"Fanciful similarity or substantial similarity: A perspective on requirement of originality in the light of copyright infringement of a cinematograph film under Indian copyright law"

Ms. Charu Srivastava
Assistant Professor, School of Law, University of Petroleum and Energy Studies, Dehradun

Prof. [Dr.] Shobhlata Udapudi
Gujarat National Law University, IPR Professor

1. Abstract

Originality, expression and fixation are the three interrelated foundational aspects of copyright law globally as well as under Indian Copyright Law. However, the law in India does not define any of these requirements though of extreme importance under the Copyright Act of 1957. The scope and nature of originality and allied concepts gains complexity when comprehended in the context of a cinematographic film under the copyright law given the divergent decisions by Indian courts.

Thereby, the authors aim to give a comprehensive understanding of scope of originality in relation to a cinematographic film with the help of analysis of copyright infringement cases in relation to cinematographic film. This paper starts with the brief discussion on what constitutes a cinematographic film. To be effective, the paper highlights the issues and then moves on to the Indian Copyright Law to interpret various provisions with the help of case laws. In this regards, the reference shall be made to statutory provisions, judicial case laws and academic literature. Essentially the scope of the paper is limited to the Indian Copyright Act of 1957 and Indian case laws.

Keywords: Originality, Idea-Expression dichotomy, Fixation, Doctrine of Merger, cinematographic film and copyright infringement

2. Introduction

The three requirements to qualify as a copyrightable work as per Indian Law are Originality, Expression and Fixation. All the three form the thread without which a work cannot be considered as a copyrightable work under Section 13 of the Indian Copyright Act of 1957. Although, none of these words are explicitly defined nonetheless they derive their existent from the interpretation of the provisions and rules of the Copyright Act of 1957. Originality is the most quintessential element which has two aspects, one that it should come from the author not being copied from someone else's work and the second aspect to it is the standard of creativity. It is though not

provided in the law that a work has to be of certain standard in terms of creativity but it does desire certain amount of creativity to claim stronger protection. Other interlinked requirements are expression and fixation which entail that expression is the original work of the author because that it what is the skill and judgment of the author expressing a particular common or a novel idea. Fixation is an offshoot of expression which requires that a given work as per the law is required to be fixed in some form otherwise the expression will not be considered as a legal expression as per the law of a given jurisdiction. Example, the sand castles are an artistic work which is expressed by the author by making use of sand, however, the sand castle is not fixed as per the legal understanding and hence can't be copyrighted. Fixation brings certainty to the work, so that the viewer is able to identify and perceive the work in the same form as they were when published for the first time by the author.[i]

Now, taking about the cinematograph film, it consists of several other original underlying works including literary work in the form of a script, dialogues; dramatic work including the choreography; musical work which involves the music composition or the theme music of the movie; artistic work comprising the setup, costumes, accessories, props etc. and the sound recording. All these original underlying works cumulatively make up the single cinematographic work, the copyright of which vests in the producer, who invested in the movie. Time and again there have been questions raised as to the requirement of the originality in a cinematographic film i.e. whether a cinematographic film is required to be original or what is the degree of originality required in a cinematographic film? This issue often arises because of the language of the Section 13 of the Copyright Act of 1957. The literary, dramatic, musical and artistic work is preceded by the term 'originality' whereas the cinematographic film and the sound recording does not mention the requirement of 'originality'. Similarly, Section 14 of the Act provides rights of the owner wherein the literary, dramatic, artistic, musical work are treated differently and cinematographic film and sound recording are treated differently.

Hence. in the matter of a cinematograph film, understanding originality has always been a roller coaster ride, given the divergent views of courts on the interpretation of Section 13 [Meaning of copyright], 14 [Economic rights] and 2 (m) [infringing copies]. Some decisions put forward that the infringing copies should mean exact copies of the film whereas some state that another work which is substantially, fundamentally and materially resembles the original film can amount to infringing copies.

3. Meaning of a cinematograph film

A cinematography film is a homogenous material. It is a collection or collage or ensemble of various works like story, screenplay, dialogue, sound track, video images, lyrics etc. Each of these works may also enjoy copyright protection. By operation of law or by contract or assignment the producer of the film may be vested copyrights in the above works. When the film as a whole is exhibited the individual owners of copyright in underlying works who have permitted the film to be made in return of consideration cannot claim copyright but if a part of the film is segregated

and the individual work is culled out and exhibited otherwise than the film then the individual owner can assert his copyright and demand royalty for the second use.

Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (1886) expresses what all are considered as work under the ambit of copyright. It states that all literary and artistic work and every production of the literary and artistic work including cinematographic work to which are assimilated works expressed by a process analogous to cinematography.[ii] International copyright treaties and convention do not define originality. However, it does mention, that the translations, arrangement, adaptations of literary, artistic or musical work shall be protected as original works[iii], which means such works will be considered as original works and afforded the some protection as that of any other original work. Having said that whether the protection afforded to them will be thick or thin is a question that is usually answered in the court of law when the dispute arises.

Further Section 2 (f) of the Copyright Act defines a cinematographic film, the definition does not define what constitutes a film rather explains the technical aspect of fixation of a cinematographic film.[iv] However a cumulative reading of cinematographic film and visual recording could mean every recorded work along with the images or moving visuals will be considered as cinematographic film. Cinematographic work as per the practice manual for cinematographic work from the government of India includes a vast variety of recorded videos such as dance performance, choreography, public delivery of lectures, video games and many more.[v]

4. Concept of originality in a cinematograph film

Demystifying the applicability of idea expression dichotomy in a cinematograph film involves a persistent reading and grasping of the legislation, case laws in conformity with the techno-legal aspect.[vi] Whether a work is original or not cannot be understood in isolation, it is always answered in the context to a dispute or at the stage of the registration. More clarity comes from the case laws, when given facts are analyzed in the light of legislations.

There is hardly any judgement which directly examines the concept of originality of a cinematographic film, however, the copyright disputes in relation to a cinematographic film for copying/reproduction comes as a rescue to some extent. While examining whether the work of defendant is copied from plaintiff's work or not, the court examines the nature of plaintiff's work and identifies what has been copied by the defendant. If the copied element forms part of the original expression or something that is too novel then defendant's work can be said to be copied from plaintiff's which inadvertently means that the plaintiff's work as far as that expression is concerned was original unless defendant can prove that plaintiff's work is nothing but a collection of elements that form part of ideas, scene a faire, public domain etc[vii].

5. Idea Expression Dichotomy

Idea Expression dichotomy is undoubtedly one of the most fundamental concepts of Copyright Law Jurisprudence which paves the way for identifying the elements of a creative work being

copyrightable and form the basis for copyright infringement. However, theoretically it might sound easy to bifurcate elements of idea from expression but in reality it is easier said than done. In almost all the cases of copyright infringement of a cinematograph film or in any kind of work, the question of '*what has been copied*' is omnipresent which forms the basis of the entire dispute.

It traces its origin from the US case law of Baker v Sheldon[viii], reading the case law one can conclude that it is not the theme or the subject matter of the content which is protectable, it is only the manner of expression of the subject matter which is protectable and enforceable against the copier.[ix] Indian case law which is a counter part of Baker V Sheldon is R.G. Anand v. Delux Films [1978][x], one of the most cited case in copyright law in India. Although the judgement came in the year 1978, yet it still holds great importance as it comes from the Apex Court. The dispute arises from the alleged copying of the Plaintiff's play 'Hum Hindustani' by the defendants in their movie 'New Delhi'. Plaintiff's play 'Hum Hindustani' was a great success when performed for the first time in February 1954 and was praised in press and public. The defendants approached plaintiff to discuss the possibility of adapting the play into a movie somewhere in 1954 December. However, somewhere in 1955, the plaintiff came to know about the movie 'New Delhi' and that's when the issue began. The plaintiff's filed the suit for copyright infringement in the District court alleging that a close comparison of the two works would lead to irresistible inference and unmistakable impression that film is nothing but a colorable imitation of the play. The defendants contented that the similarities that exist between the two works is because of the similarity in the theme, both the works are based on the idea of provincialism however, the treatment of the theme in the film is done in a different way. The district court decided in favor of Defendants. The court reasoned that the film is dealt not only in the context of provincialism but it also depicts the social evils of dowry system and caste system whereas the play only revolved around the provincialism. Plaintiff filled the appeal in High Court, the High Court affirmed the decision of the District Court. Finally, appellants move to Supreme Court alleging that both district court and high court erred in in applying the principles of copyright law The respondents contented that given the concurrent findings of facts by the District as well as High Court, the Supreme court need not to go into the merits of the case and moreover, there are substantial dissimilates between the film and play.

The court carefully considered and elucidated various authorities and case laws and laid down certain guidelines:

1. There can be no copyright over the theme, plot, emptions, landscapes etc. meaning thereby that elements forms the part of common stock.
2. If the similarities between two works exist because of the similarities in the idea, then it is not infringement.
3. The spectators, readers and viewers perception about the two works can play an important role.
4. If the same theme in the two work is treated differently, thereby giving rise to two completely different work, then it is not copyright infringement.

5. Material broad dissimilarities and coincidental similarities may negative the intention of copying.
6. The copying must be proved by cogent and clear evidences by applying the various test that were laid in decided case laws.
7. In the dispute regarding the stage play being converted into a film, several changes can be made to the expression of the play when adapted into a movie to give it altogether a different color to it, thereby, making the task of proving copying more challenging.

So it is quite possible to specifically copy a drama and adapt it into a movie without being caught by making several variations and give it a different impression. The court then goes onto narrating the drama followed by the expression of the film. Every minute similarity and dissimilarity is observed by the court to carefully make a conclusion on alleged copying. Finally, the court listed the dissimilarities that were fundamental to the film and outweighs the similarities between the play and the film. Also, the plaintiff failed to prove the infringement by clear and cogent evidences that the defendant' film is nothing but a colorable imitation of plaintiff's play. So, if the expression is different, there can be no copyright infringement but such conclusion can be rebutted by proving that the changes are mere impressions to escape liability of infringement.

6. Doctrine of Merger and Scenes a faire doctrine

The doctrine of merger and scenes a faire is an offshoot of Idea expression dichotomy i.e. if idea and expression is to be applied as a principle in every case then Doctrine of merger and scenes a faire explains what an idea is and what is an expression. The merger doctrine states that when there are only few ways of expressing an idea or when the idea and expression are so merged together that they cannot be separated, then such expression should not be protected under copyright law otherwise it will create monopoly which was never intended by the legislature. Another related concept of scenes a faire meaning 'scenes which must be done' in a given work. For example, a movie based on Hitler or Ceaser or any king will have dialogues like Long Live the king or it will have certain landscape, costumes, artistic work and so on, which are indispensable in a given work. These forms the stock elements, these elements in a given work are not copyrightable because others expressing the same idea will need those very elements to express their idea.

7. Thick and Thin protection

How likely a set of given works will claim copyright protection depends upon the kind of elements forming the work. The work can be based on its composition categorized into three levels. One, work consisting of highly fictional element, for example Harry Potter. Two, work consisting of fact and imagination such as a documentary. Three, work based on facts or compilation of data such as a clientele list, a territorial map, a telephone directory etc. The higher the creativity is, the higher the protection, highly fictional works will have the strongest protection whereas the last category i.e. the fact based work can only get protection provided it has a new expression in terms of style, format or arrangement.

Moreover, this thick and thin protection is not a law, it is only a way to decipher how strong the protection might be given the kind of work. It does not mean that rights related to work falling into category two and three cannot be enforced, it is just that in such cases usually identical copying or copying of style, format or arrangement will be the force behind holding defendants liable for copyright infringement.[xi]

8. What is the take of Judiciary on originality in a cinematographic film?

The ambit of originality in a cinematographic film is deduced from the meaning and interpretation of the rights of the producers, infringing copies and other relevant provisions. The judgements do not necessarily go into the question of how original the cinematographic film is rather they analyse whether the defendants impugned work is a copy of the plaintiff's work or not? While answering this issue, the courts elaborate upon the elements in a cinematographic film that afford greater protection and hence copying from there amounts to infringement. This understanding given by courts reflects on the concept of originality in a cinematographic film. Cinematographic like any other creative work consists of both original and unoriginal elements.

8.1. A transition from stricter interpretation to purposive construction: Judicial perspective

8.1.1. Whether right to copy means exact copying by duplication or includes a substantial copying?

Referring to a highly debated case decided by the Bombay High Court, Star India Private Limited vs Leo Burnett (India) Private[xii] wherein court at length discussed the scope and extent of the rights of producers under sec 14 (1) (e). Certainly, the interpretation of law is quite a task because it involves a balance between different provisions of the Act as well as between different legislations. Interestingly, in copyright issues, there is a lot of discretion and scope to expand the meaning of the word.

Plaintiffs, Star India were in the business of acquiring copyright, they entered into a contract with Balaji and acquired the copyright in the TV serial 'Kyunki saas bhi kabhi bahu thi' directed by Balaji for some consideration. To publicize the serial, the plaintiff's also acquired ownership over the artistic work depicting the logo and the title of the serial in a particular style. The TV serial launched in July 2000 brought a revolution in the TV serial industry, soon after numerous Saas bahu serial came to be telecasted on television but none could gather the amount of audience that Kyunki saas bhi kabhi bahu thi assimilated. Later. they came to know that the defendants produced an advertisement of 'Detergent Tide' entitled 'Kyunki bahu bhi kabhi saas thi' The plaintiffs contented that the advertisement created by defendants is nothing but a copy of their daily soap and hence leaves an unmistakable impression in the minds of viewers that the plaintiffs have associated themselves with the defendants and have authorized them to create such an advertisements.

The counsel for the Defendants contented that the defendant No. 2 i.e. the P&G group of companies is a leading company across the world and TIDE is one of their best-selling detergent

brand across the world. They invest millions of dollars in advertisement. P&G group of companies have got their mark TIDE registered in India as well as in other countries. For the current advertisement which is in question, the defendant contented independent creation of the defendants. The defendants further gave a blow by saying that the allegations made by plaintiffs are baseless and there have been unnecessary delay and laches from their side and hence the suit should be dismissed.

The two pertinent issues raised by court need attention here, one, whether the commercial violated rights of producers of TV Serial. For this court referred to sec 14 of the Copyright Act? Two, whether plaintiff proved that defendants act amounts to passing off by misrepresentation and hence caused damage to their merchandising rights?

The plaintiff contented that the meaning of the word 'to make a copy' under sec 14 (1) (d) not only means an exact copy but also a substantial copy and as per the R.G. Anand case, substantial does not mean quantity but quality. So, if the defendants have copied the substantial portion including the beginning scene and the essence then the advertisement is nothing but a copy of their work. However, the defendants contented that there is a contrast in sec 14 itself. Looking at the sec 14 (1) (a), (b), (c) on one hand hand and sec 14 (1) (d), (e) on other hand, one can easily decipher the difference between the rights in relation to literary, artistic, dramatic work and cinematographic film, sound recording work. In the earlier, the rights includes right to reproduction whereas in the later the word reproduction is missing and the only right the owners of a film have is to make a copy meaning thereby if the defendant have not produced a exact copy of the plaintiffs film, then it doesn't amount to infringement. The court accepted the argument and held that the defendant shot another advertisement film and even if it resembles the earlier film, it does not amount to infringement since the making of another film is not included under Section 14 (d) (i). The position in the case of literary, dramatic or artistic work seems to be different. A narrow copyright protection is accorded to a film/sound recordings than for literary, dramatic or artistic work.

The reason becomes more interesting when the court answers the second issues relating to the passing off. The court stated that there cannot be any misrepresentation because the nature of the two work is completely different. One is a TV serial which runs into hours and the other is a few seconds advertisement. Moreover the TV serial is telecasted on star plus, however the advertisement is never telecasted on star plus. The probability of association by the viewer is negligible, the advertisement cannot substitute the TV serial. Hence there cannot be any question of misrepresentation. With regard to the potential exploitation of merchandising rights, the court said that the merchandising right can only come into picture when your character has developed to such an extent that it can be protected under copyright law. Since, the characters in the TV serial are not that developed, the question of merchandising rights does not arise.

The court seemed to give a strict interpretation to sec 14 and justified the different treatment given to cinematographic film by not giving any relief to the Plaintiffs. Having said that, the court did

mention that had the characters of the TV Serial developed into a copyrightable characters, may be the judgment would have gone in favour of Plaintiff on the ground of copyright infringement of characters. Characters do form the original element in a cinematographic film.

8.1.2. Mere similarities are not enough, Plaintiff have to prove striking similarity. However, whether defendant had access to material or not is a relevant fact that may play a decisive role in copyright infringement.

Once again the Bombay High Court in Block vs Yashraj Films Pvt. Ltd[xiii], applied the principles laid down in the R.G. Anand case and decided the case to be a non-infringing one. This case is somewhat similar to R.G.Anand case where two works that are to be compared are of different nature, one is the script and other is the full-fledged movie. The plaintiff, author of the script 'ONCE' claimed that the film DHOOM 3 infringes his copyright in the script and hence prayed for interim injunction against the release of the satellite broadcast since the film had already been released in 2013. Plaintiff stated that he handed over the script of ONCE to defendant early 2010 to negotiate for adapting the script into a movie. Plaintiff did not hear anything from the defendants and later came to know that the film DHOOM 3 is nothing put a replica of his script. Plaintiff alleged that defendants used his script without his consent and thereby violated his copyright.

Applying the principles of R.G. Anand court compared the two works at length and concluded by rejecting the relief demanded by the plaintiff. The court stated that that it is an accepted principle of law that the similarities between the two works should be substantial or material. Mere coincidences are not enough because that could be because of several other factors such as common idea, source or inspiration. No copyright protection can be afforded to the elements of common stock and hence one must be careful while highlighting the similarities between two works, if the similarities consist of elements forming part of common stock then no copyright protection can be given to unoriginal elements of plaintiff's work. If protection is given to such common stock elements then it would stifle creativity.

Another important issue that need attention is whether the defendant had access to the material provided by the plaintiff? This is where the case gets interesting because R.G.Anand case had already laid down the premises for comparing two works. The relevant evidence that needs to be established is the access to material i.e. whether defendant had access to material that belongs to plaintiff? The facts that answer this question establishes to some extent the reason behind similarities which could be copying since defendant had the script of the plaintiff with themselves. However this alone cannot prove the guilt because substantial or fundamental dissimilarities may outweigh the similarities unless it can be proved that there are striking similarities.

However, in the given case, the plaintiff failed to prove and meet the requirements for the grant of interim injunction i.e. prima facie violation, irreparable injury and balance of convenience. Moreover, the plaintiff could not prove that the script was handed over to the defendant as well as his delay for pressing the claims. Additionally, plaintiff failed to prove that how release of the film on television channels will prejudice his rights, that an injunction order should be granted.

In this case, the court exhaustively compared the similarities and dissimilarities, which gives a very good understanding of how comparison should be made.

8.1.3. Infringing copy of a cinematographic film could mean a substantial copy and not just exact copy produced by duplication.

Finally in July 2019, the Delhi High Court in the matter of MRF Limited. V Metro Tyres Limited[xiv], provided a very insightful judgment in relation to copyright infringement of a cinematographic film. The pertinent issue was whether an infringing copy of a cinematographic film has to be an exact or duplicate copy or even a substantial, fundamental, material similarity will suffice to claim copyright infringement?

This case related to allegation of copying of an advertisement. Advertisements are cinematographic films so all the provisions related to cinematographic films are applicable to an advertisement as well. MRF tyres came up with their advertisement titled MRF NV Series present REVZ. Later in October 2016, plaintiff came to know that defendants have also come up with advertisement titled Bazooka Radial Tyers which as alleged by plaintiff's was a blatant copy of their work. The plaintiff filled the suit against the defendant for copyright infringement.

The plaintiff elaborated upon how the meaning of the cinematographic film was amended in the year 1984 to counter the menace of piracy. Pre amendment the definition of cinematographic film under sec 2(f) was quite narrow however by virtue of 1984 & 1994 amendment, the scope of the definition was broadened to include any visual recording and any work produced by any process analogous to cinematography which includes video films as well. In 2012, Section 2(f)[xv] was further clarified with the specific addition of a definition in section 2(xxa)[xvi] for visual recording forming part of definition of a cinematographic film since 1994.

The plaintiffs' counsel contented that the comparison of two advertisement shows similar sequencing, form, treatment and expression and the coincidences that exist in the defendant's work are neither incidental nor based on chance. They claimed that their futuristic setting of the space and related props were novel and original. The plaintiffs tried to convey by referring to third party advertisement that the same theme was possible to be expressed in so many different ways and the fact that defendant's work resembles plaintiff's work is nothing but shows a mala fide intention to copy the expression on the part of defendant. They further contented that the cinematographic film is a work separate from its underlying work and protected differently. Since it is a different category of work, it needs treatment and protection as an individual work.

The defendant's tried to argue in an old fashioned manner contented that a conjoint reading of sec 2 (m) (ii), 14 (1) (d) and sec 51, reveals that to allege copyright infringement of a cinematograph film, it is necessary to prove that the impugned work is an exact copy of the plaintiff's work or some images or sound recording produced by duplication. The counsel relied on the judgement of Single Judge of Bombay High Court in Star India Private Limited v. Leo Burnett (India) Pvt. Ltd[xvii] as discussed earlier. The councsel also stated that reliance cannot be placed on R.G.Anand case,

as it related to script or literary work rather than a film and the test for copying is different for literary works from cinematographic films. Further, stated that the similarities highlighted by the plaintiff's do not form part of kernel or the heart of the work.

The court finally hearing all the arguments by the parties including reference to certain International Conventions such as Berne Convention and Rome Convention held that the *"A film is recognized is being as more or greater than the sum of its part."*This Court stated that sec 13 (1) (b) is built on the foundation of originality only, and reading the provision without the requirement of originality is a fallacy. The relevant portion is reproduced as follows:

"20. A cinematograph is a felicitous blend, a beautiful totality, a constellation of stars, if I may use these lovely imageries to drive home my point, slurring over the rule against mixed metaphor. Cinema is more than long strips of celluloid, more than miracles in photography, more than song, dance and dialogue, and, indeed, more than dramatic story, exciting plot, gripping situations and marvellous acting. But it is that ensemble which is the finished product of orchestrated performance by each of the several participants, although the components may, sometimes, in themselves be elegant entities. Copyright in a cinema film exists in law, but Section 13(4) of the Act preserves the separate survival, in its individuality, of a copyright enjoyed by any work notwithstanding its confluence in the film. This persistence of the aesthetic personality of the intellectual property cannot cut down the copyright of the film qua film. The latter right is, as explained earlier in my learned Brother's judgment set out indubitably in Section 14(1)(c). True, the exclusive right, otherwise called copyright, in the case of a musical work extends to all the sub-rights spelt out in Section 14(1)(a). A harmonious construction of Section 14, which is the integral yoga of copyrights in creative works, takes us to the soul of the subject. The artist enjoys his copyright in the musical work, the film producer is the master of his combination of artistic pieces and the two can happily coexist and need not conflict. What is the modus vivendi"

The court gave a purposive interpretation and stated that the cinematographic film may not infringe any of its underlying work like literary, musical, dramatic work but nonetheless may lack originality because it infringes others copyright in a cinematographic film because of its substantial, fundamental or material similarities. To find out copyright infringement in a cinematographic film, the tests laid down in R.G.Anand case can be applied in this case as well since the protection offered to a cinematographic film is at par with other works. Further, it was clarified that the meaning of copy does not mean exact copy produced by duplication but even an imitation of reproduction amounts to copy. However, the court after thwarting all the arguments of the defendants, made the decision in favour of the defendants and held that the two advertisements are neither fundamentally nor substantially or materially resemble each other. They both have different expression. The plaintiff's advertisement is more about tyre manufacture process whereas the defendant's advertisement is about durability of its tyres. The court agreed with the in

8.1.4. Viewers' testimony that the later film is nothing but replica of the original film did influence the judgement of the court.

Surprisingly later in July 2019 the Delhi High Court in the matter of Yash Raj Films Pvt Ltd vs Sri Sai Ganesh Productions & Ors,[xviii] compared the two films and held one to be infringing copy of the original film. Probably, for once, the court was able to identify the substantial similarities between two films, there could be two reasons for the judgment, one, that the nature of the two works was same, both were cinematographic films and may be when you have to compare the two works of identical nature the task becomes slightly easier. However, the author does not propose this conclusion as a concrete one. Two, since this case was pretty much already fought in the market itself, the viewers were already convinced that the defendant movie is nothing but a replica of plaintiff's movie. There were a lot of evidence in the form of the viewers testimony. Also, the acts of the defendants prior to the release of their film made the things more suspicious.

The facts related to a hit movie Band Baja Barat staring Anushka Sharma and Ranveer Singh, released in December 2010 pan India. It was a successful launch, the film received many awards and accolades. In April, 2011 the plaintiff decided to make remake of the movie in Tamil and signed various artists for the same. In May 2011, plaintiff took a precautionary measure and issues a general notice in Tamil and Telgu language that Plaintiff has not sold the right to remake to any person or company and still holds all the rights related to the movie. However, later in November 2011, the plaintiff came to know that defendant No. 1 intended to make the remake of the plaintiff's film. In response to which plaintiff sent two legal notice that any such remake of his film will amount to infringement. However, later in January 2013, the defendant No. 1 released the trailer of his movie named JABARDASTH. Watching which plaintiff felt that the trailer looks like his movie and sent a third notice to defendant no.1 and asked for the complete movie as well as the script, so that the plaintiff can watch it and ascertain whether the defendants movie was a copy of his film or not. Like earlier this time also the defendant blatantly ignored the notice and released his movie JABARDASTH in February 2013. Plaintiff after watching the film felt exploited and found that the Tamil movie is nothing but a blatant copy of his film and hence filled the suit for copyright infringement.

Plaintiff contented that the plot, story, expression, characters and everything else of the impugned film blatantly resembles his film and the impugned film gives unmistakable impression of his original film. The counsel submitted the substantial similarities between the same as well as the reviews of the viewers who watched JBARADATH after watching BAND BAJA BARAT.

The court referred to MRF Limited v Metro Tyres[xix] and explained what consists a film? A film is recognized as a separate work apart from the underlying work that makes it up. Every film needs to fulfil the requirement of the originality or creation. Further, to make a copy of the film does not necessarily mean a physical identical copy. It could mean substantial or material reproduction as well. Accordingly the comparison should be made in "the substance, the foundation, the kernel"

of the two films. Consequently, court held that the defendants have blatantly copied the plaintiff's film and hence infringed their copyright in the film.

9. Conclusion

In the conclusion it is only apt to say that a broader understanding of the concept of originality can be laid down but no objectivity can be brought to the concept of originality and its applicability in a cinematographic film. A single work may consist of several unoriginal and original elements. The level of protection attributable to each element is not alike, it depends upon the nature of element and its expression. So, if it is demonstrable that the two works materially differ in the manner they treat the idea and project the scenes, then no copyright infringement can be proved. Lastly, none of the above cases except the BAND BAJA BARAAT case, the plaintiffs were able to prove copyright infringement, nor was the court convinced that the similarities were material. Well, the possible reason for the different view has already been stated above. It is a question of how a viewer perceives things, how ONCE script was different from DHOOM 3 film and how JABARDASTH film was identical to BAND BAJA BARAAT is nothing but a question of subjective perception.

However, it is safe to conclude that rather than looking into whether defendants actually copied the plaintiffs work or not, the question that is to be answered is '*what has been copied?'* Looking at what has been copied gives an understanding of whether the original elements have been copied or the unoriginal. Having said that, still many doubts emerge about what does 'originality' means such as the concept of format rights. Format rights are nothing about a different manifestation of idea, the reason of protecting the format rights is the novelty of idea. Time and again, the courts have diverted from the basic principles of idea expression dichotomy. No decision actually helps to analyze another dispute. Further, it is undoubted that the objective of Copyright Law is to protect the rights of the producer but such rights are not absolute, the intention of the legislature was never to be over protective of the rights and consequently we have exceptions and limitations. However, striking a balance between the different categories of right holders and between the different categories of right holders and the users is a challenging task. Since every case is pristine applying the same law to every new situation is a troublesome task.

[i] Literary work is fixed in writing. Writing the original content is the expression and expressing the content in words brings certainty to the work and that is what fixation is. Literary work cannot be fixed orally.

[ii] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) Available at https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf

[iii] Berne Convention, 1886: Article 2(1) and (3))

[iv] Cinematograph film" means any work of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films. [Section 2 (f)].

Visual recording" means the recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method [Section 2 (xxa)].

[v] Practice and Procedure Manual: Cinematograph Films, 2018, Copyright office, Government of India. Available at http://copyright.gov.in/Documents/Manuals/CINEMATOGRAPH_MANUAL.pdf

[vi] Technology has penetrated so much that every aspect of copyright has to be seen through the lens of digital aspect to it as well. With infringement of copyright surfacing online, the need to study copyright along with the effect of technology becomes pertinent.

[vii] Kurtz L A, The scope of copyright protection in the United States, Entertainment Law Review, 6(3) (1995) 89.

[viii] 101 U.S. 99 (1879)

[ix] It can also be stated that the practical application of the literary content is no copyright infringement for the obvious reason that the very objective of reading and writing a book is putting the content to practical usage. For example, a science book explaining an experiment does not restrict the reader from practicing the experiment and commercially exploiting the result of the experiment or the experiment itself for there is no copyright over the experiment as such, the copyright exists only on the manner of expression of explaining the experiment.

[x] AIR 1978 SC 1613

[xi] Kent M H & Kaufman J J, An associate's guide to the practice of Copyright Law.(Oxford University Press, New York), 2009.p.5,7.

[xii] 2003 (2) Bom CR 655

[xiii] NOTICE OF MOTION (L) NO. 502 OF 2014 SUIT NO. 219 OF 2014

[xiv] CS(COMM) 753/2017

[xv] Supra Note 4.

[xvi] Supra Note 4.

[xvii] Supra Note 12.

[xviii] CS(COMM) 1329/2016

[xix] Supra Note 14.