Promoting Entrepreneurship and Protecting Copyright of Authors: Revisiting to the Traditional Meanings of Originality and Authorship of Copyright Law

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Abstract- *In this paper, it is argued that even today's changing face of objectives of copyright protection and its underlying rationale have a direct bearing on some issues of copyright law. For example, from the very inception of the evolution of copyright law, it was thought that the primary purpose of recognition of this right is to protect the rights of author or creator of a work rather than that of securing the rights of the person who has made arrangements to complete the work by way of organizing matters and providing necessary financial assistance. This phenomenon is yet accepted in copyright law and even further advocated by writers highlighting that copyright is a way gives property rights in relation to mental labour or intellectual creative labour. In other word, arguably copyright rests on creativity rather than investment!*

Despite following the same principle in application and enforcement of copyright law, trends of modern copyright law is much more favourable in determining and securing the rights of these investors or, in other word, as commonly known, entrepreneurs rather than that of the rights of real authors or creators. This situation is obviously reflective in some copyright concepts such as copyrights of employer, joint ownership/authorship or co-authorship, concept of moral rights etc.

This paper analyses the dominating nature of copyright ownership of enterprises/ investors and private organizations over the traditional copyright ownership of actual creators of works and recommends necessary limitations to be imposed upon entrepreneurs in acquiring full copyright ownership by analysing the concept of joint authorship and moral right under copyright law. It further emphasizes the importance of providing a broad definition for the idea of originality in the context of the present copyright law development in Sri Lanka.

Keywords- copyright, originality, authorship, entrepreneurship

I. INTRODUCTION

It has been viewed by many writers that recent development of copyright law and its emerging trends are closely connected with the modern scientific and digital technological development of the world that they have a direct and inevitable impact on the rights of copyright owner such as copying, reproduction, adaptation, distribution and rental (Spinello & Tavani, 2005; Flanagan & Montagnani, 2010). However, in this paper, it is analysed that, apart from the impact of scientific progress in the mode of digital technology, which make it difficult to realize the true nature of potential piracy and the rights of the copyright holder, even the changing face of *objectives* of copyright protection and its underlying rationale have a direct bearing on some issues of copyright law. For example, since very inception of the evolution of copyright law, it was thought that the primary purpose of recognition of this right is to protect the rights of *author* or *creator* of a work, rather than securing the rights of the person who has made arrangements to complete the work by way of organizing matters and providing necessary financial assistance (Chandra, 2010; Davis, 2012; Bentham, 1962[1839]). This was evident from ancient times when the Statute of Anne, commonly known as the first Act on copyright law passed in England, which provided that the author becomes the owner of copyright and the author of a book had the sole printing right on that book for 14 years (Statute of Anne, 1709). This phenomenon is yet accepted in copyright law and even further advocated by scholars highlighting

that copyright is a way that gives property rights in relation to *mental labour* or *intellectual creative l*abour (Chandra, 2010; Flanagan, 2010).

It can also be argued that this phenomenon is mainly stemmed from the two main traditions of this law called **copyright Law** *(Common Law tradition)* and **authors' right** (Civil Law tradition). 'Creativity' of a work as a main requirement in proving originality is basically recognized by the latter. Cornish (2010) opines that Authors' rights systems take as their starting point the intellectual act of formulating a "work" and, therefore, tend to maintain in their law some initial criterion relating to creative expression. This differs in intent from the common law test that what is not copied is original.

As mentioned, arguably it is a basic doctrine of copyright law that **copyright rests on creativity rather than investment**! This ideology, which is mainly originated from the continental copyright law, is also has a concrete philosophical basis. One scholar analyses; "In the tradition of continental copyright law (*droit d' auteur*), the already noted subjective character of the notion of originality, corresponds to the primary natural law-conception (that Hegel borrowed from Kant) of creative works as an expression of the human personality (giving rise, in the French version, to proprietary title, 'la *proprietela plus sacree'*, in the fruits of one's own labour. As a result, creative works are protected as such, irrespective of the mediocrity or otherwise, of the expressive results" (Ghidini, 2006).

Despite following the same principle in application and enforcement of copyright law, trends of modern copyright law is much more favourable in determining and securing the rights of *investors* or, in other words, commonly known as, *entrepreneurs* rather than real authors or creators. This trend is obviously reflected in some copyright concepts such as copyrights of employer, joint ownership/authorship or co-authorship and in the concept of moral rights etc.

This is illustrated by Section 14(4) and 14(5) of the IP Act of Sri Lanka which grant the ownership of copyright to the employer for the work done by an employee 'within the employment' and grant ownership of copyright of a commissioned work to the 'commissioner' of the work.

Today, effectiveness of copyright protection is not only dependent on the relationship between right owners and users of copyrighted works. In fact, the effectiveness, as well as the efficacy of this protection, is also determined by the relationship between *creative - author* of a work and entrepreneur, who has initiated, arranged and organized the particular work even by way of commissioning and employing creative authors and other artists. Hence, if this relationship is not properly recognized and secured by means of defining some existing copyright concepts by broadly and providing more liberal and flexible meanings to them, the future protection of copyrights through its enforcement and implementation by courts and other administrative authorities will be at stake. It is therefore submitted that whatever internal conflict that may arise between the **creative author of a work** and **investor or organizer** of a work should be first settled.

In UK, there are several attempts to settle this issue. Cornish (2010) illustrates that one of such attempts is having an agreement between author and entrepreneur. Thus publishers might agree upon the maximum rate of royalty that each would offer authors for certain types of copyright exploitation. The controversy between the producer (investor) of a film and the first (principal) director (author) has also been settled by granting copyright for the principle director of a film. In compliance with EU directives, Article 2(1) of the Duration Directive requires the principle director of a film made after July 1, 1994 to be given a copyright equivalent to that of other true authors.

As mentioned above, this dispute of conflicting interests of author/creator and entrepreneur is clearly manifested in some traditional concepts of copyright law such as moral rights, joint authorship and works done under an employment or commission.

II. MORAL RIGHT ISSUE

Moral rights are generally vested with the original author/creator despite the fact that the copyright ownership is given to the same or is vested with another person. Chawla (2013) examines moral rights have their origin in the "*droit moral"* enjoyed by authors in various European countries,

notably France, Germany, and Italy. It refers collectively to a number of rights, which are more of a personal than commercial character. Section 10(1) of the Intellectual Property Act of Sri Lanka provides that the author of a work shall independently of his economic rights and even where he is no longer the owner of those economic rights have moral rights. Article 6bis of Berne Convention also emphasizes that "independently of author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object o any distortion, mutilation or other modification of the work"(Berne Convention, 1971). Hence moral rights are commonly known as the right to be identified as the author of a particular work (paternity rights), right to object to a false attribution and right to object to derogatory treatment (right of integrity).
In the modern development of copyright law, the importance of moral rights has increased even though some critics argue in converse. For example; while recognizing the importance of moral right in the present scenario, Cornish argues "equally, the innocent author may well need more help in realizing his economic potential than in protecting his essential relationship to his work." (Cornish, 2010) Further, Davis points out; "In UK, it is fair to say that copyright law is primarily concerned with protecting the rights of the owner (not always the creator) to exploit a work economically". He further emphasizes weaknesses of moral rights; "paternity right must be specifically asserted by the author to have effect. All of these rights may be waived by consent... Moral right may be expensive to enforce, and the outcome of such an action may be uncertain." (Davis, 2012)

However, now there is a tendency of recognizing moral rights which not only belong to authors of a work, but even to other right holders such as performers and entrepreneurs. For example; section 205 C of the UK Copy right, Designs and Patent Act of 1988 (CDPA 1988) provides that there are rights to be identified where qualifying performances are given in public or broadcast live, or where a sound recording of a qualifying performance is communicated to the public or copies are issued to the public. Section 205 F of CDPA further recognizes performer's right against derogatory treatment.

This trend is mainly emerged due to modern technological and digital involvement with copying, performance, broadcasting and fixation of work and their direct impact of multiplication of piracy. Hence in the present development of the copyright law, this moral right concept can be applied to remedy several drawbacks of the system, in particular, to protect authors' rights that are generally undermined or neglected by the prominent impact of economic rights of the copyright holder.

III. CINEMETOGRAPHIC WORK/FILMS

Unlike some other main intellectual property jurisdictions such as USA, UK and India, there is no direct recognition of Cinematographic work/films under the intellectual property Act of Sri Lanka. The Act only recognises audiovisual works in which cinematographic works may also be protected. Therefore, when recognising the ownership of copyrights including economic and moral rights of the owner of a cinematographic work, Sri Lanka copyright law faces some difficulties.

On one hand, this work involves the rights between the person who initiates a work and makes necessary arrangements to complete it by way of getting skilled and non skilled labour, supplying necessary financial assistance and, on the other hand, the rights of the other person who contributes his knowledge, intellect and creativity to make the final product a success. If producer of a film is identified as the 'author' of the work due to his role as the 'parental' contributor over the initiation and completion of the work (whole production), logically, both economic and moral rights should be vested on him as he is the copyright owner and the author of the film. But in practice, in a cinematographic work, there may be many 'authors' who actively contribute to the completion of the work such as art director, musical director, principle director. Recognition of moral rights of these every 'author' becomes a more complicated issue if their separate authorships are expected to be recognized while the sole ownership of the producer over the 'every aspect' of the film has also been upheld.

It is arguable that this issue can be settled through proper recognition of moral rights of parties whose sole contribution to the work is also significant. Perhaps audiovisual works such as

films, tele-drama and some other musical works such as operas can be recognized under the broader category of *collective* works under the Sri Lankan law. With respect to works that come under the category of collective works copyright ownership goes to the person who initiated the work, that is, most probably the entrepreneur. Simply putting, this is an issue between the producer of a film and the principal director.

Until recent time, in many parts of the world, the ownership of a film including its copyright is given to the producer neglecting the constant demand made by directors for recognition of their separate copyrights. For example, under both the 1956 and 1988 Acts in UK, the person who undertook the arrangements necessary for the making of the film, that is normally the film producer, in his capacity as financial and administrative organizer was accorded the copyright in it. However by the year 1994, the standard expected to be achieved by UK was to comply with the Duration Directive which requires the principal director of a film to be considered as one of its authors. However in UK now, even going beyond the required standard, copyright in a film is given jointly to the producer and to the principal director (Cornish, 2010).

Hence it can be argued that under UK law, not only the moral rights of directors of films have now been secured but also their (authors/directors) demand for "equitable" or "proportional" remuneration for the contribution made by them has also been achieved.

In Sri Lanka, the acquisition of these rights by film directors is questionable as there are no expressed provisions or regulations on this right. In such circumstance, applicable provision is section 14(5), which provides; "in respect of audio visual work, the original owner of economic rights shall be the producer, unless otherwise provided in a contract" (Intellectual property Act, 2003). According to this, the producer of a film can be considered as the copyright owner. However, the co- authors of the audiovisual work (film) and authors of the pre-existing works, included in, or adapted for, the making of the audiovisual work can maintain their economic rights in their contribution, to the extent that those contributions or pre-existing works can be the subject of acts covered by their economic rights separately from the work (IP Act, 2003). However this section is silent about the moral rights of these authors whose separate contributions are made to the completion of the work (film).

On the other hand, according to section 14(4), if the contribution of the main director of a film is considered as a work commissioned by the producer, the owner of economic rights shall be, unless otherwise provided in a contract, with the person who commissioned the work. However, it is notable that, in these two situations only economic rights are given to the producer. As moral rights are inevitably vested with the author, it can be argued that a director of a film, (being qualified as an author of that particular work,) is entitled, under SL law, to be identified as the "author" of the work and is further entitled to enjoy moral rights such as right to object any distortion, mutilation or other modification of the work.

The production of a cinematographic work can be done by different means. If the work is purely initiated by the producer hiring other contributors such as directors, actors and musicians, the ownership of copyright of the producer can easily be presumed. But in circumstances where the other contributors' involvements for the completion of the work are as pivotal as the producer, the same presumption can not be applied. In such situations, the researcher is of the opinion that there are some lessons to be learnt from the Indian experiences. In India, it is the basic rule that the author in relation to cinematograph film is the producer. However, where a cinematographic film is made for valuable consideration at the instance of any person, such person in the absence of any agreement to the contrary is the first owner of the copyright. Where a cinematograph film is made in the course of the author's employment under a contract of service, the employer is the first owner in the absence of any agreement to the contrary (Copyright Act, 1957[amended 2012]).

IV. MORAL RIGHTS AND ISSUE OF NEIGHBOURING RIGHTS

It is a well settled law in countries including several international conventions that under neighbouring rights, three types of "intermediary" works are protected; namely contribution of performers, sound recorders and broadcasting organizations.

Generally their rights are not protected under copyright law as their contribution can not be identified as a "creator-author" work. He/she or "it" is the person who makes necessary arrangements; for example, for making sound recording or broadcasting. Their rights are protected under *neighbouring* or *related rights* which is a related aspect of copyright law. Under this law they are only entitled to exclude others from unauthorized fixation, reproduction and broadcasting of their works.

Generally, as moral rights are vested with authors/creators of an original work, it is questionable whether any sound recorder or broadcasting organization is entitled to enjoy these rights. As far as sound recorders and broadcasting organizations are concerned, is there any possibility for them to seek legal remedy on the ground of mutilation, derogation of their works by a third party? Is it possible for sound recording or "broadcasting" to be *derogated* or mutilated by a third party under the impact of digital technology? Answers to these questions are not clear under the traditional intellectual property law regime.

In the strict application of legal principle of law in relating to moral rights, the above rights are somewhat difficult to enforce. In other words, traditional moral rights or neighbouring rights law concepts are not capable enough to remedy these issues.

V. COPYRIGHT PROTECTION' OF NEIGHBOURING RIGHT HOLDERS

It is noteworthy that despite the need for proving the fact that the claimant is a "creator- author" in a work for its copyright protection, with respect to rights of sound recorders and broadcasting organizations, in many jurisdictions including UK, the law has been developed to grant copyright protection over their rights. As discussed in the inception of this paper, it seems that this new law is developed in the phase of the modern trend of commercializing literary and artistic works to protect organizational and financial interests of investors and entrepreneurs. The very nature of copyright protection of these two categories is recognized currently under UK law. Cornish further argues, "law has developed in order to protect investment, not creativity, and therefore do not depend upon any level of aesthetic achievement" (Cornish, 2010).

In comparison with the rights of sound recorders and broadcasting organization, performers have very limited scope of protection under related rights/neighbouring rights concept. In fact, they are entitled only to exclude others from fixation, reproduction and broadcasting of their "unfixed" or live performance. A performer, e.g. signer, may also not be entitled to oppose any derogatory or mutilated action committed against his voice or other performances, either through modern technology or human activity which may affect badly his honour or reputation as moral rights subsists with the author.

VI. PERFORMERS' RIGHTS

Under this sub topic, the researcher examines the possibility of protecting performers' rights under the concept of joint authorship.

The question 'Who are joint authors'? is sometimes questionable under different jurisdictions. According to section 05 of the intellectual property Act of Sri Lanka, work of joint authorship is interpreted as a work or creation for which two or more authors have contributed, provided that the work does not qualify as a collective work. (in collective works, though several person's contribution to the completion of the work is important. Generally, there is a single physical person or legal entity who initiates the work and gives necessary directions to create the work and hence he is recognized as the original owner of the economic rights) (IP Act, 2003). Section 14(2) further explains ownership of joint authorship; "In respect of a work of joint authorship, the co-authors shall be the original owners of the economic rights. If, however, a work of joint authorship consists of parts that can be used separately and the author of each part can be identified, the author of each part shall be the original owner of the economic rights in respect of the part that he has created". (IP Act, 2003)

In Sri Lanka, it seems that there is a possibility of identifying joint authorship in two ways. Firstly, as works consisting of parts that can be used separately and the author of each part can also be identified separately. Secondly, works in which the contribution of each joint authors to the work can

not be clearly distinguished from each other e.g. a painting made by two artists where their individual contribution can not be separable. In many other jurisdictions including UK, the concept of joint authorship is recognized in association of this second notion in which the distinct contribution of joint authors are not clearly identifiable. There, each must provide a significant creative input to the expression of the finished work which is not distinct from the contributions of others. Explaining UK law on joint authorship, Cornish comments; "each must provide a significant creative input to the expression of the finished work, which is not distinct from the contributions of others. (Cornish, 2010) Chawla explains the legal position of India on the same matter. "A work can be created by two or more persons jointly. A work of joint authorship according to section 2(z) of Copyright Act means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors".(Chawla, 2012)

It can be argued that in Sri Lanka, if this "separate joint authorship" concept is acceptable, rights of contributors of a work like a song can be protected under this joint author concept by giving the contributors of the work; namely, the lyricist, musical composer and the signer "property rights". However, it must also be mentioned that regarding song, the legal approach of United Kingdom is completely different from this idea. Cornish justifies the non- protection of song under the concept of joint authorship. "joint authorship does not arise where a creative work is compounded of parts that demand discrete forms of mental activity: the text and music for a song or opera...In such cases there are distinct copyrights, each with its own duration measured by relation to the life of the relevant author, each requiring for its exploitation the assent of the owner of that particular right." (Cornish, 2010)

Hence protecting performer's right (particularly rights of a singer) under the concept of joint authorship is a contradictory approach which will disregard the principles and legal acceptances of the main intellectual property jurisprudences of the world. In solving this problem, some lessons can be learned from other jurisdictions where rights of performers have been expanded and more strengthened.

VII. NEW TREND OF PROTECTING PERFORMERS' RIGHTS

However, this problem of interpretation of existing copyright concepts in order to "empower" the rights holders under copyright law will not arise if law making authorities are confident to expand the relevant law by initiating law making process like in UK where performers now have rights in four main categories.

1. Rights in copies- Performers have four basic property rights, giving exclusive rights to reproduction, distribution, rental and lending. (CDPA 1988 ss. 182A,B,C,D) It is notable that in many other jurisdictions, these rights are generally vested only with copyright owners)
2. Non- proprietary rights against bootlegging- Includes all performers rights that are provided internationally (e.g., TRIPS) such as initial fixation and the live broadcasting of performances.(CDPA 1988 s. 182.)
3. Remuneration right in public uses- A commercially published sound recording of a performance is played in public or broadcast to the public, the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording. (CDPA 1988 s. 182D.)
4. Moral rights- Surprisingly these moral rights are broadly given to a performer who has never been recognized as an *author* under traditional copyright law, basic rights are identified and in addition, the right to object to derogatory treatment is also recognized under this. For example, the right to object to derogatory treatment arises where a qualifying performance has been broadcast live or is played in public or communicated to the public via a sound recording with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer.(CDPA 1988 s. 205C, 205D, 205E, 205F)

India, by its 2012 amendment to the Copyright Act, introduces both economic and moral rights for performers. (With respect to their performances) For example; section 38 B, a new addition to the Act, provides that performer has right to claim to be identified as the performer of his performance and to restrain or claim damages in respect of any

distortion, mutilation or other modification of his performance that would be prejudicial to his reputation (Copyright Act, 1957[amend. 2012]). It is submitted that this '*prejudice to the reputation*' is a logical ground that can be used by courts in determining the damage occurred to the plaintiff and granting remedies irrespective of his/her status as copyright owner or a performer.

VIII. ROLE OF THE COURT

Further, this problem and even the *moral rights* of other two categories can be effectively addressed if courts are competent enough to give liberal interpretations for these rights. Cornish comments "no matter whether copyright ownership is with someone but what court should consider is whether particular action amounts to a "derogatory treatment" to the plaintiff or is an act prejudice his "honour and reputation".(Cornish, 2010)

Then the issue of *authorship* of the work will not arise as the court is expected to consider the case on the basis of possible prejudice that occurred to the honour and reputation of the claimant.

IX. CONCLUSION

In the phase of today's' copyright development, in granting economic or moral rights, the traditional division of creative work and organisational work is no more important. The idea "creator- author" should be interpreted to mean not as 'creative author', but as the author who 'created' a work. This 'creation of work' may even include any entrepreneurial work done by a skilful investor. The notion that "copyright rests on creativity rather than investment" is now an idea which requires a legal refinement in the light of contemporaneous development of copyright law. Today's copyright law, while attempting to respond to diverse repercussions emanating from the rapid development of technology, is now in the phase of identifying its challenges. These challenges are emerged due to changing interests among right holders such as authors/creators and investors and entrepreneurs of a work. Efficacy and the effectiveness of future copyright law is largely dependent on how legal enforcement bodies are competent adequately to define and refine the nature of the rights arising from copyright protection to meet with different interests of both "intellectual skills" holders and "organizational skills" holders. In absence of such enforcement mechanism, introduction of an effective legislation identifying and clarifying rights of those who make different contributions to complete a "publicly beneficial literary, artistic or audiovisual work" will be the only alternative.

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