EMERGENCES AND DECLINE OF SWEAT OF THE BROW: IN INDIA AND THE UNITED STATES

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Abstract

Sweat of the brow provides copyright protection on the foundation of the effort, hard work, talent and investment of capital laid in by the maker instead of the originality. According to this principle, an author acquired rights through modest reliability throughout the creation of a work, such as database, directory, factual compilations. It is also recognized as Industrious collection standard. With time this doctrine became an important aspect of copyright. The underlying principle behind this rule was to reward the one who utilized his sweat and strength in assembling the factual work.

Initially for getting copyright there should be originality, diminimus requirement and fixation requirement and most important work should be originated from author not to be derivative work. But now a day judges on different events implies that imitative work need not be unique in its place it should be stated in an entirely novel way in order to be copyrighted. Uniqueness must be adjudicated through seeing at the work as a complete one, not only at its component measures. Therefore, the rule sweat of the brow is in disagreement with the essential norm of the Copyright Act. It led to confusion on the issue of regulating the borders of the notion of originality.

This paper will discuss the usage of Sweat of the brow doctrine in different countries and how they are not detriment to originality. I will further discuss about the recent cases that have come up and grabbed the attention of this doctrine and also the changes that has been formulated by judges from sweat of the brow to degree of originality and creativity.

Keywords: *Copyright, Creativity, Intellectual Property law, Originality, Sweat of the Brow, Industrious collection, Protection.*

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INTRODUCTION

In every country for all forms of Intellectual property there have been certain criteria that are sine qua non to conferring de jure protection. Since one has right to get protection over their work. For copyright, in literary work 'originality of expression' is of an utmost importance, even in the case of compilation and derivative works. Therefore, in the whole world originality is a basic touchstone for getting copyright in literary work. The basic purpose for protecting a work is to encourage the progress of science and useful arts and to protect a person creative expression not the idea. Originality is not define anywhere in the copyright law of any country and moreover, what quantum of originality is required to get copyright is too not mentioned. In India copyright subsists, inter alia, in 'original' literary.[1] However, it is still not define anywhere what standard of originality should be followed in India and same with the United States.

This ambiguity is often viewed as a manifestation of a long-standing and ongoing struggle between two different doctrinal schools. On the one hand, the '*sweat of the brow*' or 'industrious collection' school holds that labor or industry, even in the absence of creativity, may be sufficient to make out a finding of originality for copyright purposes[2]. On the other hand, 'Intellectual Creativity' is a very important aspect of copyright law. For getting copyright protection there should be existences of the minimal level of creativity by the creator. Now a day, the courts are seeing a test of originality from a perspective of creativity aspect more than sweat of the brow doctrine. In other words, copyright law promotes creativity[3].

SWEAT OF THE BROW NOT DETERMINANT TO ORIGINALITY

For seeking copyright for a work, it is imperative to ensure that such work is an original. Largely, in every country common law tends to confer copyright protection on any work on which substantial skill or labor has been expended and this doctrine is known as sweat of the brow. This doctrine emphasis on how much labor and diligences a person took to create a work, rather than how original work is.[4] The origin of this doctrine cannot be acknowledged, but through study this is clear that this doctrine is the result of interpretation of earlier

[1] India Copyright Act 1957, S 13
[2] Abraham Drassinower, Sweat of The brow, Creativity and Authorship: On Originality in Canadian Copyright Law (2004)
[3] Dr. Tabrez Ahmad & Ankur Mishra, Creativity and Copyright: U.S. and Indian Perspective.
[4] Mini Gautam, Originality Under Copyright Law Is There Any Definite Standard? (2015)

statutes[5].In case of *University of London Press* v. *University Tutorial Press*[6] the court originally propound the doctrine of sweat of the brow and explain that general requirement for originality does not mean that the work must be the expression of the original or inventive thought, it just that it should originate from the author and not be copied work. Skill and labor must have been expended in the creation of the work.

Even in the case of *Desktop Marketing system private Ltd* v. *Telstra Corporation Ltd*[7] the court held that relevant database and compilation is an original work in which copyright subsist. Also court stated that originality requirement is not that strict and labor and effort in industrious compilation was sufficient. In the case of *Ladbroke* v. *William hills*[8] court have recognized that where there is skill, judgment, labor & knowledge there is copyright involved. Originality is present if there has been the implementation of adequate degree of labor, skill, judgment and knowledge in the production of the substantial work. It was held that "what is worth copying is prima facie worth protecting." Due to this doctrine, work is defined in terms of commercial values[9].

The generosity of the copyright system, it is well established that railway timetables[10], football fixture list[11], examination papers[12] are literary work within the meaning of copyright and included as tables or compilations so there is no doubt that they are protected. There should be sufficient 'skill, judgement and labour' accordingly operates as a proviso de minimis. But there is no copyright subsist in Ledger sheet & blank forms, Rules and Recipes, White pages listings of telephone directories, Idea and Principles, Method of operation, Fact and Theories (although particular expression of facts or theories are copyrightable). Even long before the Copyright Act, the U.S. Supreme Court recognized in 1879 the fact-expression dichotomy in the case of *Baker* v. *Selden*, [13] explained the reason behind limiting copyright protection on mathematical science. Further, "The owner of copyright under this title has the exclusive rights to do and to authorize to prepare derivative works based upon the

[5] Tracy Lea Meade, Note, Ex-Post Feist: Applications of a Landmark Copyright Decision, 2 J. Intell. Prop. L. 245, 250 (1994).at 248
[6] University of London Press v Universal Tutorial Press [1916] 2 Ch. 601
[7] (2002) 55 IPR 1
[8] [1964] 1 All ER 465
[9] Teresa Scassa, Originality and Utilitarian Works: The Uneasy Relationship between Copyright Law and Unfair Competition (2004)
[10] Blacklock v. Pearson [1915] 2 Ch. 376
[11] Football League v. Littlewoods [1959] Ch 637
[12] University of London Press v Universal Tutorial Press [1916] 2 Ch. 601
[13] (1879) ,101 U.S. 99, 103, 25 L. Ed. 841

copyrighted work[14]".The standard of originality should be set at the intermediate level of skill and judgment.

SHIFT OF SWEAT OF THE BROW TO CREATIVE ORIGINALITY

The core objective of copyright is not to reward the labor and effort of authors, but "to promote the Progress of Science and useful Arts". For getting copyright protection there should be a minimal creativity. Before *Feist Publications, Inc.,* v. *Rural Telephone Service Co.*[15], the courts had developed sweat of the brow doctrine but that is not consistent with the core principles of copyright[16]. In order to determine 'originality', the word 'creation' is employed as a criterion. After *Feist Case*[17] it came out that "originality in copyright involves independent creation and a bit of creativity". This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright[18]. The Supreme Court promoted creativity originality theory and tried to abolish sweat of the brow doctrine. The creative originality doctrine was also applied by various courts, which protected only creative aspect of the compilations[19].The originality requirement articulated in and *Burrow-Giles*[20] case remains the touchstone of copyright protection. This Court defined the crucial terms "authors" and "writings". In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality[21].Minimum level of creativity should be there for copyright protection. Perhaps sweat of the brow doctrine tries to protect the skill and effort but then by applying this doctrine courts outlawed future compliers from future compilation. On the other hand, creative originality approach guaranteed that future compilers could work on previously created factual compilations, so long as selection as well as arrangement was not copied. This resulted in the fair use of the copyrighted work. Sweat of the brow doctrine is not valid only modicum of creativity is the best one which suits copyright.

PUBLIC DOMAIN

[14] U.S Copyright Act 1976, 17 U.S.C. § 103(a)
[15] (1991) 499 U.S. 340, 351-353
[16] Dr. Tabrez Ahmad, Creativity and Copyright: U.S. and Indian Perspective
[17] ibdi
[18] Philiph. Miller, Life after Feist: Facts, The First Amendment aned the copyright status of automated database (1991)
[19] Miller v. Universal City Studios (5th Cir. 1981),Inc., 650 F.2d 1365, Worth v. Selchow & Righter Co (9th Cir. 1987) 827 F.2d 569 ,Eckes v. Card Prices Update (2nd Cir. 1984) 736 F.2d 859
[20] (1884), 111 U.S. 53
[21]< https://www.law.cornell.edu/copyright/cases/499_US_340.htm> accessed on 6th October, 2016

Copyright should be viewed as a contract between society and the author consonant with the Constitutional objective of promotion of science and the useful arts[22]. With growing awareness of and a new emphasis on the importance of maintaining a broad public domain of fact-based works. This analysis thus gives a broader perspective on the historical argument that the industrious collection doctrine has always been the ruling principle of copyright law in the United States and shows this assumption is not entirely valid[23]. In case of *Fogerty* v. *Fantasy*[24], Copyright law reflects a balance of competing claims upon the public interest; creative work [25]is to be encouraged and rewarded but the copyrighted material should also serve the public at large which means that the art should be available to public for developing knowledge and art in the society.

POSITION AND APPLICABILITY OF SWEAT OF THE BROW

UNITED STATES

USA has the oldest and the most developed Copyright laws in the world.[26] After the period of ambiguity for a long time because of criteria for copyright protection with respect to literary work, in 1991 Supreme Court of U.S has being taken a landmark shift from "Sweat of the brow" to "Creativity originality". In landmark judgment of *Feist Publications* v. *Rural Telephone Service Company*, *Inc*[27] the U.S Supreme court established a new originality paradigm i.e.., constitutional requirement of creativity. In this case court found that there should be creative choice in the selection and arrangement of data for the grant of copyright. And it makes clear that whether copyright should subsist on mere labour or creativity.

Facts- Rural Telephone service was a certified public utility and provided phone services to several communities in north- west Kansas. Rural was obliged to publish annually an updated phone directory consisting of white and yellow pages. Rural get hold of the data from

[22] Daniel J. Gervais, FEIST GOES GLOBAL: A COMPARATIVE ANALYSIS OF THE NOTION OF ORIGINALITY IN COPYRIGHT LAW,(2002)
[23] Miriam Bitton, Trends in Protection for Informational Works under Copyright Law during the 19th and 20th Centuries, (2006)
[24] (1994) Inc. 510 U.S. 517
[25] https://books.google.co.in/books?id=8eniCQAAQBAJ&pg=PA40&lpg=PA40&dq=%22of+competing+claims+upon+the+public+interest;+creative+work%22&source=bl&ots=bfFrw0kAK0&sig=wrEJ5LCq7SqeP3mWrDbVtwsDSDY&hl=en&sa=X&ved=0ahUKEwjtx8bVrIXQAhWMr48KHdhqD44Q6AEIHTAA#v=onepage&q=%22of%20competing%20claims%20upon%20the%20public%20interest%3B%20creative%20work%22&f=false
[26] Analysis of doctrines: 'Sweat of the brow' & 'Modicum of creativity' vis-a-vis Originality in Copyright Law <<http://www.indialaw.in/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/ > Accessed on 15th October, 2016
[27] (1991), 499 U.S. 340

subscribers, who had to postulate their particulars to obtain phone services and circulated its directory free of cost to subscribers but arose revenue from selling yellow pages advertisements. On the other hand, Feist Publications, Inc., was a publishing company specializing in area-wide phone directories, covering much larger areas. The Feist directory that is the subject of this litigation covered 11 different telephone service areas in 15 counties and contains 46,878 white pages listings compared to Rural's approximately 7,700 listings. Both of them compete vigorously for yellow pages advertising. Feist nonetheless used Rural's white pages listings, taking 1,309 names, towns and phone numbers without Rural's consent.[28] Feist's directory was also distributed free of charge. Rural as the only provider of telephone service in its area, Rural obtained subscriber information quite easily. Feist is not a telephone company not having any monopoly status, and thus lacked independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies. All agreed except Rural. Feist listing included the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-1983 white pages. Four of these were fictitious listings that Rural had inserted into its directory to detect copying. Rural successfully sued Feist in district court on the assertion that it could not use the information given in Rural's directory while arranging its own directory and it lead to copyright infringement.

Issue: Did copyright subsist in the telephone directory?

Court observation: The court in order to decide this case found that originality in literary work is a *sin qua non* of copyright which cannot be ignored. In doing so, court followed a long line of earlier Supreme Court decisions that have limited copyright protection to the "original intellectual conceptions of the author."[29] In case of *Burrow Giles*[30], the Supreme Court defined "author" as "'he to whom anything owes its origin; originator; maker[31]. In Milestone judicial pronouncement of the *Trademark cases* [32], "writings" are defined as "only such as are original, and are founded in the creative powers of the mind of the author. Moreover, the court observed that facts are not copyrightable but compilations may be

[28] Nine originality, sweat of the brow
[29] Philip H. Miller, Life A er Feist: Facts, the First Amendment, and the Copyright Status of Automated Databases (1991)
[30](1884), 111 U.S. 53
[31] ibid
[32] (1879) 100 U.S. 82

copyrightable only if complier selection and arrangement shows sufficient originality. The Supreme Court made this clear in *Harper & Row, Publishers, Ina* v. *Nation Enterprises*[33], stating emphatically that "no author may copyright his ideas or the facts he narrates". The Court found statutory support for this standard in section 101 of the Copyright Act of 1976, which defines "compilation" as a work formed by the collection and assembling of preexisting data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[34]The premise that facts are not copyrightable is the most fundamental axiom of copyright law. In rejecting the "sweat of the brow" in this case Supreme Court noted that it arose because of misinterpretation of statues in 1909 of Copyright Act because of which sweat of the brow doctrine contravenes fundamental copyright principles by protecting underlying facts.

Held: The Court overturned the Lower Court's judgement and the United States Supreme Court granted Feist's petition for certiorari and the Court held that Feist Publications did not infringe the copyright held by Rural Telephone. Because Rural fails to prove originality in its coordination and arrangement of facts. It didn't show de minimis creativity and there was a lack of the requisite originality too. What Feist's use was the listings and that cannot constitute infringement. This decision makes it clear that copyright rewards originality, not effort. And there should be mere creativity should have involved for grant of copyright.

Applicability of Feist: After Feist, Supreme Court edict that anions the original selection and arrangement standard as the only true judicial measures for determining the copyright status of automated database & other factual compilations. It negate that not novelty but originality was held to be indispensable requirement for the work to be copyrightable. And requisite level of creativity is small. In case of *Key Publications, Inc.* v. *Chinatown Today Publishing Enterprises Inc*[35]court held that directory is subject to copyright protection because it showed creativity and thus it is copyrightable. The Feist statement that "the copyright in a factual compilation is thin" has been borne out in case law subsequent to the Feist decision. In case of *Bellsouth Advertising & Publishing Corp.* v. *Donnelley Information Publishing, Inc. ("BAPCO")* [36]held that compilation as whole may be copyrightable, but the defendant will not amount to infringement. In *CCC Information Servs., Inc.* v. *Maclean Hunter Market*

[33] (1985) ,471 U.S. 539
[34] U.S Copyright Act 1976, 17 U.S.C. § 101
[35] (CA2 1922) 281 F. 83
[36] (11th Cir. 1993), 999 F.2d 1436

Reports, Inc[37]., the Second Circuit posited that there are facts or ideas that are "infused with the author's taste or opinion," as opposed to explaining phenomena or furnishing solutions to problems. The court recognized that using the merger doctrine to rule out protection for the compilation itself by characterizing as ideas the criteria used to select or arrange its contents would render copyright for compilations illusory. "The requisite level of originality may differ according to the nature of the work. The strictly limited level "original" achievement that is required in order to attract literary copyright. Thus, in the case of *CCB Canadian Ltd. v. Law Society of Upper Canada*[38] the court is of the view 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.

INDIA

Though, ideas themselves are not protected, but the expression of those ideas are protected under Indian Copyright Act, 1957. Idea need not necessarily be new[39]. It is imported to note that with regard to *R.G. Anand* v. *Delux Films & Others*[40] there can be no copyright in an idea or subject matter but only in the arrangement and expression of such idea[41]. Copyright protection is conferred only on original literary works[42].And the work must be originated from the author. In *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd*[43] Supreme Court held that cl. (a) of section 13 (1) protects original work whereas cl. (b) and (c) protect derivative works. 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[44]. The act does not define "originality" or "original" for judicial interpretations. According to section 14 of the Act, only author of the work, subject to sec.17 of the Act is entitled to have copyright protection and can enjoy the exclusive rights therein India is a wealthy country and strongly followed the doctrine of 'sweat of the brow' for a considerably long time. And this approach developed in U.K. and had been followed by the Indian Courts

[37] (2d Cir. 1994) 44 F.3d 61
[38]SCR 339 (Canada), 2004 1
[39] Ameet Datta and Suvarna Mandal, Saikrishna & Associate, 'Originality' concept under India's copyright regime (2015)
[40] (AIR 1978 SC 1614),
[41] ROBBIN SINGH, UNDERSTANDING THE CONCEPT OF ORIGINALITY UNDER COPY RIGHT LAW IN INDIA
[42] Copyright Act 1957, S 13
[43] Indian Express Newspaper (Bombay) Pvt Ltd v Jagmohan (AIR 1985 Bom 229)
[44] Ranjit Kumar, Database Protection: The European Way and the Impact on India, 45 IDEA

before the test of 'modicum of creativity' came into scene[45]. In *Burlington Home Shopping* v. *Rajnish Chibber*[46], it came out that compilation can amount to a 'literary work' only when it includes one's time, skill and labour of the author. But no copyright subsists in news per se.[47] After ***Feist Case***[48] the concept of the creativity originality is evolved and it swung away from sweat of the brow doctrine. It has been witnessed in several cases that the court has taken a shift from sweat of the brow which pronounced in *University London Press* v. *University Tutorial Press*[49] to "minimal creativity originality" concept adopted by the U.S Supreme court. In India this shift is interpreted in *Eastern Book Co.* v. *D.B Modak* [50]. The court set the standard of originality i.e.., there should be a mid-way between 'sweat of the brow' and 'minimal creativity'. At the same time, "creativity is not required" to make the work 'original'.[51] In the judgment of *Dr. Reckeweg & Co. Gmbh. and Anr.* v. *Adven Biotech Pvt. Ltd*[52], the court rejected the contention of the plaintiff on the ground that mere compilation of the work was not sufficient to get copyright protection.

DATABASE

Historically, database is protected under copyright laws and its protection test is covered under the doctrine of sweat of the brow. Now a days, in the era of the digitalization, adequacy for protection of database has been increased because it has been key beneficiary of electronic commerce. In section 2 (o) of Copyright Act 1957, includes computer program under literary work. India being a member of the Berne convention and TRIPS agreement, the requirement of originality in selection and arrangement of the content of the database is require attracting copyright protection.[53] In the case of *McMillan* v. *Suresh Chunder Deb*[54] , *Govindan* v. *Gopalakrishna*[55]shows the use of the sweat of the brow in determining copyright protection database by Indian courts .Then the Delhi High Court in the case of *Diljeet Titus & Ors* v. *Alfred A Adebare & Ors* [56], dealt with this matter, related to the database protection,

[45] ibid
[46] 1995 PTC (15) 278
[47] https://home.kpmg.com/content/dam/kpmg/pdf/2014/09/AgenceFrancePresse.pdf ,accesssed on 15th october ,2016
[48] ibid
[49] ibid
[50] SCC 1 (2008) 1
[51] ibid
[52] MANU/DE/0961/2008
[53] Apar Gupta, Protection of Database in India: Copyright termination Sui Generis Conception (2007)
[54] ILR 17 Cal 951, (1890)
[55] Mad 391, AIR 1955
[56] PTC 609, 2006(32)

and held that the copyright protection is extended in the form of modicum of creativity in the selection, arrangement or co- ordination of the contents of a database to attract copyright protection. The database can be protected under copyright law if there is a creative compilation of works that themselves is an original creation. Though India does have a very strong copyright regime, which is in pari materia with the UK "sweat of the brow" doctrine, but the recent decision by the Delhi high court seems to cast a doubt on whether the Indian Copyright regime protects "unoriginal" databases[57].

CONCULSION

Nowadays, in India Sweat of the brow is of no more importance in the copyright law, like U.S because it violates the basic principle of copyright. Moreover, Originality is always going to be imperative yardstick for copyright protection in literary work. Even the modicum of creativity is also not too perfect for originality test because then it no-where describes what level of creativity is needed by an author. There should be middle path for both the doctrines either it be sweat of the brow or modicum of creativity which create balance between both. Because as we live in era of digitalization protection of database compilation becomes essential and there should be some separate copyright laws for protection of database. And talking about public consideration if sweat of the brow is given for labour and effort nothing original will exist anymore because one will use the previous work of others and then one will copy the other previous work's. So Copyright protection is not there to entertain every compilers compilation work of already known facts. There should be some importance given to labour of a person but only in few cases not in every mere compilation. As U.S is a developed country, legislature there should be more focused on database protection rather than the creativity aspect for protection. When it comes to India, they should try sui generis of data protection like EU. Though U.S is clear with creativity approach for testing originality but as we come to India, it is still stuck between sweat of the brow and modicum of creativity for determining originality as seen in several cases. Indian courts should put more focus on the originality of work rather than labour of a person because Copyright protection is basically for progress of science and art. By applying sweat of the brow doctrine it will not lead to the progress of science as well as of art.

[57] Hailshree Saksena, Doctrine of the 'sweat of the brow'