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Contract For Service and Contract of Service Under the Copyright Regime

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The concept of ownership- First Ownership

Authorship and ownership have long been closely intertwined in copyright law. Indeed, one of the notable features of the 1710 statute of Anne, in the U.K. was that it recognized authors as first owners of the literary property they created. The basic formula is repeated in the Indian Copyright Act of 1957 which declares that the author of the work is the first owner of copyright.[1] The rule that copyright initially vests with the author is, however subject to number of exceptions. The first and the most important concerns works made by employees. Exceptions also exist in relation to crown copyright, parliamentary copyright, and to works created by officers of international organizations. Judicially originated exceptions also exist where a work is created in breach of a fiduciary duty or in breach of confidence.

Before looking at these in more detail, it is important to note that, although the author is usually the first owner, it is possible for an author to assign his or her copyright to third parties. This means that the question of who is the copyright owner at any particular point of time will depend upon what has happened to the copyright since it was first created. since valid agreement can be made in relation to the transfer of future copyright, it may be that, when copyright arises, the first owner of copyright under the statutory scheme is immediately divested of their rights in favour of an assignee. It is also important to note that, while the law recognizes that a person other than the author may be first owner, the question of who is the author remains a distinct one (and an important one). A work made by an employee author, for example, has duration dependent on the life of the author (i.e., the employee) even if the first ownership is vested in the employer. Equally, issues of qualification and moral rights are determined by reference to ownership (not first ownership).

Works created by an employee

Section 17(a) and 17 (b) of the Act provides that, in the absence of an agreement to the contrary, where a literary, dramatic, musical, or artistic work, or a film is made in the course of employment, the employer is the first owner of any copyright in the work.[2] While employee retain moral rights in the work they create, these are subject to a number of limitations.

Critics have suggested that, by granting first ownership of the work created by employees to employer, British law fails to provide creators with sufficient additional incentives to create. It is also said that British law fails to acknowledge the natural rights which employee author have in their creations. In doing so, it is said that British law fails to follow the underlying rationales for copyright. In response to arguments of this sort, it is suggested that, while employers might not create works, they provide the facilities and materials that enable the act of creation to take place. In so doing, they make an important contribution to the production of new woks. It is argued that granting first ownership to employers encourages employer to invest in the infrastructure that supports creator. As employers are often in a better position than employees to exploit the copyright in a work, it is also suggested that it makes more sense to give copyright to employer than to employees. Another argument in favour of giving ownership to employers is that, in the absence of a provision that formally granted first ownership to the employer is that in the absence of provision that formally granted first ownership to employers is that, in the absence of a provision that formally granted ownership to employers, employers would require employees to assign their copyright to them. As section 11(2) achieves what would otherwise happen in practice, it thus serves to reduce transaction costs. In response to the argument that, in granting first ownership to employers, employees are not properly rewarded for their creative efforts, it is suggested that employees are rewarded through other means, such as pay, continued employment, and

promotion.[3]
However problematic may be the arguments in favour of granting first ownership of employee works to employers, they have dominated policy changes that have been made in this area. In particular, while under copyright act, 1956 employee journalists presumptively shared copyright with newspapers, this 'anomaly' was removed in the 1988 Act.[4] As a result, under the current law

2 Lionel Bentley And Brad Sherman, Intellectual Property Law (3d ed. 2009) Pg. 28

3 *Supra* note 2

4 Section 17 (a), Copyright Act, 1957.

copyright in all works made in the course in the employment belongs to the employer (unless there is an agreement to the contrary).
For an employer to be first owner of copyright it is necessary to show that (i) the literary, dramatic, musical, artistic work, or film was made by an employee; (ii) the work was made in the course of employment; and (ii) there is no agreement to the contrary.[5]

Definition of an Employee

An employee defined in1988 Act if the U.K. as a person who is employed under a contract of service or apprenticeship.[6] A contract of service is frequently distinguished from a contract for services. In general, it is easy to determine whether someone is an employee or not. However, there are many different sorts of work relationship, some of which are less easy to designate as employment relations. In such situations the courts tend to focus on whether there is the so-called 'irreducible minimum' necessary to give rise to an employment relation: namely 'mutuality of obligation' and 'control' if these two factors are present the relationship might be one of the employments: if they are not present, it is not. However, these factors are not of themselves conclusive. The court will examine all other relevant aspects and provisions to establish whether they are consistent with a contract of service.

(i) 'Mutuality of Obligation' In an employment relation the employer undertakes and is bound to provide work and pay, the employee to provide their labour. In other sorts of relationship there is not necessarily such mutuality. Consequently, if no such mutuality exists, there is no employment.[7] So, for example, an arrangement whereby an artist carries out work for an advertising agency will not amount to an employment relationship if the agency is free to offer any work to others, and the artist is free to refuse the work requested by the agency.

(ii) Control. The second aspect of the irreducible minimum is that one party (the employer) must be capable of exercising control over the other (the employee).[8] The more control the one party is able to wield, the more likely it is that the parties are in an employment

5 Section 17(b), Copyright Act, 1957.

6 The Copyright and Designs Act of the U.K. Section 178

7 Carmichael v. national power plc(1994)4 All ER 897(HL)

8 Ready Mixed Concrete (SOUTH EAST) LTD. *V.* Minister of Pension and National Insurance (1968) 2 QB 497.

relationship. The control test is regarded as relevant even there are many professions ('from surgeons to research scientist') where a person has a considerable amount of freedom, but nonetheless is ordinarily regarded as an employee. In these circumstances the courts have stressed that the question whether someone is an employee depends on whether there is 'sufficient framework of control'. Thus, even where a person is not under a great degree of supervision, they still may be an employee.[9]
If the irreducible minimum is present, the tribunal will then consider all other factors. One important, but not determinative consideration is the descriptive used (such as 'independent contractor'). Other factors

which suggest that someone is not an employee include the fact that they have great deal of responsibility, provide their own equipment, hire their own helpers, take financial risks, have other commitments, and have the opportunity of profiting from the tasks they perform.[10] The courts will also look at the way financial arrangements between the parties are organized as a way of determining whether someone is an employee. Factors which indicate that someone is an employee include the fact that they are paid wages; that income tax deductions are made on the 'pay-as-you-earn' basis; and that both parties contribute to pension schemes and make national insurance payments.[11]

The Copyright Act, 1957 provides that in the case of work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) of Section 17 does not apply, the employer is taken to be the first owner of the copyright therein.[12]

In order to get copyright vested in an employer, the work must not only be made by his employee, but must also be made in the course of his employment. Where a translation was made by a person on the regular staff of the newspaper, but during his spare time, the copyright did not vest in his employers, but remained in the translator.[13]

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9 Stevenson Jordan v. Mc Donell & Evans (1952) 69 RPC 10,22 (Denning lj.)

10 Robin Ray v. Classic FM[1998] FSR 622.

11 Lionel Bentley And Brad Sherman, Intellectual Property Law (3d ed. 2009) Pg 130

12 Copyright Act, 1957, Section 17, Proviso (c)

13 Byrne v Statist Co. (1914) 1 KB 622

Contract for service and Contract of Service: The distinction

The law distinguishes between 'contract of service' and 'contract for services'. Thus, not every contract under which one works for another or provides service for another is a contract of service.[14]

According to *Halsbury Laws of England*, a contract of service is not the same thing as contract for services, the distinction being the same as that between an employee and an independent contractor; an employee is a person who is subject to the commands of his employer as to the manner in which he shall work. The existence of direct control by the employer, the degree of independence on the part of the person who renders services and the place where the service is rendered are all matters to be considered in determining whether there is a contract of service.[15]

In the earlier times, the emphasis for determining as to whether an employment amounts to contract for service or contract for services, emphasis was placed on the amount of control of the employer over the employee.

In *Simmons v Health Laundry Co.*[16] It was held by Fletcher Moulton, LJ:

"The *greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control, the greater probability that the services rendered are of the nature of professional services and that the contract is not one of service*"[17]

In *University of London Press Ltd v University Tutorial Press Ltd*[18] also, the element of control was considered important in deciding whether or not the authors of certain examination papers who were not on the staff of the University of London were employed under the contract of service. The Court answered in Negative.

14 V.K. Ahuja, Law Relating to Intellectual Property Rights, (1st ed. 2011) Pg 54

15 *Halsbury's Laws of England*, vol 9, fourth edn, para 860.

16 (1910) 1 KB 543

17 *Id.*

It has also been held in the later judgments that degree of control is not always so important, particularly

in the case of professional people who may be employed under contract of service.[19]

Thus, in *Stephenson, Jordan and Harrison v McDonald and Evans*[20] Lord Denning held that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under contract for services, his work, although done for the business, is not integral into it, but is only accessory to it.

This test was approved in *Market Investigations Ltd v Minister of Social Security*[21] where Cooke, J stated that the fundamental text to be applied appeared to be whether the person who performs the services is performing them in business on his own account. If yes, the contract is one for services; if not, it is a contract of service.

Commissioned work, as is the law established in India, is done under contract for services. This was held in the case of *Gee Pee Films Pvt. Ltd v Pratik Chowdhury & Ors.*[22]

Conclusion

Section 17 of Copyright Act, 1957 provides for the Copyright to those other than the author of a work. The relationship between an Employer and an Employee is an important aspect in determining the ownership of a copyright. The status of an Employer is ascertained by the nature of the contract as to whether it is a contract of Service or for service. The view of the courts in determining the distinction between contract of service and contract for service has been changing but has always revolved around the extent and mode of control of the employer over the employee.

References: -

1. J. A. L. Sterling, World Copyright Law (2d ed. 2003)
2. Lionel Bentley And Brad Sherman, Intellectual Property Law (3d ed. 2009)
3. V.K. Ahuja, Law Relating to Intellectual Property Rights, (1st ed. 2011)

19 Morren v Swinton and Pendlebury Borough Council (1965) 1 WLR 576; Whittaker v Minister of Pensions and National Insurane (1967) 1QB 156

20 (1952) 69 RPC 10.

21 (1969) 2 QB 173