

The concept of new media



THE CONCEPT OF NEW MEDIA

New Media as a term cannot be described by a single, uniform definition. This is because the concept of New Media evolves along with the development of technology and as the modes of communication progress and become in many ways, more instant. The concept of New Media takes definite form when the comparison between the old and the new mediums of communication takes place. In the present age, the mediums of television, recorders, radio and paper books have taken a back stage and the electronic mediums of communication have emerged triumphant. Today, the most popular and most instantaneous means of communication is the Internet which is the core element distinguishing new media from other forms. The popular definition of New Media is recognized with the use of a computer for the means of distribution and exhibition, by way of the internet, rather than with production. Thus, texts distributed via a computer are considered as New Media whereas those printed on paper, without the use of the computer and the internet are not. This Lev Monovich has labeled as the ' culture of computerization.' [1] According to Monovich, the computer encompasses all mediums/methods of communication and affects all types of media, text, still images, moving images, sound and special constructions. [2] However, Monovich himself states that limiting the advent of New Media to the device of a computer is too limiting.

Monovich lays down the following principles that determine new Media [3]-

1. Numerical Representation

Monovich states that all types and forms of New Media can be described mathematically, that is in terms of the binary code and so are numerical representations. Therefore, by applying appropriate algorithms, New Media can be manipulated. A cinematograph film for example is a sequence of images/frames, each of which has its own numerical representation.[4]

2. Modularity

This is also known as the ‘fractal structure of New Media’. Media elements consist of pixels, bites, characters, scripts, voxels etc, each of which combine to create the larger image, that is, what we see. However, each one retains its independent identity separate from the whole. Going back to the example of the cinematograph film, each frame would be independently created and would thereafter be combined together to create the whole cinematograph work. However, a single frame can thereafter be removed, altered or deleted without having an effect on the whole ‘work’.

3. Automation

The above two principles, that is Numerical representation and Modularity allow the work to be automated in many operations. For example, in cinematograph films software is programmed to automatically produce artificial life such as crowds of people as required in the film. Another more common example is when a computer automatically generates web pages when the user reaches the site.

4. Variability

An object of New Media is parallel to the idea of liquid. New media is not fixed in one definite format but can exist in a myriad of versions. New Media

frequently changes as it is stored digitally with a numerical code. Thus, variability is a consequence of principle 1 – numerical representation and principle 2 – modularity.

In order to get clarity, one can compare old media with new media. Old Media is created by a human creator who manually assembles the text, the images, and the video and audio elements in one particular format which then becomes fixed for perpetuity. Copies of the work can be made, but only identical copies can be made. In contrast, New Media, which constitutes numerous codes, changes each time it is generated. This is because, after it is created by the human creator, New Media then begins to be generated automatically which is what results in different versions. As New Media is stored digitally, in contrast to a fixed medium, each element retains its separate identity which can then be assembled into numerous sequences under the program's control.

Variability of New Media is created due to the following factors[5]-

1. Media elements are stored on a media database
2. Each time Media is created, different elements are used along with different numerical coding
3. New Media can be displayed using a number of different interfaces
4. The information about the user can be used by a computer program to automatically generate and customize the media composition
5. New Media is through branching/menu based interactivity thus allowing the user to choose. This is when a user enters a programme; the user is given a number of options to choose from. The branch next

advanced to in the program would depend upon the choice made by the user which for each user would not necessarily be the same.

6. New Media contains objects that are periodically updated.

5. Transcoding

The fifth principle is the most significant, the cultural transcoding of media. This means that all data is turned into computerized data. While on the one hand computerized media still displays structural organization which is comprehensive to the users such as images, texts etc. on the other hand media follows the conventional structure of a computer's organization of data. Therefore, New Media can be seen as two distinct layers, the 'culture layer' and the 'computer layer'. The layer that can be viewed as a representation is the culture layer and the operating functions are the computer layer.

Lev Manovich, in his introduction to *The New Media Reader*, defined New Media by using eight propositions:

Today, the increasingly rapid change in technological development is leading to rapidly changing forms of new media thus leading to new and unexpected methods of distributing and exhibiting copyrighted work. Methods of distribution or exhibition are constantly evolving and are modernizing hence giving old content new form and value. For example, the exhibition of performing arts has evolved from theater to pictures, television, videocassettes, LDs, DVDS, streamed videos and then to cell phone formats and tablet formats. A similar scenario has been witnessed in the music industry where the method of storing the data recorded has changed.

Copyright Law, including the Copyright Act, 1957 grants authors an exclusive right over their creations.[6] Copyright in a work lasts for long durations. Section 22 of the Act states that “ *Copyright shall subsist in any literary, dramatic, musical or artistic work published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies.*” During this time, the value of the work and the circumstances surrounding its distribution would be liable to change considerably. To get a full understanding of the concept imagine that a newspaper publisher wants to release a compilation of articles on a CD-ROM and simultaneously wants to create an online database. There would be a possibility that a number of the authors would not be alive to give their consent to such distribution of their work. Finding the right holders to all articles to get them to agree to re-release the works would be prohibitively difficult. Copyright laws across the globe have not enunciated on the copyright protection of ever-changing New Media. Thus, New Media will prove to be a highly contentious issue due to the gaping loophole in the law. As India has not expressly dealt with the issue of New Media as a challenge to copyright law this chapter will look at legislative reasoning in other countries before drawing a conclusion as to what India’s legislative development shall be in this respect.

The legal landscape with respect to new use rights is bifurcated into two. While USA and the UK recognize new use rights and generally allow the free transfer of rights to unknown uses of copyrighted works, copyright grants are restricted in Germany, Spain, Belgium.

CHAPTER__ COPYRIGHT PROTECTION OF TWEETS AND FACEBOOK POSTS

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Twitter along with Facebook epitomizes the term ‘ social networking sites’ which allows a user to create a profile and regularly interact with other users. While Facebook allows posts and images to be uploaded on a user’s profile, Twitter is a real time application that allows public contact amongst the users. Thus, in the Internet age, Twitter and Facebook are the most commonly used social networking sites. Copyright issues with respect to one site will apply equally to the other site. Therefore, for discussion sake, the example of Twitter is chosen.

‘ Tweets’, the posts by users on the site, are relatively simple as a mechanism. They are short in length as they cannot exceed 140 characters and on a general basis answer only one question.[7]Users on Twitter share stories, facts, information, breaking news, updates on world events, entertainment, sports etc. Twitter users can follow other users or vice versa and updated tweets would appear as and when they are posted.[8]

Twitter, via its terms of service, declares that the user retains his/her rights to any content posted[9], therefore Twitter states that the user is entitled to the Intellectual Property Rights that get vested with the user as a result of any post. Alternatively, by signing up as a user on the Twitter website and making the content available to the public by posting tweets, the user grants a license to Twitter. The license includes Twitter’s right to make the content available to other organizations, companies etc.[10]

Whether tweets on Twitter are copyrightable has, till date, not been a contentious issue in India. However, in the United States the copyrightability of tweets has been under debate. Therefore, to be able to culminate in a

satisfactory answer, we first need to see whether a Tweet/post satisfies the requirements of the Federal Copyright Act. I will simultaneously transpose a similar argument in the Indian context. As per Section 102(a) of the Act, original works of authorship that are fixed in a tangible medium of expression, whether now known or later developed, are protected. Therefore, the pre-requisites for copyright protection under the Federal Act and the Indian Copyright Act, 1957 are –

1. Originality

The term ‘ original’ has not been defined either under the Federal Act or under the Act of 1957. However, Section 13(1)(a) of the 1957 Act states that copyright shall subsist in ‘ original literary, dramatic, musical and artistic works;’ which is indicative that copyright shall only extend to works that are the fruits of a person’s labour and skill. In the United States, it was observed in *Alfred Bell Co. v. Catalda Fine Arts* [11] that the term “ ‘Original in reference to a copyrighted work means that the particular work ‘ owes its origin’ to the author” . Further, in the landmark judgment of *Feist Publications Inc. v. Rural Telephone Service Co.* [12] it was observed that originality work that is directly attributable to the skill and labour of the author and that the work in question is independently created and is not a mere copy.[13] In order to be protected under the Copyright Act, 1957, a work must satisfy the criteria of ‘ work’ as defined in Section 2(y) of the Act. In *University of London Press v. University Tutorial Press* [14]. Peterson held that the word original does not imply that the work must be the expression of original or inventive thought. Originality as interpreted with respect to copyright protection relates to the expression of thought.[15] For a work to

be considered original under the Copyright Act, it is sufficient if the contribution is minimal or poor.

2. Work of Authorship

The second pre-requisite for copyright protection to apply to any work is that the work must be a 'work of authorship'. (continue)

3. Fixation in a tangible medium

The third element that is required for copyright protection is that a work is deemed created when it is first fixed, that is given a tangible form. This is parallel to the concept that an idea is not copyrightable but the expression of that idea is entitled to copyright protection.[16] Thus, if the idea is not made into a tangible medium, i. e. expressed, it cannot be protected by way of copyright. For example, in the field of literary work, the idea of the novel would not be copyrightable, but when the idea is expressed on paper in the particular manner of the author; fixation of the work would take place. For copyright protection, the medium, form and method of fixation of the work is not substantially consequential.

Tweets create a challenge to the Copyright law and its application. However, the fact that Twitter's Terms of Service include a Copyright Policy is indicative of the fact that the content on Twitter, including tweets, is copyrightable.[17] However, for a particular tweet to be entitled to copyright protection a tweet needs to satisfy the 3 basic requirements given above, a tweet must be an original work, it must be the work of the author and it must be in a fixed, tangible form.

1. Whether a Tweet is entitled to Copyright Protection?

- To establish whether a tweet is entitled to Copyright Protection the following points are established –
- A tweet is an original work as the work is independently created. The users of Twitter post a tweet that is the result of their skill and labour. The Tweet meets the originality threshold stated in *Alfred Bell & Co.* [18] however there is no specific reference to determine whether all Tweets are original. However, is it safe to say that some Tweets are original. As a corollary, it is seen that a tweet is a creative work. In First it was held that the work must contain a modicum of creativity, “*No matter how crude, humble or obvious ‘ it might be.*” [19] However, Phrases and words that have common, widespread usage cannot be copyrighted.
- A tweet is a literary work as stated under the Acts. As the term literary in the Federal Act connotes neither literary merit nor qualitative value, the term literary can have an expansive interpretation. Applying this standard, all tweets qualify as literary work. Further, to constitute a work of authorship, the work should be based on intellectual labour for which the content of the tweet must be examined. Generic, common phrases and questions cannot be works of authorship as they require no intellect in their expression. However, a poem, an expression, a joke is tweeted would be works of authorship because the work would be the result of intellectual labour as well as a literary work.
- A tweet is fixed in a tangible medium i. e., Twitter. Tweets cannot be viewed without the aid of a computer or any other device that can be connected to the internet.[20]

Nevertheless, Twitter users face many challenges in meeting the three prerequisites for copyright protection. This is due to the following reasons[21]-

1. Size – Tweets are very short in length, with a limit of 140 characters. Therefore, the word limit makes it impossible for the work to reach the level of creativity which is required for copyright protection.
2. Content – It is well established that facts are not copyrightable. Tweets are mainly regarding notifications, events, gossip, and comments on political situations etc. Copyright law does not extend protection to facts and so tweets, despite their varying expressions, cannot be copyrighted.
3. Scenes a faire – Tweets describe events, affairs, circumstances, scenes which cannot be expressed in more than a limited number of ways. For example, a tweet regarding the sunset will describe the sun as brilliant, or sunny, or bright. When an idea can be expressed in only a limited number of ways, such expression cannot be copyrighted as providing copyright protection to such an expression would be providing copyright protection to the idea itself.[22]

2. Copyright in Quotes and Short Phrases

Protection by way of Intellectual property rights over the most minimal of creative work has been regularly debated. Copyright protection of brand names, slogans, advertising mantras etc. have become a contentious issue. Courts are forever embroiled in the task of breaking down the exact meaning of the definitions provided in the statute. To get a better understanding of the boundaries of protection by the Act of 1957 some of the definitions provided are required to be repeated.

Section 13 of the 1957 Act lays down that copyright protection is accorded on literary, dramatic, musical and artistic works, cinematograph films and sound recordings. Rights as provided in the statute can be exercised only by the owner of the copyright.[23]Quotes and short phrases are of two types. One type is cutting a small part from a longer sentence, example a book whereas the other type is when the quote stands on its own in entirety. Tweets would be form of the second type of quote/short phrases.

Copyright protection to short phrases and quotes has been refused in a number of cases by the Indian courts. To claim a copyright infringement, the de minimis standard must be satisfied. Courts have refused to grant protection to slogans in advertisements, newspaper headlines for there is no copyright in a mere collection of words that is not a compilation. In this matter the law of trademark infringement and passing off has proved to be more useful. The underlying reason is that although such short phrases may be considered ‘ works’ but they are unable to satisfy the requirement of originality.

Leading case laws by the English and Indian courts have expounded upon this matter.

[1]Lex Monovich, “ Language of New Media” MIT Press, 2001. Pg. 43

[2]Id.

[3]Id. Pg. 49

[4]Id. Pg. 50

[5]Id. Pg. 57

[6]Section 14 of the Copyright Act, 1957: “. . . “ *copyright*” means the *exclusive right subject to the provisions of this Act. .*”

[7]Rebecca Haas, Twitter: New Challenges to Copyright Law in the Internet Age, 10 J. Marshall Rev. Intell. Prop. L. 231 (2010) , pg. 236

[8]Id

[9]You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed) – <https://twitter.com/tos>(Twitter Terms of Service) – Last Accessed – 8/04/2014

[10]Supra n. 3, pg. 237 (Rebecca Haas)

[11]191 F. 2d 99, 103 (2nd Cir. 1951)

[12]499 U. S 340, 351-52 (1991)

[13]Rebecca Haas, pg. 238

[14]1916] 2 Ch 601. The case involved the copying of mathematic questions, which were held to be original for

the purposes of copyright law

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[15]Tissya Mandal. “ *Copyright in quotes* ” available at -<http://ssrn.com>. abstract= 1818985

[16]Id.

[17]Supra n. 5 Twitter Copyright Policy states:

Twitter respects the intellectual property rights of others and expects users of the Services to do the same. We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us. If you believe that your Content has been copied in a way that constitutes copyright infringement, please provide us with the following information: (i) a physical or electronic signature of the copyright owner or a person authorized to act on their behalf; (ii) identification of the copyrighted work claimed to have been infringed; (iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit us to locate the material; (iv) your contact information, including your address, telephone number, and an email address; (v) a statement by you that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notification is accurate, and, under penalty of perjury, that you are authorized to act on behalf of the copyright owner. – Last Accessed – 8/04/2014

[18]Supra n. (Alfred Bell)

[19]Supra n. __ at 345

[20]Rebecca Haas, Pg. 245

[21]Consuelo Reinberg. “ Are Tweets Copyright- Protected?” WIPO Magazine, July 2009

[22]The concept of idea-expression being expressed in a limited number of ways is called the “ Doctrine of Merger”, which will be discussed subsequently.

[23]Section 14 of the Act lays down the rights that are exclusively granted to the owner of the copyright. Section 57 of the Act further defines two forms of ‘ moral rights’ that are conferred on the author, right of paternity and integrity. The right of paternity is a right provided to the author which is the right to prevent others from claiming authorship of his work. Right of integrity enables the author to prevent mutilation or distortion of his work or any other act which would be prejudicial to his reputation and honor.