

UNDERSTANDING THE CONCEPT OF ORIGINALITY UNDER COPY RIGHT LAW IN INDIA BY ROBBIN SINGH*

Introduction

“The sine qua non of copyright is originality.”¹

Originality is a precondition to copyright protection. If the work of a person is not original but a mere copy of someone else's original work then copyright protection cannot be granted to such a person. Thus, for a work to be original it is important that it should not have been copied from another work. Protection of copyright in a work is necessary for the purpose of protecting a person's creative expression and to encourage creative expression. Copyright protection should be a form of reward for a person seeking protection of his original work.² For a work to be protected under the copyright law, it is imperative to ensure that such is an original work and is not copied from any other work of any other person. Such a right is granted in relation to original works since one has the right of protection over the work completed through one's own efforts. It is important to note that with regard to *R.G. Anand v. Delux Films & Others*³ there can be no copyright in an idea or subject matter but only in the arrangement and expression of such idea. It is not even necessary that the work involve novel expression of a thought. All that is required for originality of expression is that the expression should not be copied from another work. Thus the work should be composed by the author independently.⁴

It is currently unclear what standard of originality is followed in India, as Indian courts have not made any clear pronouncements on the concept of originality.⁵ Through judicial pronouncements, the following tests of originality have been developed:

* G.N.L.U, Gujarat

¹ Feist Publications Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991)

² Krishna Hariani & Anirudh Hariani, *Analyzing “Originality” in Copyright Law : Transcending Jurisdictional Disparity*, 51 IDEA, 491 (2011).

³ R.G. Anand v. Delux Films & Others , AIR 1978 SC 1613

⁴ *Supra* n. 2 493

⁵ Ranjit Kumar, *Database Protection: The European Way and the Impact on India*, 45 IDEA

1. Sweat of the Brow Test
2. Modicum of Creativity Test
3. Skill and Judgement Test

Sweat of the Brow Test

This test was originally propounded in *University London Press v. University Tutorial Press*⁶, which conferred copyrights on work merely because time, energy, skill and labour were expended (ie, originality of skill and labour).⁷ The Privy Council had approved this principle in the case of *Macmillan & Company Ltd. v. Cooper*,⁸ wherein it was held that the product of the labour, skill and capital of one man which must not be appropriated by another.

This approach developed in U.K. and had been followed by the Indian Courts before the test of ‘modicum of creativity’ came into scene. The approach of the courts as above is often referred to as the “sweat of the brow” doctrine where more importance is given as to how much labour and diligence it took to create a work, rather than how original a work is.⁹ This approach was observed in the case of *Burlington Home Shopping v Rajnish Chibber*.¹⁰

Modicum of Creativity

This approach was developed by the U.S. Courts through the case of *Feist Publications Inc. v. Rural Telephone Service Co.*¹¹ It acknowledges that not every effort or industry, or expending of skill, results in copyrightable work, but only those activities which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of creativity.¹² According to this test, for a work to be original and

97, 115 (2004).

⁶ *University London Press v. University Tutorial Press*, [1916] 2 Ch 601

⁷ BEN ALLGROVE, *INTERNATIONAL COPYRIGHT LAW: A PRACTICAL GLOBAL GUIDE* (2013)

⁸ *Macmillan & Company Ltd. v. Cooper*, (1924) 26 BOMLR 292

⁹ Mini Gautam, *Originality Under Copyright Law Is There Any Definite Standard?*

<http://www.legalservicesindia.com/article/article/originality-under-copyright-law-is-there-any-definite-standard-970-1.html> (last updated June 1, 2015)

¹⁰ *Burlington Home Shopping v Rajnish Chibber*, 61 (1995) DLT 6

¹¹ *Supra n. 1*

¹² *Supra n. 7*

copyrightable, it should contain a 'minimal degree of creativity'. Earlier the Courts in India followed the 'sweat of the brow' test, however the approach of the Court changed after the introduction of modicum of creativity test. The focus of this approach was on the creativity rendered to the work of a person for it to be considered original. Eventually, the need of balancing the efforts and creative element in a work was realised for it to be rendered as original.

Skill and Judgement Test

This test provides for the Indian approach to determine whether the 'work' in question is 'original work' or not. In order to ascertain this, the author should have applied his 'skill and judgement' in creating the work and such work created should have the minimal element of creativity thereby leading the work to be original. Thus, it is observed that India adopts a middle path between the two extreme approaches i.e. the U.K. approach (sweat of the brow doctrine) and U.S. approach (modicum of creativity). In the case of *Eastern Book Company and Others v. D.B. Modak & Anr.*¹³, the Delhi High Court, while considering the question of whether the head notes of reported cases constituted original expression, referred expressly to the *Feist* decision, and adopted a "modicum of creativity" standard, along with the standard of skill and labor.¹⁴ In this case the copyright over copy-edited judgments was discussed. This case is important since a shift in the approach of the Supreme Court in deciding the copyright of 'original work' took place. The 'sweat of the brow' doctrine was rejected by the Court which relied on the U.S. approach of 'modicum of creativity' in ascertaining whether the work in question was original or not for the purpose of valid copyright being granted to such work.

In this case, the Supreme Court Case reporter, was aggrieved by other parties infringing their copyright and launching software containing the judgements edited by SCC along with other additions made by the editors of SCC like cross references, head notes, the short notes comprising of lead words and the long note which comprises of a brief description of the facts and relevant extract from the judgments of the court and standardisation and formatting

¹³ *Eastern Book Company and Others v. D.B. Modak & Anr.*, AIR 2008 SC 809

¹⁴ *Supra* n. 2

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

Journal.lawmantra.co.in

of text, etc.¹⁵ The question raised before the Court was whether the work of law reporters infringes the copyright of the judgements delivered by Courts in India. The Court majorly relied on the ‘skill and judgement’ test as formulated by Supreme Court of Canada in the matter of *CCH Canadian v. Law Society of Upper Canada*¹⁶ and observed as follows:

“37. ... to be original under the Copyright Act the work must originate from an author, not be copied from another work, and must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. Creative works by definition are original and are protected by copyright, but creativity is not required in order to render a work original. The original work should be the product of an exercise of skill and judgment and it is a workable yet fair standard. ...”¹⁷

The Court preferred a higher threshold than the doctrine of “sweat of the brow” but not as high as “modicum of creativity”. The Canadian standard of copyright is based on skill and judgment and not merely labour.¹⁸ Precondition to copyright is that work must be produced independently and not copied from another person.¹⁹ Thus, in order to establish a valid copyright, it becomes essential that the work should firstly be an independent work of the author and should not be merely copied from any other source. Such work is to be created by the exercise of skill and judgement of the author. Also, such exercise of efforts on the part of the author should not be trivial in nature and thus should not be a mere exercise of the mechanical function of copying the work of another. Variation must be substantial in nature than merely trivial thus requirement of degree of originality is quantitative in nature.²⁰ According to this midway standard, an ‘original’ must be a “product of an exercise of skill and judgment”, where ‘skill’ is “the use of one's knowledge, developed aptitude or practised ability in producing the work” and ‘judgment’ is “the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing

¹⁵ Shuchi Mehta, *An Analysis of the Doctrines: ‘Sweat Of The Brow’ & ‘Modicum Of Creativity’ Vis À Vis Originality in Copyright Law* <http://www.indialaw.in/766/> (last updated June 1, 2015)

¹⁶ *CCH Canadian v. Law Society of Upper Canada*, 2004 (1) SCR 339 (Canada)

¹⁷ *Supra* n. 13

¹⁸ *Supra* n. 9

¹⁹ Hailshree Saksena, *Doctrine of “Sweat of the Brow”*, (May 3, 2009) <http://ssrn.com/abstract=1398303>

²⁰ *Supra* n. 2

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

Journal.lawmantra.co.in

the work".²¹ It was thus finally held that, "collection of material and addition of inputs in the raw text does not give work a flavour of minimum requirement of creativity, as skill and Judgment required to produce the work trivial. To establish copyright, the creativity standard applied is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required."²²

In the present case, publication of the work of Eastern Book Company in the form law report 'Supreme Court Cases' required effective and substantial skill and exercise of judgement of the part of the law reporter while providing for paragraph numbering, internal referencing, brief descriptions, formatting, head noting etc. and thus such work was not trivial and mechanical in nature. Through such work of the law reporter, a minimal element of creativity in the form of a novel work can be established, thus such Eastern Book Company was held to have the copyright of their work.

Through the skill and judgement test, major shift was observed in the approach of Courts in India from 'sweat of the brow' to 'modicum of creativity'. This position was steered by the landmark Eastern Book Company case which paved the way for a positive development in the sphere of determining the originality of a work by the Courts.

A recent case was decided by the Delhi High Court on September 29, 2014 (*Tech Plus Media Pvt. Ltd. v. Jyoti Janda & Ors*), wherein the copyright of databases was discussed. Earlier in the case of *Burlington Home Shopping v. Rajnish Chibber*²³, it was held that a compilation may be considered a copyrightable work by virtue of the fact that there was devotion of time, labour and skill in creating the said compilation.²⁴ Also, in the case of *Diljit Titus v. Mr. Alfred A. Adebare*²⁵, customer lists merely stored on the computer was recognised as a compilation protectable under Copyright Law. In the present case, the Court refused to

²¹ Adarsh Ramanujan, Prateek Bhattacharya & Esheetaa Gupta, *Infringement Analysis in Copyright Law*, (2011) http://www.lakshmisri.com/Uploads/MediaTypes/Documents/WHITE_PAPER_IP_Infringement_Analysis_Esheetaa_REVISIED.pdf

²² Himanshu Sharma, *India: Sweat Of The Brow: An Approach In Contrast To Minimum Creativity* <http://www.mondaq.com/india/x/272382/Copyright/Sweat+Of+The+Brow+An+Approach+In+Contrast+To+Minimum+Creativity> (last updated June 1, 2015)

²³ *Supra* n. 10

²⁴ V. Lakshikumar, *India and Databases under Copyright Law*

<http://www.managingip.com/Article/3396027/India-Originality-and-databases-under-the-copyright-law.html> (last updated June 1, 2015)

²⁵ *Diljit Titus v. Mr. Alfred A. Adebare*, 130 (2006) DLT 330

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

Journal.lawmantra.co.in

recognize the copyright of the plaintiff's in its client list and database.²⁶ The work of the defendant, though based on the primary work (client list and database) of the plaintiff, was a development rendered through skill and judgment of the defendant and such skill and development was not involved in the compilation of the work of the plaintiff. Also, the databases were merely a collection of names and e-mail addresses of the visitors to the Plaintiff's website and thus could not be afforded copyright as they did not fall in any category of work as stipulated by Section 13 of the Copyright Act, 1957.²⁷ This approach of the Court was observed while relying upon the Eastern Book Company case wherein certain skill and judgement needs to be proved for a valid copyright and it constituted a higher test of originality for copyright in compilations in India. It is important to note that deviation from the earlier 'sweat of the brow' doctrine in respect of copyright of databases has taken place through this case.

The ratio of the Supreme Court in Eastern Book Company case has also been followed by the Division Bench of Delhi High Court in *Syndicate of Press of the University of Cambridge on behalf of the Chancellor Masters and School v. B.D. Bhandari & Anr.*²⁸, wherein the requirement of skill and judgement of the author along with the minimal standard of creativity was held essential to establish a copyright.²⁹

Further it is important to note the case of *Dr. Reckeweg and Co. Gmbh. and Anr. Vs. Adven Biotech Pvt. Ltd.*³⁰, wherein the contention of the plaintiff was rejected as their work was held to be mere compilation and in this case Delhi High court completely rejected the phenomena of the doctrine of sweat of the brow.³¹ Reliance was placed on the Eastern Book Company case while delivering the judgement.

²⁶ *Supra* n. 21

²⁷ Sabia Trambo, *Higher Test for Originality for Copyright in Compilations in India*

<http://ipfrontline.com/2014/12/higher-test-for-originality-for-copyright-in-compilations-in-india/> (last updated June 1, 2015)

²⁸ *Syndicate of Press of the University of Cambridge on behalf of the Chancellor Masters and School v. B.D. Bhandari & Anr.*, 2011 (185) DLT 346

²⁹ *Supra* n. 7

³⁰ *Dr. Reckeweg and Co. Gmbh. and Anr. Vs. Adven Biotech Pvt. Ltd.*, 2008 (38) PTC 308

³¹ *Supra* n. 19

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)

Journal.lawmantra.co.in

In the case of *The Chancellor Masters and Scholars of The University of v. Narendra Publishing House and Ors.*,³² The question before the Court was whether guide books, comprising of the answers of mathematical questions provided in the plaintiff's book, published by the defendant would constitute copyright infringement. The Court while applying the test of originality as held in EBC case, held that such publication of guide books would not constitute copyright infringement.

Summing up the Indian approach to test the originality of a work, the Delhi HC held in a recent case “... *not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of creativity ...*”³³

CONCLUSION

Originality requires only that the author makes the selection or arrangement independently and that some minimal amount of creativity is present in the work of the author. While a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will. Also, it is important to note that for copyright protection, the work created by the author should be a result of substantial variation and not a result of trivial variation. In order to encourage the avenues of research and development, the law has been practical to hold that for originality, the work in question is not required to contain novelty.³⁴

India provides a practical approach in the ascertainment of a original work as it does not completely rely on modicum of creativity as developed by the U.S. Courts, in fact, it very well balances the sweat of the brow approach with the creativity element by ensuring that skill and judgement are exercised by the author in the creation of an original work. Since, the issue of originality is centric to the copyrightability of a work, regard has to be placed on the skill and judgement test to be applied on the factual circumstances of every individual case.

³² *The Chancellor Masters and Scholars of The University of Oxford v. Narendra Publishing House and Ors.*, 2008 (106) DRJ 482

³³ *Emergent Genetics India Pvt. Ltd. v. Shailendra Shivam and Others*, 2011 (47) PTC 494 (Del)

³⁴ V.K. AHUJA, *LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS*, 28-29 (2d ed. 2015)