee Martha, The Genius and the Copyright: Economic and Legal Conditions of the Emergence of 'Author' 426 (1984)

Ninth Circuit observed in *Aalmuhammed v. Lee*[301] that the word 'author' is generally used to signify the 'originator or the person who causes something to come into being'. The author therefore is the person with 'creative control' and supervises the creation of the work by exercising this control. The Ninth Circuit affirmed the definition of 'author' coined in *Burrow-Giles Lithographic Co. v. Sarony*[302]where the United States Federal Supreme Court defined 'author' as 'he to whom anything owes its origin'. The author was termed as the 'master mind' who executes a basic idea. The Ninth Circuit discussed all these authorities in *Cindy Lee Garcia v. Google, Inc. and Ors*.[303] And concluded that at no point did Garcia exercise any creative control over the script or her performance. The control rested with the director Mr. Youssef who had supplied the script, equipment and given the necessary directions to the actress. Garcia could not be considered the originator of the idea or concept shown in the film. Hence, she could not claim authorship over her performance.

The term 'author' thus refers to the creator of the copyrighted work. It may also be a person who records the ideas of mind or supplies those ideas. The author is solely responsible and therefore deserves exclusive credit for the creation of a unique work.[304]

The other type of authorship can be seen under the 'Work for Hire' Doctrine. The U.S Supreme Court in *Community for Create Works v. Reid*[305], has outlined the ingredients that characterize a work for hire in employer employee relationships:

i. Control by the employer over the work on how the work is done, location, equipment etc.
ii. Control by employer over the employee's schedule, assignments, method of payment, hiring of assistants etc.

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[301] 202 F.3d 1227 (9th Cir. 2000)
[302] 111 U.S. 53, 56 (1884). See also *Goldstein v. California*, 412 U.S. 546, 555-60, 561 (1973), "…*While an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an "originator," "he to whom anything owes its origin*."
[303] MANU/FENT/2325/2014
[304] Woodmansee Martha, The Genius and the Copyright: Economic and Legal Conditions of the Emergence of 'Author' 426
[305] 490 U.S. 730

iii. Status and conduct of employer that is the nature of employer's business, withholding of tax in payment of salary to employee etc.[306]

These factors however are not exhaustive. Supervision or control over creation of the work may not necessarily amount to 'control'. Most importantly, there must be a regular, salaried employment relationship, and the work must be created within the scope of such employment. This arrangement though is purely contractual meaning that if the author of a work is in a strong bargaining position, he or she can retain the copyright while negotiating the contract with the newspaper proprietor or employer. If the employer or proprietor sees enough value in associating with the author, then it may agree to let the author have the copyright for the works created under a contract or in course of employment.

The recognition of this kind of authorship is premised on protection of investment and promotion of business. In stark contrast to the natural rights and utilitarian rationales of copyright protection, the investment protection theory offers copyright protection based on the financial support of the creative process rather than the process itself.[307]

As explained by Professor Ginsburg,

"*The work for hire doctrine rests on the grounds of facilitation of investment and exploitation*."[308]

The creative control test applied to the work for hire doctrine focuses primarily on the creation and fixation of the expression instead of creative process overall. For works made for hire, the main reason of control is 'the manner and means by which the product is accomplished'.[309]

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[306] See also Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma* 57 IDEA 431, 442 (2017).

[307] NB Schaumann, *Small Business and Copyright Ownership* (1996) 22 Wm. Mitchell L. Rev. 1469, 1482; JL Schwab, *Audiovisual Works and the Work for Hire Doctrine in the Internet Age* (2011) 35 Colum. J.L. & Arts 141, 149.

[308] JC Ginsburg, *The Concept of Authorship in Comparative Copyright Law* (2003) 52 DePaul L. Rev. 1064, 1088.

[309] Bingbin Lu, *A theory of 'authorship transfer' and its application to the context of Artificial Intelligence creations*, Queen Mary Journal of Intellectual Property, Vol. 11 No. 1, pp. 2–24 (2021)

5.5.2 Ownership

The principles of copyright ownership were clearly outlined by the United States Federal Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co*[310]. The Second Circuit had relied upon these principles in *DOE 3 v. Arista Records LLC*[311]. The Supreme Court had observed that the owner possesses the exclusive right to:

a. reproduce,
b. perform publicly,
c. display publicly,
d. prepare derivative works of, and
e. distribute copies

of the concerned work. Likewise, the owner could license any of these activities to a potential licensee. The Seventh Circuit relied on Prof. Nimmer's commentary in *Phoenix Entertainment Partners Llc Slep Tone Entertainment Corporation v. Dannette Rumsey Basket Case Pub Incorporated*[312] and concluded that Section 106(3) of the Copyright Act 1976 granted the copyright owner the exclusive right to sell, give away, rent or lend any material embodiment of his work.[313]

For example, under 17 U.S.C. § 106(4), the composer of a musical score would have the right to reproduce the music onto the soundtrack of a film or a videotape. The synchronization right is a form of reproduction right created by statute as an exclusive right of the copyright owner i.e. in this case, the author of the score. The owner may authorize others to perform the work or assign the existing rights through an exclusive or a non-exclusive license.[314]

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[310] 499 U.S. 340, 361

[311] 604 F.3d 110 (2010), "*Section 106 of the Copyright Act affords a copyright owner the exclusive right to: (1) reproduce the copyrighted work; (2) prepare derivative works; (3) distribute copies of the work by sale or otherwise; and, with respect to certain artistic works, (4) perform the work publicly; and (5) display the work publicly*."

[312] MANU/FEVT/0347/2016

[313] See also *National Car Rental v. Computer Associates* 991 F.2d 426 (1993)

[314] *Buffalo Broadcasting v. Am. Soc. Of Composers* MANU/FESC/0048/1984, See also *Lulirama Ltd. v. Axcess Broadcast Services* 128 F.3d 872 (1997)