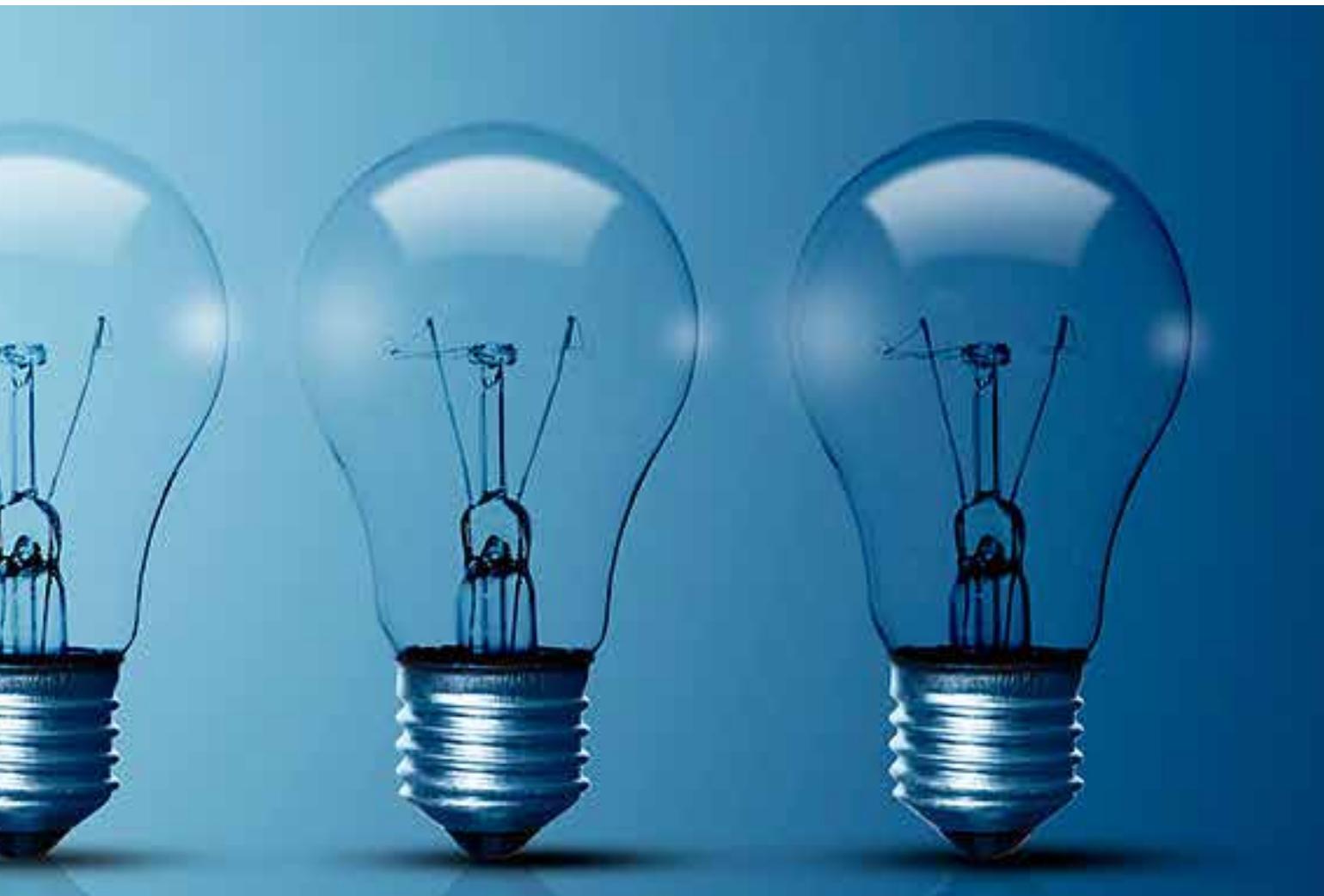


Transformative Metamorphosis Under Copyright Law

Transformative works form the bedrock of the doctrine of "fair use" as such works offer and assure breathing space within the precincts of the law



A lot of people take inspiration from other's copyrighted work to create something new, whether it is a movie, song, or painting. No matter whether the inspired work is adaptive work, derivative work or transformative work, the question is whether a person is legally allowed to do so or not? To know the answer, it is imperative to know and understand the copyright law.

Copyright is the most interesting as well as important aspect of Intellectual property. It is the exclusive right of a creator over their literary, musical, and artistic works. The primary purpose of Copyright law is to protect the creative expression of an idea that it is transformed into a book, musical work, film, painting, etc. However, before we delve deeper, it is important to understand the concepts of adaptive work, derivative work and transformative work and whether it is permissible as well as protected under the copyright law.

Although adaptations, derivatives and transformative works are similar, transformative work belongs to a completely different genus as opposed to derivative work and adaptive work.



Aishwarya Chaturvedi

Associate, Singh & Singh Law Firm

- **Adaptation** - It pertains to work that is same as the original work that is presented in a different format. For example: Harry Potter, the famous fantasy novel has been adapted into movie. Here, the original work is a book and the movie is its adaptation, which means the new work is same as the original work and only the format of presentation has been changed.
- **Derivative works** - Artistic or literary work derived from one or more existing works but includes sufficient element of originality. The Spanish translation of Dan Brown's novel "The Da Vinci Code" is an example of a derivative work.
- **Transformative works** - It is a work that is completely new but has taken inspiration from an existing copyrighted work. For example: The famous Indian singer and lyricist, Dr Bhupen Hazarika took inspiration from Paul Robson's Old Man River and made the song "Bistirnapaarore", which he later translated to Bengali and Hindi. In this song, he had changed the lyrics of the song completely but the essence of the original song i.e. Old Man River is not changed.

The concepts of derivative works and adaptive works are similar but the concept of transformative work is completely different.

The copyright law not only protects the original work, it also forbids people from making adaptations of protected works without seeking permission from the copyright owner of the original work. However, if the adaptation is done by seeking permission or the work that has been adapted is in the public domain, the adapted work becomes eligible for copyright protection.

It is important to note that adaptation as per the Indian Copyright Act is a mere conversion of work from one format to another. For instance, a conversion of novel into a screenplay or a photograph converted into a sculpture, etc. In case of adaptation, it is not taken into consideration whether a significant amount of new material is added to the adapted work.

It is also important to note that adaptive work is eligible for protection under the Copyright law, if it is done by seeking necessary license from the creator of the original work or the original work that has been adapted is in the public domain.

Similarly, in case of derivative work, original work would be infringed in absence of a valid license agreement between the owner of the original work and the creator of the derivative work from the original. But what about transformative work?

Since both adaptive work and derivative work depend considerably and use original work, the risk of copyright infringement is high. However, in case of transformative work, it only takes inspiration or makes use of raw data of

the original work; primarily an idea, which is not protectable under the copyright law.

Let us discuss the concept of transformative work in detail. Transformative work is essentially work that draws upon existing works and transforms expression from them to creating new work that criticizes, comments upon, or offers new insights about those existing works and the social significance of others' expressions. The United States Copyright law allows transformation as a possible justification for copyright infringement as such work qualifies for fair use. The concept of transformative use was brought into copyright law as a refinement of the concept of fair use, especially of the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes" (U.S. Code Title 17, Chapter 1, § 107).

In the celebrated case *Patrick Cariou Vs. Richard Prince*¹, the concept of transformative work was analyzed. Here, Patrick Cariou had published a book of photographic portraits taken in Jamaica and Richard Prince, a renowned artist, added some content of his own on some of the portraits of Cariou's book and exhibited his collection at Gagosian Gallery in New York as appropriation art. Consequently, Partick Cariou filed a copyright infringement suit against Richard Prince, the founder and owner of the Gallery and RCS MediaGroup (which printed the exhibit catalog). The Southern District of New York (SDNY) held that Prince's works were infringing and were not transformative work. However, the Second Circuit reversed the decision of SDNY as it found that Prince's works were indeed "transformative" to a "reasonable observer" and therefore fair use. The Court found the works to be transformative if they presented a new aesthetic.

The copyright law in the United Kingdom envisages a 'substantial part' doctrine, which essentially permits transformative use. Furthermore, the copyright law in the United Kingdom allows a fair use defense, of which commentators have seen transformative use as an element. The substantial part doctrine may be seen as protecting transformative use. Where the subsequent work does not retain a substantial part of the prior work, the secondary work is protected: as long as what has been taken from a prior work has been changed enough so that no 'substantial part of the plaintiff's work survives in the defendant's work', a defense will stand.

In India, the concept of transformative work has been established almost a decade back in the landmark judgment *The Chancellor Masters & Scholars of The University of Oxford Vs. Narendera Publishing House and Ors.*² In this case, the Plaintiff, Chancellor Masters & Scholars of The University of Oxford, a well-known publisher of academic books, published a text book for the students of Class XI and per an agreement, copyright in the said textbooks

¹ United States Court of Appeals, Second Circuit. 714 F.3d 694 (2013). ² ILR (2009) 2 Del 221. ³ (2011) 185 DLT 246 (DB).

vested with the publisher. However, in 2005, it came to their notice that the Defendant, Narendra Publishing House was publishing guide books on mathematics comprising similar questions and thus, the Plaintiff filed a copyright infringement suit against the Defendant. Here, the Plaintiff claimed copyright in mathematical questions and answers published in their textbooks therein. Hon'ble Justice S Ravindra Bhat pertinently held that the doctrine of fair use or fair dealing is an integral part of copyright law. It permits reproduction of the copyrighted work or use in a manner, which, but for the exception carved out would have amounted to infringement of the copyright.

The Hon'ble Court after referring to a number of authorities on the subject observed that the same idea might be developed in different ways and if the defendant's work is nothing but a colorable imitation of the plaintiff's work, then it would amount to infringement. It set out the following as the test for determining infringement:

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

Remarkably, the Hon'ble Court, propounded a principle resembling the 'transformative work' doctrine developed in the United States much later. The Hon'ble Court held as follows:

“Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.”

The purpose and manner of use of the questions found in the plaintiff's textbooks, by the defendants was found to be different. Thus, the defendants' works were said to be 'transformative', amounting to review under Section 52 (1) (a) (ii) of the Act.

Similarly, in *Syndicate of The Press of The University of Cambridge Vs. B.D. Bhandari & Anr.*³, a bench comprising Hon'ble Justice A.K. Sikri and Hon'ble Justice Suresh Kait, upheld the judgment in *The Chancellor Masters & Scholars of The University of Oxford Vs. Narendra Publishing House and Ors* and held that the task is to ascertain whether the newly created work is substantially different in character than the original work and does not comprise of superficial changes/alterations. The Hon'ble Court further held that another aspect which needs to be taken into consideration for ascertaining whether such

work is transformative in nature is to determine whether the purpose of such work is substantially different from that of the original work.

The aforementioned judgments form the law of the land and establish that the concept of transformative work pertaining to literary work comes under the umbrella of Fair Use. However, the law pertaining to transformation of musical works is arguable and relatively undetermined. It is crucial to understand that if a song is created by taking inspiration from an existing popular song with no substantial similarity between the two works in terms of verbatim use of the lyrics or the musical composition of the song, the new song thus created is transformative work because a new work is created which serves a different purpose, caters to a different audience and is substantially different in character. For instance, as mentioned above, the famous Indian signer and lyricist, Dr Bhupen Hazarika took inspiration from Paul Robson's "Old Man River" and made the Assamese song "Bistirnapaarore", which he later translated to Bengali and Hindi. The song is not just a mere translation of the original song but is fundamentally a completely new song and only the idea behind the song, (which is not copyrightable) has been used in creating it. Therefore, such musical works also ought to be recognized as transformative works and hence, be construed as part of the "fair use" doctrine. Conversely, it is imperative to understand that a musical work which merely repackages/ recreates/republishes the existing musical work would not result in transformative work and instead would amount to copyright infringement as the copyright law does not envisage exploitation or use by a person of copyrightable work without acquiring due permission from the owner/ creator of such work. For example, Late Shri Kishore Kumar's celebrated Hindi song "Roop Tera Mastana" originates from a Bengali song of Late Shri Kishore Kumar himself which even though is not a verbatim translation of the Bengali song but retains the musical composition of the said song in its Hindi version. In such a situation, the said work cannot be said to be transformative as someone else's musical composition has been borrowed and retained even though the lyrics are different. Therefore, such work would not constitute fair use but would amount to copyright infringement in the event such work is exploited without taking due permission from the producer/ owner of such song and without payment of appropriate royalties.

The aim of copyright law is to promote arts and science and the concept of transformative works fosters the same. Therefore, it can be said that transformative works form the bedrock of the doctrine of "fair use" as such works offer and assure breathing space within the precincts of the law.

