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Protection of Architectural Design under Intellectual Property Rights

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Intellectual property rights proffer certain legal rights to the inventor or creator to safeguard their artistic, literary, technical, or scientific invention or creation for a certain period of time, but when it comes to architecture, designs are far more intricate and require ample amount of time and backbreaking work so it becomes essential to protect those works to safeguard architect's designs and his vision and to motivate him to create more unique work in future. Surprisingly, there is no surefire way to protect against infringement claims although there are ways to minimize the chances of such claims. To minimize the scope of accusation of infringement, one should know what is protected and how it is protected. The primary learning from this article is that an idea cannot be copyrighted only the original expression of that idea can be copyrighted and there are so many elements in an architectural building that are so common that by law they are not protected. This article aims at analyzing the different ways to protect architectural work.

Keywords: *design, ip, protection, architectural work.*

INTRODUCTION

Architectural buildings are a perfect blend of science and art and they combine technology with aesthetics in spite of the general idea that the discipline of architecture is purely a technological

task. Architectural design requires imagination, ingenuity, and dexterity, therefore anything that includes human intellect is capable of being protected under intellectual property rights. The protection of buildings under copyright and trademark laws are very much contrasting across the nations, therefore often leading to heated debates, but it is important to protect them to safeguard the moral and financial rights of the owner of the work. Trademark protection can be granted to architectural work provided, it should not be a functional aspect of the construction.

TRADE DRESS PROTECTION

Trade dress protection mainly focuses on the protection of goods and services on their external appearances and the objective is to protect them from being copied. The packaging and the color combination of the product must be unique. Trade dress is basically an extension of the trademark. The essentials of trade dress require the product to be graphically represented, distinct from others, used in relation to goods or services from others, and be in print. The basic criteria for getting trade protection under trade dress is that the design must be non-functional and distinct. Indian trademark law is inspired by the English Trademark Act of 1994 acquired from the Lanham Act of 1946. The concept of trade dress has been reflected under section 2(1)(zb)¹ of the trademark act 1999 which describes it as "*a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, their packaging, and combination of colors*". Section 2(1)(m)² of the act defines 'mark' by including the shape of goods and packaging etc. The advantage of getting trademark protection is that it increases the scope of commercial exploitation of the work and maintains its distinctiveness. Apart from trademark protection, architectural work can be protected under the copyright act of 2012³ and the design act of 2002⁴. It is pertinent to note that copyright protection was not granted to *Architectural work* until the revision of the Berne Convention in 1908 when it was included in the list of "literary and artistic works" protected at

¹ Trademark Act 1999, 2(1)(zb)

² Trade Marks Act 1999, 2(1)(m)

³ Copyright Act 2012

⁴ Design Act 2002

the international level under Article 2(1)⁵. In India artistic work gets protection under the copyright act of 2012, as per the definition under section 2 (c) (ii) artistic work is defined as “any building or structure having an artistic character or design, or any model for such building structure”, only original work of art gets protection under the copyright act it shouldn't be plagiarized. Section 57⁶ of the act provides protection of the moral rights of the author (architect), thus he can claim his authorship and prevent his work from mutilation or distortion and can seek an injunction to restrict the infringer to use his work in case of copyright infringement. Section 52⁷ describes the *fair use doctrine*, meaning, it won't be considered an infringement when pictures of protected buildings are taken, or when they come in the background of a cinematographic film (discussed in detail in the next section). Copyright protection is granted from the inception of the original work itself, an architect is not required to get copyright registered but they can, because it might make their case stronger in case of infringement. Design act of 2002 also grants protection to architectural work under section 2 (d)⁸ and here registration is mandatory, unlike the copyright act. There are two major requirements that need to be fulfilled in order to get architectural design registered under the design act. Firstly, it has to be registered under classes 25-03 and 25-99 of the design act, and secondly, if work has been produced more than 50 times and the copyright act is not applicable then protection against infringement is granted under the design act. Registration with the trademark act is comparatively more difficult than the other two, trademark protection is suggested for heritage buildings or tourist spots⁹.

FREEDOM OF PANORAMA

Freedom of panorama is considered an exception to copyright law it's a right to publish pictures of artwork present in public, the name comes from the German term 'panoramafreinheit' meaning “panorama freedom”, these laws restrict the owner of copyright work to take legal

⁵ Berne Convention 1908, art 2(1)

⁶ Copyright Act, 1957, s 57

⁷ Copyright Act, 1957, s 52

⁸ Design Act, 2002, s 2(d)

⁹ 'Protecting architectural design' (*Talwar Advocates*, 23 October 2020) <<https://talwaradvocates.com/protecting-architectural-designs/>> accessed 27 December 2022

action against a person for the breach of copyright. Different countries have different interpretations of this law. Freedom of panorama originated in the country Germany, in 1840, the kingdom of Bavaria enacted the first 'freedom of panorama' in the world, later it spread throughout Germany, and it provided an exception to copyright law with respect to any "work of art and architecture in the exterior contours". There are three major aspects to consider with respect to freedom of panorama those are public space, purpose, and artistic work. The definition of public space differs across jurisdictions, for example in Germany you cannot take a picture or reproduce a work of art that is under copyright from your personal space such as your balcony. There are different interpretations of public space, in some places they include open spaces such as parks and streets other places include indoor spaces such as public libraries or public museums as well. The purpose of reproduction of such work also matters, many countries such as France, Belgium, and Germany do not allow freedom of panorama for commercial purposes¹⁰. The last consideration is artistic work, works of art such as sculptures, paintings, and murals are not allowed to reproduce usually, in the opinion of the court such rights should be reserved with the author of the work itself. In India, it is covered under section 52 of the copyright act 1957. The relevant proposition section 52(s)-(u)¹¹ of the copyright act, 1957, states-

"52. certain acts not to be an infringement of copyright- (1) the following acts shall not constitute an infringement of copyright, namely,-

(s) the making or publishing of painting, drawing, engraving or photography of a work of architecture or the display of work of architecture;

(t) the making or publishing of painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of section 2, if such work is permanently situated in a public place or any premises to which the public has excess;

¹⁰ Rupin Chopra & Nikita Sinha, 'Freedom of Panorama' (S.S Rana & Co, 8 December 2021) <<https://ssrana.in/articles/freedom-of-panorama/>> accessed 20 December 2022

¹¹ Copyright Act 1957, 52(s)-(u)

(u) *the inclusion in a cinematograph film of-*

- I. *an artistic work permanently situated in a public place or any premises to which the public has the excess; or*
- II. *any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the public matters represented in the film;”*

INDIA

In India, until now two buildings have received trademark protection namely the Grand Taj Mahal Palace hotel and the Bombay Stock Exchange building under the trademark act of 1999¹². The Taj Hotel is one of the prominent landmarks of Mumbai, built in the year 1902 and owned by Indian Hotel Company Limited, it is registered under class 43 of the nice classification. It means that now permission will be required for the depiction of the facade of the Taj for commercial purposes if artists or brands wish to feature the same and accordingly IHCL will charge, however, there is no restriction for non-commercial use such as publishing photos or videos in media. According to IHCL the reason behind this “unconventional” trademark is to “protect and underline the distinctiveness of the brand” later on in 2018 Phiroze Jeejeebhoy Tower famously known as Dalal Street or Bombay Stock Exchange building got an image trademark. It is very much possible that we will witness a rise in the trend of image trademarks in India. In *Raj Rewal v Union of India*¹³, the high court of Delhi interpreted the scope of moral rights for architectural work, it deals with the disparity between the constitutional right of the land owner and the moral rights of the architect. Raj Rewal a prominent architect, designed the Nehru Pavilion and hall of nations located in Pragati Maidan. In 2016, the Indian trade promotion organization suggested the demolition of the structure for the redevelopment of the Pragati Maidan into a convention center to host an exhibition, as a consequence Mr. Raj filed a suit against the Union of India and the Indian trade promotion organization for the breach of

¹² Aarefa Johari, “Two iconic Mumbai buildings have got trademark protection. What does this mean for artistic freedom?” (Scroll, 16 April 2019) < <https://scroll.in/article/916322/two-iconic-mumbai-buildings-have-obtained-trademarks-what-does-this-mean-for-artistic-freedom> > accessed 28 December 2022

¹³ *Raj Rewal v Union of India* CS (Comm) No 3/2018

his moral rights under section 57¹⁴ of the copyright act, 1957. After hearing contentions from both sides, the court interpreted the scope of moral rights and come to its decision that section 57 of the copyright act provides protection only for “partial destruction, that is, in case of distortion or mutilation that dishonor the integrity and dignity of the creator’s work” Additionally, it also relied upon Section 57(1)¹⁵ to explain that failure to display works cannot be deemed as an infringement of moral rights. According to Section 57(1), what cannot be seen, heard, and is neither displayed nor portrayed for the viewer cannot violate the integrity and dignity of the author’s work.

BUILDINGS THAT ARE PROTECTED AROUND THE WORLD

Any original building gets copyright protection automatically right from the moment they are built, therefore restricting people to replicate the design of the building without the permission of the copyright owner. Many iconic buildings such as the Pyramids, the Taj Mahal, and the Eiffel Tower are out of copyright protection, and that's why these buildings are freely reproduced in amusement parks. The buildings such as Burj Khalifa, and Burj Al Arab which are built recently enjoy copyright protection for many years in the future.

The world-famous Eiffel tower in Paris was built in the year 1889, consequently, it no longer holds copyright protection. People are allowed to take pictures of the same during the day time however, It is fascinating to note that the “Societe d’Exploitation de la Tour Eiffel” still owns the copyright for the unique lighting at night that twinkles for 10 minutes each hour from nightfall to 2:00 a.m. but then why are there more than 30 million pictures of luminous Eiffel tower are present across the social media? Well, those pictures are taken for personal use, and the commercial exploitation of the luminous Eiffel tower may lead to copyright infringement¹⁶. Empire State Building is protected under a trademark, the case of Empire State Building L.L.C v Michael Liang helps to understand the protection enjoyed under the trademark act. The

¹⁴ Copyright Act 1957, 57

¹⁵ Copyright Act 1957, 57(1)

¹⁶ Anuja Shah ‘THE PROTECTION OF ARCHITECTURAL DESIGN OF BUILDINGS - A GROWING TREND’ (Krishna & Saurashtri, 6 January 2018) <https://www.krishnaandsaurastri.com/admin-assets/images/pdf/articles/1612788187THE_PROTECTION_OF_ARCHITECTURAL_DESIGN_OF_BUILDINGS_-_A_GROWING_TREND.pdf> accessed 18 December 2022

architectural design of the building has been registered under classes 35, 36, 38, 41, 43, and 45 of the Nice classification, therefore ESRT (Empire State Realty Trust) was successful in restricting Michael Liang, a beer maker from getting registration of trademark logo which include the picture of the building, Empire State Building LLC argued that the building has its own gift shop that sells wine and champagne, and a beer with the logo of the building would cause confusion on the part of the public, TTAB (Trademark Trial and Appeal Board) agreed with the ESRT and the registration of the beer logo with the picture of the building was denied on the grounds of '*dilution of trademark rights*'.

CONCLUSION

The laws for the protection of architectural design in India are at a very inceptive stage compared to the rest of the world, there aren't really laws that made clear and loud protection of architectural designs, it is the judiciary that has made interpretations of the existing laws to grant protection. Since India is a developing country and with further development in the construction sector, more and more architectural inventions will be seen leading to the development of these laws. Certain architectural and creative aspects of buildings can be protected as trademarks, today buildings like the Rock & Roll Hall of Fame, Space Needle in Seattle or the Empire State Building are not just four walls and a roof for protection or for storage purposes, and they are beyond those archaic definitions. Buildings designed by architects are works of art. It's the art, vision, and hard work of the architect and therefore must be protected. The precedents and jurisdiction on this particular subject are very limited therefore the interpretation of the court may vary.