

Subject: Law

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Paper : Intellectual Property

Module : Originality Requirement in Copyright Law



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Module Detail	
Subject name	Law
Paper name	Intellectual Property
Module name/ Title	Originality Requirement in Copyright Law
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Pre- requisites	Basics of copyright protection; need for copyright; economics of copyright; justifications for copyright protection
Objectives	To examine the concept of originality as a qualification requirement for copyright protection; discuss cases concerning originality from a comparative jurisdictional perspective; to locate the standard of originality in Indian copyright law
Key words	Copyright; originality; First publication; EBC v D B Modak; sweat of the brow doctrine; modicum of creativity



Introduction

The term *Copyright* can be literally construed to mean something as simple as ‘*The right to copy*’. Before the invention of the Printing Press in the fifteenth century, the need for a law protecting the copying of books or manuscripts did not arise because of the arduousness involved in manually copying a book. But soon, with the invention of Printing, the need for a law prohibiting unauthorized printing, sale or import of a book arose. And in England, a series of law (Ordinances, by-laws, Acts *et.al.*) were passed to cater to this *need*. The Licensing act, 1662 is the first statute that expressly mentions *inter alia* that the *ownership* of a book or *copy*¹ thereof by the *Owner* to be a *Common Law Right*.²

This finds a clearer interpretation in Lord Justice Mansfield’s words in *Millar versus Taylor*³ where he says, “Because it is *just*, that an author should reap the pecuniary profits of his own ingenuity and labour. It is *just*, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he will ever publish...”⁴

So, the keywords essential here are “*ingenuity*” and “*labour*”. How important are these words to the establishment of copyright over a copyrightable work⁵, will be seen in the following paragraphs.

Learning Outcome:

- Students will be able to understand the need and the context of the requirement of originality in copyright law
- Will understand how the concept of originality has evolved through statutory and judicial interventions
- Will be able to understand the requirement of originality in different works that are protected under copyright

¹ Copy, in its technical sense used to signify “an *incorporeal* right to the sole printing and publishing of somewhat intellectual, communicated by letters.”

² Licensing Act (parchment copy), London (1662), 13&14 Car.II, c.33, accessible at http://copy.law.cam.ac.uk/cam/tools/request/showRecord.php?id=record_uk_1662a .

³ *Millar v. Taylor* (1769) 4 Burr. 2303, accessible at http://copy.law.cam.ac.uk/cam/tools/request/showRecord.php?id=record_uk_1769 .

⁴ *Ibid*, para 2399.

⁵ “*Work*” within the meaning of Section 2(y) of The Copyright Act, 1957.



Originality: Meaning

Isaac Newton once wrote, “*If I have seen further it is by standing on ye sholders of Giants.*” True to the very spirit of the statement, most of the works that are created (*literary, musical or artistic*) cannot be said to be completely novel or *unknown* to mankind. The ingenuity of an author lies in his expression of the known ideas. In other words, the way in which an author chooses to arrange the known forms of expression (words, musical notes, objects, *et. al.*) is unique for each author and that uniqueness is what we call *Originality*.

Originality: It's requirement

The first hurdle that a work has to cross to be copyrightable is the ‘*Test of Originality*’. To comment on the appropriateness of this test, one has to go back to the Common Law approach to copyright. The keywords, as were earlier pointed out, were “*labour*” and “*ingenuity*”. According to Lockean Theory of Property, the rationale behind providing an author with *copyright* over his/her work lies in the *labour* that the author puts in making the work in its present form.⁶ Another important theory of Intellectual Property worth mentioning here is the ‘*Personhood Theory*’. This theory states that when a person works on anything, he expresses his personality on that subject. So, as humans, in themselves are in possession of their person, so, by extension, they should also be the owners of subjects or objects they have worked on, as they become extension of their personality.

But there are other schools of thoughts that maintain that mere *labour* in producing a work is not enough for making it copyrightable. The other key word comes into play: *Ingenuity*. Ingenuity is essential because of two reasons:

- (a) According to the *Incentive Theory* of Intellectual Property, Intellectual Property Rights (including copyright) is an incentive for intellectual work carried on by the author of a given work to make a certain work. Copying a certain work cannot be the intellectual work envisaged by the theory.
- (b) Doing away with ingenuity will promote copying or plagiarism or piracy, giving rise to free riding, again devaluing a product of *real* intellectual work. And as the object of Intellectual Property law is *to promote the Progress of Science and useful Arts*⁷, copying and free riding goes against the very spirit of Intellectual Property law.

The next natural question that crops up is ‘How to determine Originality in a work’? We will try to answer this in the next section.

Originality: Tests

⁶ Locke 1960, *Second Treatise*, § 27-28

⁷ United States Constitution, Article I, Section 8, Clause 8



The tests for finding out Originality have evolved through various case laws. We will look at a few case laws that have helped find the various tests used for determining Originality in a copyrighted work.

Quality of a Work Irrelevant

Though the importance of Originality in Copyright Protection was earlier acknowledged in many case laws⁸, the first case where the issue of Originality was expressly dealt with was *Bleistein v. Donaldson Lithographing Co.*⁹ In this case; the opinion of the court was delivered by Mr Justice Holmes. He laid down the law very clearly that “*The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act*” So, the quality of a work or the merit of a work does not determine its copyrightability. What does is whether the work is the author’s own or plagiarised from somewhere¹⁰. But the issue is not as simple as it seems.

Derivative Works: The Bigger Issue

The issue with originality looms mostly over Derivative works: works which are derived from other works: compilation of facts, directories, law reports, etc. The complication seems to arise from the settled position of law that “*No author may copyright his ideas or the facts he narrates.*”¹¹ So, the natural question that arises is ‘how can a compilation of facts be copyrightable?’ Various courts have addressed this concern of *monopolisation of facts* in various case laws. And on careful analysis of them, two schools of thoughts or tests seem to have evolved over time in dealing with Originality in Derivative Works:

The ‘Sweat of the Brow’ Doctrine:

The Sweat of the Brow can be thought to be the traditional approach to Copyright Protection. This test recognizes the *labour* put in by an author or compiler into the making of a work.

So, according to this doctrine, irrespective of any creativity or judgment on the part of the author, if it can be proved that the author has expended considerable labour and

⁸ *United States v. Steffens*, *United States v. Witteman* and *United States v. Johnson*, 100 US 82 (1879)., *Burrow-Giles Lithographic Co. v. Sarony*, 111 US 53 (1884).

⁹ 188 US 239 (1903).

¹⁰ *L. Batlin & Son v Snyder*, 536 F2d 486, 490 (2d Cir 1976)

¹¹ *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 US 539, 556 (1985)



expenses over the making of his work, he is liable to get his work protected by copyright. Mere industrious gathering of data and facts even when such effort lacks imagination or judgment entitles the “*compiler*” to get a copyright over his/her “*product*”.

Lord Halsbury’s judgment in the landmark case of *Walter v. Lane*¹² can be said to be the paradigmatic “Sweat of the Brow” doctrine. In this case, several public speeches were reported in The Times newspaper at various occasions. Later, the defendant published a book containing all these speeches and short notes on them. It was also admitted by the defendants that these speeches were taken from the reports in The Times. The times sued for copyright infringement of the speeches they published. Lord Halsbury laid down that there is considerable labour involved in “*reproducing spoken words into writing or print and first publishing it as a book*”. And so, if a telephone directory can be a protected by Copyright¹³, so can a *verbatim* report of public speeches.

The “*Sweat of the Brow*” doctrine can hence be thought to be one which does not distinguish between an author and a publisher. Producers produce products: any manufacture that requires investment of labour or money or both. On the other hand, what an *author* produces is a work; one which requires investment of *something more* than pure labour or money, something that requires the presence of a *creative intellect*, one which transforms a product into a work. So, the difference between a *work* and a *product* is completely blurred under this doctrine. In other words, under this doctrine, a publisher is equally entitled to the copyright in a work as an author. Hence, this doctrine also seems to stress on the fact that the purpose of copyright law is less “*protection of authorship*” and more “*stopping misappropriation by others of any labour*”

‘Creativity Standard’ Doctrine:

The other doctrine that has evolved with time and through various case laws is the doctrine of *Creativity Standard*. It maintains that a work must be creative to be original and thus protected by Copyright.

A major landmark case that glorified this doctrine in the U.S. is *Financial Information, Inc. v. Moody's Investors Service*¹⁴. The case involved daily issues of 4" x 6" index cards printed with information concerning current municipal bonds being

¹² [1900] A.C. 539

¹³ *Konor Enterprises*, 878 F2d 138 (telephone directory); *Hutchinson Telephone Co. v Fronteer Directory Co.*, 770 F2d 128, 131-32 (8th Cir 1985) (telephone directory); *Southern Bell Telephone & Telegraph Co. v Associated Telephone Directory Publishers*, 756 F2d 801 (11th Cir 1985); *Schroeder v William Morrow & Co.*, 566 F2d 3 (7th Cir 1977) (gardening directory); *G.R. Leonard & Co. v. Stack*, 386 F2d 38 (7th Cir 1967); *Hartfield v Peterson*, 91 F2d 998 (2d Cir 1937) (cable and telegraphic code); *Southwestern Bell Telephone Co. v Nationwide Independent Directory Service*, 371 F Supp 900 (WD Ark 1974).

¹⁴ 751 F2d 501 (2d Cir 1984)



called for redemption. Typically, the information consisted of the identity of the issuing authority, the series of bonds being redeemed, the date and price of the redemption, and the name of the trustee or paying agent to whom the bond should be presented for payment. According to the plaintiff, they had expended considerable effort and money to compile the information.

The Second Circuit on appeal while rejecting the copyrightability on the Bond Cards and remanding it back affirmed that “*a compilation may receive a valid copyright only if something has been added to the data: the “authorship” of the compiler in making the requisite selection, coordination, or arrangement of the data.*”¹⁵

In England, again Lord Robertson’s dissenting judgment in the landmark case of *Walter v. Lane*¹⁶ can be said to be the paradigmatic “Creativity” judgment. Lord Robertson, in his dissent highlights the nature of reporting a speech verbatim, which is reporting it as it is. On this premise, he further states that a copyright cannot subsist in such a verbatim reporting of a speech because there is no scope of any “*construction*” on the part of the maker. He distinguishes it from the telephone directory cases¹⁷ on which Lord Halsbury had relied on saying that those are “*at a different plane*” than this.

Hence, the *creativity* doctrine requires the maker to do something more than pure industrious compilation: be it giving structure or organization or the compilation must display originality in the “*selection, creativity and judgment in choosing*”¹⁸ the compiled materials. Hence, the “*Creativity Standard*” doctrine seems to affirm a view of copyright as concerned with the “*recognition of authorial dignity*” unlike the “*Sweat of the Brow*” doctrine.

Feist Publications: A solution once and for all?

In *Feist Publications v. Rural Telephone Service Co.*¹⁹, a similar situation involving the copyrightability of a directory listing the names, towns and telephone numbers of a large number of people of a certain area arose. On the question of copyrightability of compilations, the Supreme Court of United States emphatically laid down the following dictums:

- i. “*author*” is “*he to whom anything owes its origin; originator; maker*”²⁰
- ii. “*Facts do not owe their origin to an act of authorship... the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.*”²¹

¹⁵ *Ibid*, para 59

¹⁶ *Supra* note 12

¹⁷ *Supra* note 13.

¹⁸ *Eckes v Card Prices Update*, 736 F2d at 863

¹⁹ 111 S Ct 1282 (1991)

²⁰ *Ibid*, quoting *Burrow-Giles*, 111 US at 58

²¹ *Ibid*



- iii. The choices undertaken by the compiler as to selection and arrangement, “so long as they are made independently by the him/her and entail a minimal degree of creativity, are copyrightable”.²²

However, the Court spelt out a limitation to this copyrightability:-

“Copyright protection may extend only to those components of a work that are original to the author.”²³ So, if, for instance, the selection and arrangement are original, only these elements will be copyrightable. The facts themselves do not become original howsoever original the format and arrangement might be.

- iv. “...Originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist”²⁴
- v. The “Sweat of the brow” doctrine is rejected by the Copyright statute as it requires selection, coordination and arrangement of facts in such a way that it “as a whole constitutes an original work of authorship.”²⁵

Based on this test, the Court came to the conclusion that the impugned directory was copyrightable because of its originality in alphabetically arranging the same.

Hence, a clear position was reached by the American Supreme Court wherein they found a middle way between these two extreme schools of thoughts. So, now, a dictionary, for instance is copyrightable merely by virtue of its original arrangement, if it has one.

But how far has India adopted or shunned these tests in determining originality? We discuss that in the following section:

The Position in India

For brevity and context, we would limit our discussion to the tests evolved in India in the form of precedents.

The first case to be seen in this context is *R.G. Anand versus Delux Films and Ors*²⁶.

Brief Facts:

The plaintiff in the present case was a renowned playwright, dramatist and producer of stage plays. One of his plays titled “Hum Hindustani” had received critical acclaim and was a huge success. The play was written by him in Hindi and was enacted by him for the first time. One of the defendants informed him via letter

²² *Ibid* at 1289

²³ *Ibid*

²⁴ *Ibid* at 1296, quoting *Burrow-Giles*, 111 US at 59-60

²⁵ 17 USC § 101

²⁶ AIR1978SC1613



that they wanted to make a film based on the play and would like the plaintiff to supply a copy of the play so that the defendant might consider the desirability of making a film on it. However, the plaintiff informed them to come and visit Delhi and see the play for themselves. So, when two defendants came to New Delhi, the plaintiff sat with them in his office, read out the play for them and discussed the possibility of making a film over it. The defendants however, gave no reassurance and informed the plaintiff that they would inform him of their reaction later. However, the plaintiff did not receive any intimation from their side. After a few months, the plaintiff came to know from one of the artists involved with the defendants that the defendants had announced the production of a film named “New Delhi” which was really based on the plaintiff’s play. On being asked by the plaintiff, the defendants assured him that the film was not based on his play. But when the film was released and the plaintiff saw it, he realised that it was really an adaptation of his play without his consent. So, the present suit was filed which came in appeal to the Apex Court.

Relevant Issue:

Whether there was infringement of copyright of the plaintiff’s dramatic work?

Findings:

The Apex Court, after discussing a number of case laws, national as well as international, promulgated certain tests based on which a work can be tested to be *Original* or *Infringing*:

- “Where the same idea is being developed in a different manner...similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright.....in order to be actionable the copy must be a substantial and material one.”
- “One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.”

Applying the said tests to the present facts and circumstances and comparing both the works (dramatic and cinematographic) plot by plot, the court came to the conclusion that there was no copyright infringement of the impugned dramatic work by the defendants.

The next important case for our consideration is *Eastern Book Company and Ors. versus D.B. Modak and Anr.*²⁷

Brief Facts:

²⁷ AIR2008SC809, (2008)1SCC1



The appellant no. 1 in the present case is the Eastern Book Company, who publishes a case report named Supreme Court Cases (SCC). They publish judgments, orders and proceedings of the Supreme Court. The process of reporting of the judgment is as follows:

- i. **Procurement:** The copies of judgments, orders and proceedings are procured from the office of the Registrar of the Supreme Court of India.
- ii. **Copy Editing:** Various inputs are put in the judgments and orders to make them user friendly; an addition of *cross-references*, *standardization* or *formatting* of the text, *paragraph numbering*, *verification* and other such things.
- iii. **Headnoting:** The appellants also prepare the headnotes comprising of two portions, the short note consisting of *catch/lead words*; and the long note, which is comprised of a *brief discussion of the facts and the relevant extracts from the judgments and orders* of the Court.

The appellants claim that this whole process of putting together a reportable judgment and putting in various inputs as aforesaid require considerable amount of skill, labour and expertise and hence, the judgments, orders and proceedings so reported are Original Literary work and are protected by the Copyright Act 1957.

Relevant Issue:

Are the Reported Judgments subject matter of copyright and how *Original* are they?

Findings:

The Supreme Court discussed a catena of international decisions on the issue and then followed a Canadian Case²⁸ wherein it was laid down by the Canadian Supreme Court that the *Sweat of the Brow* doctrine which maintains that any *work* produced with labour and capital is copyrightable because copyright seeks to incentivize the labour invested by the author is not the correct standard. Diametrically opposite to this: the *Creativity Standard Doctrine* which maintains that to be copyrightable a *work* has to be novel or non-obvious, was also held to be not the correct standard and the Canadian Supreme Court held that “*to claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital.*”

The touchstone of Law relied on by the Court:

- (i) Section 52(1)(iv)(q) excludes the reproduction or publication of any judgment or order of a Court, Tribunal or other judicial authority from copyright unless the Court, Tribunal or any other judicial authority makes it copyrightable. Hence, all judicial pronouncements of the Apex Court

²⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 (1) SCR 339 (Canada)



would be in the public domain too and its reproduction or publication would not infringe the copyright.

- (ii) The Copyright Act is not concerned with the originality or literary merit but with the expression of thought. Copyrighted material is that which is created by the author by his own skill, labour and investment of capital which gives a flavour of creativity, even when it is a derivative work.

A copyrightable derivative work should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the original work, the new derivative work is somewhat different in character.

- (iii) To secure a copyright in the judgments delivered by the court, it is not sufficient to show that the author has produced the material with merely labour and capital. He must show that he has exercised his skill and judgment which may not be creative in the sense that it is novel or non-obvious, but the derivative work produced by the author must have some distinguishable features and add flavour to raw text of the judgments delivered by the court.
- (iv) The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author.

The conclusions arrived at by the Court:

- (i) Addition of certain facts or material already published, case law published in another law report and its own arrangement and presentation of the judgment of the court in its own style to make it more user- friendly can be viewed as the result of the labour, skill and investment of capital lacking even minimal creativity. These inputs in the copy-edited judgments do not touch the standard of creativity required for the copyright.
- (ii) However, the following inputs put in the original text by the appellants are to be seen differently:
 - segregating the existing paragraphs in the original text by breaking them into separate paragraphs;
 - adding internal paragraph numbering within a judgment after providing uniform paragraph numbering to the multiple judgments; and
 - indicating in the judgment the Judges who have dissented or concurred by introducing the phrases like “*concurring*”, “*partly concurring*”, “*partly dissenting*”, “*dissenting*”, “*supplementing*”, “*majority expressing no opinion*”, etc.,
- (iii) The task of paragraph numbering and internal referencing requires in the judgment entails careful consideration, discernment and choice; reading and understanding of subject of disputes, different issues involved,



statutory provisions applicable and interpretation of the same and then dividing them in different paragraphs so that chain of thoughts and process of statement of facts and the application of law relevant to the topic discussed is not disturbed, would require full understanding of the entire subject of the judgment.

Often legal arguments or conclusions are either clubbed into one paragraph in the original judgment or parts of the same argument are given in separate paragraphs. It requires judgment and the capacity for discernment for determining whether to carve out a separate paragraph from an existing paragraph in the original judgment or to club together separate paragraphs in the original judgment of the court. This exercise and creation thereof has a flavour of *minimum amount of creativity*.

- (iv) Also, an input whereby different Judges' opinion has been shown to have been dissenting or partly dissenting or concurring, etc. also requires reading of the whole judgment and understanding the questions involved and thereafter finding out whether the Judges have disagreed or have the dissenting opinion or they are partially disagreeing and partially agreeing to the view on a particular law point or even on facts. In these inputs too, the authors will have a copyright.

Hence, we can conveniently say that the Court reached a conclusion that the portions of the Judgments wherein inputs were put by the appellants were copyrightable but not the portions which are taken as it is from the Judgments delivered by the Judges.

Conclusion

Originality is important in understanding copyrightability of a *work* in question and the tests for determining *Originality* have evolved over time to form the present standard of test as laid down in *Fiest Publications* or *CCH Canadian Ltd.* or *Eastern Book Company* case.

The stance of the courts in most jurisdictions seems to be quite liberal. They acknowledge copyright if a “minimal amount of originality” is shown which happens in most of the cases. But they rightly filter out the miniscule amount of cases where even the minimal amount of creativity is missing. The present regime bars such mechanical ‘copying’ work from entering the copyright regime.

The importance of Originality and its present position in the Copyright Regime point towards the encouragement and promotion of *Intellectual Property*, one originating anew from the human intellect and discouragement of free riding on someone else's intellectual property.



Point to Remember

- The requirement of originality is mandatory in case of copyright protection
- Different courts have evolved different standards
- Originality standards vary in case of different categories of work
- Some jurisdictions follow the sweat of the brow doctrine
- *Originality* have evolved over time to form the present standard of test as laid down in *Fiest Publications* or *CCH Canadian Ltd.* or *Eastern Book Company* case.
- *Eastern Book Company and Ors. versus D.B. Modak and Anr* is a seminal decision concerning the standard of originality for judgments in India

Self-check Exercises

- What is the need for requirement of originality in copyright law?
- What is the sweat of the brow doctrine
- What is the modicum of creativity standard
- What is ratio of *Fiest Publications*
- What is the ration of *Eastern Book Company case* decided by the Indian Supreme Court