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From Doctrine of Sweat of the Brow to Modicum of Creativity- Concept of Originality in Indian Scenario

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Abstract: The evolution of the concept of originality in the Indian intellectual property landscape, transitioning from the traditional "Doctrine of Sweat of the Brow" to a more nuanced approach focusing on the "Modicum of Creativity" standard. The Doctrine of Sweat of the Brow, prevalent in earlier times, emphasized the efforts and labour put into a work rather than the creative spark behind it. However, as India aligned with international intellectual property norms, the notion of originality evolved to encompass the Modicum of Creativity standard, where a minimal degree of creative expression became the threshold for protection. This abstract provides an insight into the historical development of the concept, highlighting key legal principles and landmark cases that have shaped the Indian understanding of originality.

Keywords: Doctrine of Sweat of the Brow, Modicum of Creativity, originality, intellectual property, Indian scenario, creative expression, legal principles, landmark cases.

Introduction

Originality in a work is what is protected by copyright law. Either it is the TRIPS agreement or WIPO Copyright treaty or Berne Convention, each international instrument when dealing with compilation of work has set “intellectual creation” as a standard. The copyright law gives the author of a work exclusive rights and it is the author only who has all respective rights in a work. Meaning thereby it is only originality which is the basic prerequisite for getting copyright even if the work relates to compilation. The courts have also viewed that “the facts are not copyrightable but the compilations of the facts can be". Despite having this basic prerequisite with passage of time the doctrine of “sweat of the brow” emerged which negated the requirement of creativity in works and protected the labour and sweat of the compiler. The doctrine provided copyright protection to a work created through mechanical and automatic process even if lacking minimal creativity. The present paper encapsulates the legal position of the doctrine of “sweat of the brow” as perceived under Indian copyright law. The first part deals with the international position of the doctrine and the second part discusses the Indian position.

Origin of the Doctrine of Sweat of the Brow

The Sweat of the Brow doctrine superseded the concept of originality embedded in the copyright law and implied the protection of a compilation done with labour. Though it is difficult to trace how this doctrine got placed under the copyright law, the US authors suggest its presence in previous US statutes. The early US Statutes on copyright law protected factual compilations, like , “maps, charts

and books." Later the Act of 1909 also protected "books, including composite and works of encyclopedia, directories, gazetteers and other compilations" and copyright registration for the same was also available. It is believed that lawmakers stressed on protecting the labour done for a work which would also be in public interest.

However, the present US copyright law protects compilations but this protection is limited only to selection and arrangement of the work and not to the facts themselves. Surprisingly, with the emergence of Misappropriation law in the States a parallel to Federal Copyright law arose. On one side where the Federal copyright law focused on rewarding the creative ideas of the authors, on the other side State misappropriation law protected the labour and hard work. In *International News Service* vs. *Associated Press* the US Supreme Court held that one who gathered news with his own effort and expense for the purpose of profitable publication had a quasi-property interest in that news. A competitor who appropriated the news for his gain, at the expense of the collector of the information, had engaged in unfair competition for which it would be equitable to give relief.

The decision of the SC in *INS* case certainly points towards the recognition of the doctrine of *sweat of the brow.* Thereafter there was a split in the courts over the protection of compilations. Where some courts granted full copyright protection to a mechanical selection and arrangement of factual compilations, the others provided protection only to the compilations with certain creative aspects.

In 1991, the US Supreme Court rested the confusion between the requirement of originality and rewarding the labour & sweat of the compiler. The SC in *Fiest Publications, Inc.* vs. *Rural Telephone Service Co.* discarded the doctrine of Sweat of the Brow and upheld originality as a constitutional requirement under the US copyright law. The *Fiest* case related to publishing of telephone directories by a non telephone operator. The Fiest Publications indulge themselves in publishing telephone directories covering much wider geographical areas which resulted in less hassle to the consumers who earlier had to contact the directory assistant or consulate multiple directories. However, as Fiest not being a telephone company had no monopoly like other telephone companies over information of the subscribers. And in order to obtain white pages listings for area wise directory Fiest, though had approached all the 11 telephone Companies for getting the licence to use the information, got refusal from all. Subsequently, it used Rural Telephone Companies' information without their consent and simultaneously also got all the information investigated through privately hired personnels.

Rural sued Fiest for using its information without permission and the main issue in this case was whether rural could claim copyright in directory's information?

The Court Held:-

"Facts are not Copyrightable. But, Compilations of the facts are ". Further the court held that "originality is *sine qua non* of copyright" and "no author may copyright his idea or the facts he narrates to qualify for copyright protection, a work must be original to the author. Facts and discoveries, of course, are not themselves subject to copyright protection".

Therefore, it could be summed up that the *Fiest* Court totally negated the sweat of the brow doctrine as a basis for determining originality. And when the question relates to originality in compilation of facts, the Court emphasised the need to find originality in selection and arrangement of the facts.

Position of the Doctrine in India

The requirement of originality has gone through a paradigm shift from "sweat of the brow" to "modicum of creativity". However, in certain countries, especially common law countries like the United Kingdom, the doctrine of sweat of the brow is applicable. The Chancery Division of England explained the test of "originality" in *University of London Press* vs. *University Tutorial Press.* The Court in this case held that the requirement under the copyright act doesn't mandate that the expression must be in an original or novel form, the only criteria is that the work must not be copied from other work and it must originate from authors. The doctrine was further reiterated in *Ladbroke(Football) ltd* vs. *William Hill (Football)Ltd.* In this case also the court held that for getting copyright protection the requirement is "labour, skill & judgement" and the work must originate from the author. Further, even if the work is foolish, inaccurate or sans any literary merit, these criterias are immaterial.

The Indian perspective over the doctrine of sweat of the brow, the position on Indian side was similar to English Common law until the *Eastern Book Company Case.* It is noteworthy that the principle of "originality" under copyright regime is also a cardinal principle under Indian Copyright Act, 1957 and Section 13 provides that copyright subsists, subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say -. (a) original literary, dramatic, musical and artistic works; (b) cinematograph films.

India strongly followed the doctrine of 'sweat of the brow' for a considerably long time. The Supreme Court of India, following the approach of English Courts, observed that copyright law does not prevent a person from taking what is useful from an original work with additions and improvements. The Court has held neither original thought nor original research are necessary for claiming copyright and even compilations such as dictionaries, gazettes, maps, arithmetic, almanacs, encyclopaedias etc. are capable of having copyright. In the case of *Burlington Home Shopping v Rajnish Chibber*, were the facts were similar to that of Feist's case. the court following the doctrine held that a compilation is copyrightable.

However, the standard of 'originality' followed in India is not as low as the standard followed in England. The Bombay High Court in its judgement regarding copyright of a news article stated that there is no copyright for happenings and events which could be news stories and a reporter cannot claim any copyright over such events because he/she reported it first. The ideas, information, natural phenomena and events on which an author spends his/her skill, labour, capital, judgment and literary talents are common property and are not the subject of copyright. Hence, there is no copyright in news or information *per se*. However, copyright may be obtained for the form in which these are expressed because of the skill and labour that goes into the writing of stories or features and in the selection and arrangement of the material.

The most important Indian Case on this subject is *Eastern Book Company v. D.B. Modak*, where the Supreme Court discarded the 'Sweat of the Brow' doctrine and shifted to a '**Modicum of creativity'** approach as followed in the US. The dispute is relating to copyrightability of judgements. The facts of the case is that SCC, 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 of text, etc. The notion of **"flavour of minimum requirement of creativity**" was introduced in this case. It was held that 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. The Court held that these inputs made by the editors of SCC can be given copyright protection because such tasks require the use of legal knowledge, skill and judgement of the editor. Thus, this exercise and creation thereof has a flavour of minimum amount of creativity and enjoy the copyright protection.

Accordingly, the Court granted copyright protection to the additions and contributions made by the editors of SCC. At the same the Court also held that the orders and judgments of the Courts are in public domain and everybody has a right to use and publish them and therefore no copyright can be claimed on the same.

In subsequent cases, the Indian courts followed this approach and completely rejected the plea to protect mere works of compilation under copyright. Copyright is conferred on those works which has originated from author and which is not merely a copy of the original work. This does not push the standard of originality expected to a considerably high level, but brings in a subtle balance between ensuring reward for the efforts of an author while also maintaining a reasonable standard in the materials protected under law.

Doctrine of Sweat of the Brow: The "Doctrine of Sweat of the Brow" is an old concept that was prevalent in some legal systems, including India, before significant changes were made to copyright laws. Under this doctrine, copyright protection was extended to works that required a substantial amount of effort, labor, or "sweat of the brow" to create, regardless of whether the work possessed originality in the creative sense. This meant that even if a work lacked creative expression but involved significant effort, such as in compiling facts or data, it could still be eligible for copyright protection.

Modicum of Creativity: Over time, India moved away from the strict "Sweat of the Brow" approach and adopted a more modern understanding of copyright protection, aligning itself with international standards. The introduction of the Copyright (Amendment) Act 1994 brought significant changes to the definition of originality in Indian copyright law. The concept of "Modicum of Creativity" was introduced, which required that for a work to be eligible for copyright protection, it must possess a minimal degree of creativity or intellectual input. The work must be the result of some creative effort and not simply a mechanical or rote exercise.

Under the "Modicum of Creativity" standard, works like phone directories, databases, and factual compilations that may have been eligible for protection under the old doctrine are no longer eligible unless they exhibit a certain level of creative selection, coordination, or arrangement.

This shift in the concept of originality brought Indian copyright law more in line with international copyright standards and better accommodated the changing landscape of creativity and innovation in the digital age.

It's essential to note that the legal understanding of originality can vary depending on specific cases and the interpretation of the courts, but the "Modicum of Creativity" standard represents a significant shift from the traditional "Sweat of the Brow" approach in the Indian copyright scenario.

Conclusion

The primary objective of copyright is not to reward the labour of authors but rather to protect expression while encouraging others to build freely upon the ideas and information conveyed in the expression. But the standard of originality cannot be placed at a high threshold since majority of the work would fall out of the preview of copyright, at the same time it should not be so low that the degree of protection of work conferred by law degrades to a position where any derivative work with just trivial modifications from that of the original work will be brought under the purview of protection.

This balance is very crucial and is to some extend achieved by the US jurisprudence, which follows the criterion of 'Modicum of Creativity' which has a slightly higher expectation of originality from the authors as compare to the jurisprudence in UK, which follows the doctrine of 'Sweat of the Brow'.

The jurisprudence relating to 'Originality' of copyright in India is developing in the right direction. Since the *Modak Case*, we have deviated from the UK jurisprudence and are coining our own checks and balances so that the literature and other works, with a degree of originality,are properly brought under copyright protection while denying such protection to mere compilation without any degree of creativity from such privileges.

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[4] See, note 2, Tracy Lea and Robert A. Gorman.
[5] See, Section 101 & Section 103 of the US Copyright Act.
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[7] Ibid.
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[9] See, Worth vs. Selchow & Righter Co. 827 F. 2d 569 (9th Cir. 187); Eckes vs. Card Prices Update, 736 F. 2d 859 (2d Cir. 1984).
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