



PHOTOGRAPHY AS AN ARTISTIC WORK UNDER COPYRIGHT LAWS

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ABSTRACT

Photography which is considered as a very common skill nowadays grants certain intellectual property rights to their owners. Now these rights can give certain economical, social and legal benefits to the owner therefore to determine who is the author of such work is essential. Under copyright act the author of the photograph have been granted certain rights but whether such copyrights to the photographers are justified. Isn't photography a machine's output where human interaction is minimal. And if copyright is to be granted how to define the artistic creativity in photograph or shall we consider all photographs worthy of a copyright in this millennial era. The paper also discuss about the stand of orphan works in photography and the Indian copyright laws on this. Later the paper discusses about the meaning of fair use in photograph and when it can be considered as fair use.

I. INTRODUCTION

"Photography is the story I fail to put into words."

- Destin Sparks

Photography isn't an alien concept to anyone in today's world every second person you will look around will be holding a camera

phone or any electronic device, capable of capturing a beautiful shot. Photography is a new trend amongst this millennial population but with this new trend certain new rights emerged and new laws and principles comes into picture. Photographs are protected under the copyright act under the term artistic work in Indian copyright Act, 1957¹. Any photograph taken by the author is protected by the copyright no other person can infringe his rights associated with such photographs however in some specific situations. Certain exemptions are provided. Photography is an art and it was recognized by the courts that even after the involvement of a machine it isn't excluded from the ambit of copyright. The act of photography involves human intervention it can be defined as a way of expression. Photographs depict emotions, feelings and perspectives. When someone looks at a photograph, he sees the subject, object or nature from the eyes of a photographer, the side of the story which the photographer is trying to bring out. *"There are always two people in a photograph- the photographer and the viewer"*. (Ansel Adams)

Photography and copyright

As per section 13 of the Indian copyright act, 1957 the act applies to

1. Original literary dramatic, musical, and artistic work
2. Cinematograph films and sound recording
3. Sound recording²

The original photographs are protected under artistic works, the quality of such work doesn't matter. As per the definition of artistic work given in section 2 (c)³ it is not

¹ S.13, The Indian copyright act, 1957

² Ibid

³ Ibid



necessary to possess artistic quality for a work to fall within the category of artistic work under the Indian copyright act 1957. The category of photograph includes photolithograph and any other work produced by the process which is on the line of photography. However, the cinematography films don't fall this as section 13 has a different category for it. Photograph can be defined as an art of taking pictures by chemical action of light and other radiation such as heat and x rays on sensitive film or other material and it embraces xerography and similar processes.⁴

Any photograph which is the outcome of a photographer's skill and effort will be eligible for copyright however mere replica of a normal picture won't be eligible for that.⁵ A common picture of a famous place taken with no skills and efforts is open to the rest of the world. However if the photographer has put in some efforts and used his skills by fixing the lights and arranging the objects, selecting the exact moment and sized of the photograph of the moving object and objects and someone else replicates the same to arrive at the same product this will amount to infringement the copyright. Thus, in photography the copyright arises in the moment when you took the picture unlike the painting and sculpture it arises in the split of the second

II. ISSUE WITH PHOTOGRAPHY DEVELOPMENT

1. Dual nature of photography

The copyright arises not at the mere instance of the idea but when such idea is expressed in material form however in case of the photograph it isn't produced in one go like a painting or a sculpture. It is developed on two levels

Firstly: it is clicked by the person and it remains in its negative form

Secondly: after the negative is taken out the are available only after the chemical and mechanical processes.

The issue which used to arise were:

1. When does the copyright arises, when the shot is taken or when it is produced in the material form?
2. Who owns the copyright when the production involves the labour of so many people?
3. Where technology is an essential part for the production of a material work can one effort be deemed as more creative over others.

Photograph and original work:

Initially the court suffered great difficulty in recognising the authorship in photography since the photography is a collective outcome of the work done at multiple levels.

The *Burrow-Giles Lithographic co. v. Sorony*⁶ is the first supreme court case to recognize the photography as a skill worthy of authorship and to be protected by copyright.

In this case there were arguments against providing the protection to photography **firstly** since it used to be considered as a work done by machines only and there is no constitution protection availability to it similar to that of the writing done by an

⁴ Hugh laddie et.al., The Modern Law Copyright (London, 1980), p. 111.

⁵ V.K Ahuja, Law relating to Intellectual property rights, 42 (3rd ed., 2019).

⁶ Terry S. Kogan, The Enigma of Photography, Depiction, and Copyright Originality, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 872 (2015).



author, *secondly* it was considered that it requires no human intellect and brain it is just the mirroring of the reality, i.e., n copying whatever is already present there.

The court decided the case on the grounds by finding human skills and efforts present in the work produced it gave the example of the maps and charts which are the subject matter of the copyright both are original writings of the author.

On the similar track the court held that photographs are liable to copyright protection as long as the “ideas in the mind of the author expressed”.⁷

The court said that an author is the one who owns, originates or makes something and the nature of the copyright is to provide the exclusive right to author over his own genius or intellect.⁸This judgment leads to the courts’ reliance on the photographer’s pre shutter activities which impact the pictures in a major way. This includes selection, arrangement, settings and framing of the angle for the shot which eventually will lead to the photograph hence intellectual property.

In this case, the court addressed the issue regarding the conflicts between humans and machines in respect of the copyright’s protected subject matter. It can be concluded that the picture of nature which was taken from the camera isn’t solely because of the existence of nature but it was the photographer’s perspective, his imagination, his view and his judgments which influenced his photography. It isn’t solely a combination of already existing objects, nature, or subjects and machine the photographer’s perspective

matters. A photograph is a result of his intellect, his skills and efforts.

By addressing the personal contribution, the court describes what copyright actually protects and it is the human intellect that has the will to produce such products which need protection it can be a painting a photograph or a drawing as well. By this judgment, the court didn’t ignore the rights of the people who take the pictures without paying much attention their rights may arise or may not it depend on the conditions which were apparent at the time of taking such photographs.

However, it can be said that if the work is done by the machines only it can’t be protected, there is no originality, it is only reproduction of the existing ideas, it can be aesthetic. Copyright protection is required for human productions.

Another principle that evolved is that not only the human being controls such machines for the photograph but the photograph must not be the “ordinary” one.

hence two morals developed from this

1. humans shall control the automation
2. the one who is inventive should be given the copyright.

Monkey case (Naruto v. Slater)

This case is an extension of the two morals that we discussed earlier.

Facts:

1. In this case, a British photographer David Slater travelled to a national park in Indonesia to click some pictures of the wildlife, there he followed a troop of monkeys and tried to get a close shot however

⁷ Burrow-Giles Lithographic Co. v. Saron, 111 U.S. 53 (1884)

⁸ Burrow-Giles Lithographic Co. v. Saron, 111 U.S. 53 (1884)



it wasn't possible for him to do so. Therefore, he left his camera on a tripod stand by adjusting the settings and let the monkey click the pictures. The first few shots weren't clear so he again changed the settings and got the perfect shots. The shot was sent to many agents and was published in daily mail; however, it went viral later on.

2. Later on, the same picture was posted by Wikipedia on its page contending that a monkey doesn't own copyright of this picture that can remain in the public domain.
3. In September 2015, People for the ethical treatment of animals (PETA) stating that the picture is a result of continuous action of the monkey (Naruto) therefore he owns the copyright.
4. In 2016 January the trial dismissed the PLEA by peta stating that animals don't have any standing in the court of law, therefore, can't sue for copyright infringement.
5. In between the PETA appealed the dismissal in a court of appeals in the 9th circuit, however it was all resolved through an out of the court settlement in which it was decided that Mr. Slater would donate 25% of his future royalty revenue to charities which will protect eh Indonesian crested macaques.⁹



We can draw an analogy between this case and *Temple island collections Ltd. v. New English Teas*¹⁰ where a famous black and white picture of the houses of parliament with a red bus crossing the Westminster bridge was the issue. Here in this case the picture was used by a firm used to sell London souvenirs. When the negotiation regarding the picture's license didn't end in successful result the new English teas went ahead and clicked another picture with different angle and setting but the same monochromatic view. When the copyright infringement case was filed the defendant argued that it wasn't an original piece of work.

Here the judge held:

Individual judgments about the selection of visual angle, motifs illumination plays a role hence the author has made decisions about the arrangement of the photograph he has a copyright.¹¹

⁹ Naruto v. Slater, No. 16-15469 (9th Cir. 2018)

¹⁰ Temple Island Collections Ltd v. New English Teas [2012] EWPC

¹¹ ibid



Here, in this case, the judge identified a series of actions required to

- The angle of shot, light, and shade, exposure and effects achieved with even filters and developing techniques
- The creation of the entire scene
- And being in the right place at the right time.

Conclusion: Now if we apply all these principles held by the judge as important factors in deciding the author's copyright, we can say that in monkey selfie case Mr Slater has the copyright over the picture. It can be concluded that he set the camera put it at a perfect place, adjusted the settings, adjusted the aperture for close shot, checked the settings and kept on waiting there he was in the right place at the right time.

2. Digital photographers' creative contribution:

Since with the digitalisation and accessibility of camera in our hands' photography is a dime a dozen nowadays. The copyright for photography needs to specific and purely towards artistic photograph. The broad horizon of the copyright law right now is actually compromising the art that 'photography' is and on what

'photographers' thrives on. The renowned photographers claim that today world is lacking the creativity now everybody is holding a camera there are tons of pictures available but the quality is decreasing. Photography can't be concluded as just a reproduction of reality it is an image through the lens of the photographer, it shows just more than the subject, the layers of perspective, layer so reality even in mundane things. The camera is a tool and the photograph is an art of the photographer on which he has worked like an artist.

Photographs helps the people to broaden their horizons. Their views towards the same subject, object takes a different lane. It is like watching a same story with different mindset. A photographer is the one who sets the stage, who decides the protagonist in a movie and tells the story from his perspective.

Many of the young photographers believe that there is a distinction between "taking photograph" and "making photograph". When a photographer makes a photograph they intentionally set the frame from a specific angle, from a particular perspective, with particular tools, selecting everything that will affect the photograph.

"A picture is a worth a thousand words", hence many photographers believe that it is the duty of the photographers to check what they are putting out there in public since the picture represents their perspective there can be another side to the story. There are so many horrible pictures circulating on the internet creating multiple issues on regular basis. It is considered as their ethical duty towards the world. The case of burrow



Giles¹² talked about the issue of automated images. By giving protection to ordinary images the court actually narrows down the path of the skilled and talented photographers. When there are so many ordinary pictures available it will eventually lead to the elimination of critical audience. People don't find more art and beauty in it. It becomes a regular affair for them. The copyright law in an attempt to expand the copyright protections is actually compromising on the aesthetic value, on which the market of the photographs work.

3. Authorship in photographs

Author of the photograph under section 2(d)(iv) in Indian copyright Act¹³ is defined as a person who is taking the photograph. The photographer will be deemed as the owner of the photograph and not the owner of the negative of the photograph.

Section 17 the act talks about the author of a photograph in different conditions.¹⁴

By summarizing this section to deduce who has the ownership over a photograph we will see that:

1. that the person who took any photograph with skill and effort will be the owner of such picture
2. if such photograph is produced by the person during the course of his employment in relation to the contract of service or apprenticeship for the reason of publication in newspaper, magazine or similar periodical than the proprietor is the owner. However, in another scenario the author will be the owner.
 3. when such photograph is taken at the instance of a person in exchange of

valuable consideration, such person will be the owner in absence of any agreement to the contrary.

4. Owner can be government, PSU and any international organization.

Section 22 of the Indian copyright Act says that the term exists till the lifetime of the author and 60 years after the year author died. so in total it exists till his/her lifetime + 60 year from the next year of his/her death.¹⁵

The copyrights given were over both tangible property as well as intangible. Because the intellectual property has resulted in the production of both. However it differs from

There is a landmark case on photographs authored here *Fairmount Hotels Pvt. Ltd. vs. Bhupender Singh (2018)*¹⁶ Where the pictures of the plaintiffs hotel were taken by the defendant and were posted on his Facebook page under the name of his hotel it was held that this is an unfair use of the of the photographs belonging to another person. The court held such any such an act done with mala-fide intentions to incur undue profits from it he will be held liable for unfair use.

III. ORPHAN WORK IN PHOTOGRAPHY.

What are orphan works:

Copyright work is said to be orphaned when the author of the work is untraceable. This can happen because of the various reasons such as :

- The author couldn't have been publicly known
- The work has been published anonymously
- Or never published at all

¹² Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884).

¹³ S.2(d)(iv) Indian copyright act, 1957

¹⁴ S. 17, the Indian copyright act, 1957.

¹⁵ S.22, Indian copyright Act, 1957

¹⁶ Fairmount Hotels Pvt. Ltd. vs. Bhupender Singh (2018)



- When it is impossible to locate the owner, such sorts of works include pictures documents stored in public libraries or museums.
- Another type is the one where the works are inherently informal, collaborative, or amorphous. Such works are very common in digital world.¹⁷

The orphan work creates issues for both the potential user of such work and for the photographer and other copyright owner. Because the potential user may desperately wants to use such work and may want to get the license to use the photograph. The potential user may have to put in a lot of efforts cost and time I finding the author of the orphaned work. And even though if the potential user may use such photograph of an unknown photographer with an unknown date of creation but later on what if the copyright owner comes in and files a case which will lead to high money damages or an injunction against such a potential user. This will put the potential owner in trouble. That's why most of the time the potential users don't use orphaned work.¹⁸ And for the photographer and other copyright owner he won't be able to use such work for his research or reference hence such work will be lost. The issue of orphan work isn't a minor work it is escalating with the digitalisation of the work.

It is leading to the wastage of the intellectual property since such property has been left redundant because there is no owner to claim such work.

Two possible reasons for the increment in orphan work are:

- Eliminations of all the registries and formalities to get the copyright under Berne convention.
- The extended term of the copyright. Under section 25 of the Indian copyright act the term of copyright over a photograph is 60 years from the date of publication of the photograph.

INDIAN COPYRIGHT ACT ON ORPHAN WORK

Section 31 A of the act provides that if a person want to use an orphan unpublished or published work or communicated to the public but withheld from the public or any other work whose author is either dead or unknown or cannot be traced he can do so by applying for the license to publish or to communicate such work to public. However, before applying for the license the applicant is required to publish his proposals in any an English language newspaper which is having circulation in the major part of the country. And if such work involves the translation to any specific language then in any newspaper in published in that specific language as well.¹⁹

So Indian copyright act thus provide a chance to use the orphan intellectual property.

Rights of the photographers

The rights of the photographers are given in section 14 (c) of the Indian copyright act.

in the case of an artistic work, —
(i) to reproduce the work in any material form including depiction in three dimensions of a

¹⁷ Yael lifshitz- Goldberg, Orphan works, WIPO seminar, available at https://www.wipo.int/edocs/mdocs/sme/en/wipo_sme

s_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf, last seen on 04.05.2020.

¹⁸ [ibid](#)

¹⁹ S. 31 A Indian copyright act , 1957



two-dimensional work or in two dimensions of a three-dimensional work;

- (ii) to communicate the work to the public;
- (iii) to issue copies of the work to the public not being copies already in circulation;
- (iv) to include the work in any cinematograph film;
- (v) to make any adaptation of the work;
- (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);²⁰

From all of the above-mentioned rights it can be safely assumed that it the 'owner' of the copyright who can reproduce his work. Anyone else who reproduced the same work in any material form without the consent of the authors infringes his right to reproduce even if does only some part of the work provided that part must be the substantial part.

As per section 14 the reproduction of work in any material form includes:

1. Storing of it in any medium by electronic or other means
2. Depiction in three dimensional of a two-dimensional work
3. Depiction of a two dimensional in a three-dimensional work.²¹

One of the most certain test to assure whether something is a coy of other is the **lay observer's test**: as per this test if a person who is not an expert who is a layman in relation to the description, the objects which were reproduced appear to him as the reproduction of the work, if that doesn't happen it wont account for an infringement

IV. REPRODUCTION OF COPYRIGHT WORK

Exemption under Indian copyright act, 1957;

Section 52 of the acts describe certain acts where the use of copyright material is **permitted**. In context of photography certain relevant acts are:

1. Fair use

The doctrine of fair use allows the unauthorize use of the excerpt of the copyright work for research, private study, criticism, news, reporting, teaching, review etc. on the basis of this doctrine the copyright work can be used by any person without infringing the copyright. The term hasn't been defined anywhere in the Indian copyright act. However, there is one test to determining the fair use it is to check whether the use is likely to affect the armlet value of the copyright work. The broad principles of fair dealing have been given by the Delhi high court in the case of *super cassettes industries limited v. Hamar television network private limited*.²²

What is Fair use in photographs

The purpose of the doctrine of fair use is to grant access to the copyright material to a limited extend if it benefits the public. While granting the immunity of fair use the court looks into the following aspects:

- **The purpose of the use:** this must be education, judicial, research, reporting, news reviewing and non profit
- **The nature of the use:** it should be fact based or public content
- **The amount and substantiality used:** using only a small part of the image or only a thumbnail or low-resolution version of the image

²⁰ S. 14 (c), The Indian copyright act, 1957

²¹ S. 14, The Indian copyright act, 1957.

²² 2011(45) PTC 70 (Del.) at pp 88-89.



- **The market effect of such use:** the user wasn't in a condition to buy or license such work

Can we consider altering photographs as a fair use?

In a landmark case of *Patrick CARIOU v. Richard PRINCE*²³ U.S. the US court of appeal discussed about the alteration in photographs when can it be considered as fair use.

Facts: Cariou a professional photographer took some pictures in mid of 1990s and then those pictures were published in 2000 in a book titled 'yes rasta'. Which was described by him as extremely classical work. Prince on the other hand is an appropriation artist, which means he directly take from another work of art a real work or an existing art and uses such art and incorporates them into his own work by changing the whole context. He tries to change the work of the artist into something unrecognizable. He took 28 pictures out of 'yes rasta' and altered the images and in 2008 in a canal zone exhibit at the Gagosian art gallery he featured 28 of the prince which were published in 'yes rasta'. A copyright suit was filed against him.

Judgment: The district court held that it wasn't a case of fair dealing and held him liable however the Appeal court heard him and held that Mr. Prince's work has created an entirely different aesthetic. The court held that prince's work has given a new expression to such photographs. Mr. Cariou photographs brings out the sense of serenity and are depicting natural beauty whereas

princes work brings a hectic and provocative expression. However, the court still sent back 5 princes work to the lower to determine whether they infringed the copyright as the change was very minimal.

The court in this judgment tried to expand the meaning of fair dealing. It was held that the whole expression has been changed therefore it bring out the new expression. Hence no tampering and affecting the reputation of the old work.



2. **Reproduction of work for judicial proceeding, legislative work, and with the certified copy made under the law.**

The acts section 52(1)(d) says that the reproduction of the work for judicial proceedings doesn't constitutes copyright infringement. However, the term judicial proceedings haven't been defined by the court therefore it can be considered as the any proceedings before any court, tribunal, commission or any person having the authority to do so.

The act's section 52(1) (e) also granted use of such copyrighted work by the secretariat of the legislature exclusively for the members of

²³ Patrick CARIOU v. Richard PRINCE United States Court of Appeals, Second Circuit. 714 F.3d 694 (2013).



the legislature isn't infringement of the copyright.

Such reproduction made under certified copy is also permitted by the section 52(1) (f)

unique to a person, what can be considered as a fair use of photograph is still a question of debate, to what extent a picture can be altered to claim it as a fair use.

3. Storing of the work in electronic medium by non-commercial public library

Section 52 (1) (n) provides that any non-commercial library public library can store the work in electronic form provided before doing so they have a non- digital copy of the work.

4. Use of the artistic work by the author himself.

It says any use of the artistic work by the author himself where he isn't the owner of the copyright isn't infringement of the copyright. And where such and work is used in another work. He isn't allowed to imitate the same thing, Under section 52(1)(v)

Conclusion

Photography is an artistic work, however, the copyright law fails to justify the artistic version of the photographs, by giving the copyright protection even to a photographer who has put in minimal efforts, it is actually jeopardizing the real art which photography is. In this digitalised era where 5 photos are getting added to someone's Instagram account every hour. The copyright law for photography must dwell into the aesthetics of photography and try to protect the intellectual property which is actually worthy of protection. The whole business of art certainly revolves around aesthetics, emotions and skills. Photograph is an author's expression to the world how he sees it. Every picture is telling a story from a photographer's perspective. It is something

