

Database protection and the principle of originality

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As the originality is the threshold standard of qualification for copyright protection, defining or redefining this threshold standard has significant implications for the copyright system. As science and technology advanced, the mode of creation of works also changed. To create a work man invested his labour, money, time, skill, intelligence etc., it has to be protected. If the standards for a work to be considered original, and qualify for copyright protection are raised, both the number and types of works that can claim copyright protection will change. This article analyses the doctrines in respect of concept of originality for the protection of creative database works under copyright law. In particular, the modes of protection of databases in UK, US and Indian copyright law have been analyzed in the light of judicial decisions. The judicial interpretations of concept of originality on the basis of different doctrines like 'sweat of the brow', 'intellectual creativity' and 'modicum of creativity', try to balance, in protection of interest between copyright owners and users at its most basic level.

Introduction

Databases are generally perceived as static warehouses, storing up valuable facts and information. Considered as; useful collections of materials which consequently have value independently of their several items of content.¹ They are often creative, and usually costly to compile, present and maintain. In order to recover the initial investment of time, money and skill put into it and to avoid parasitic competition, database manufacturers protect their compilation efforts. Therefore, without the ability to restrict access to and use of databases that it compiles, an author or a company is effectively discouraged from

participating in the information age. Although traditionally, databases have been protected under copyright laws; advances in information technology have enabled potential competitors and pirates to engage in market-destructive copying. Further, in many jurisdictions, the required level of originality has been in a state of flux in recent years. A few Court decisions have been suggested which may be used to develop a new law taking into account the private and public interests and keeping in mind the primary objective of the intellectual property regime to promote creativity and innovation, and to maintain a vigorous public domain.

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1 Carstemns, David W. (1994), "Legal Protection of Computer Software: Patents, Copyrights, and Trade Secrets", J.CONTEMP. Law., Vol.20, p. 13, 16.

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Concept of Database

Data are raw facts that constitute building blocks of information and maintained in a flat file, also as technology advanced, in the common use of magnetic tape and other medium. Database is a collection of information and a means to manipulate data in a useful way, which must provide proper storage for large amounts of data, easy and fast access and facilitate the processing of data. 'Data' can be either the plural form of "datum" or a singular noun. It may mean "something given", "a fact/piece of information", "transmittable and storable computer information" or "any proposition assumed or given, from which conclusions may be drawn". Although some of these meanings are synonymous, they are not identical, which turns "data" into an extremely fluid term which is subject to interpretation.² Further, Data is a collection of facts, such as values or measurements. It can be numbers, words, measurements, observations or even just descriptions of things. Data can be qualitative or quantitative. Qualitative data is descriptive information,

Quantitative data, is numerical information. In the information technology industry, data is anything in a form suitable for use with a computer. How the data is stored, protected and used for business decisions is the scope of the "Information Technology" industry. In the Indian Copyright Act there are no specific meanings attached to word databases or computer databases. Compilations including databases are defined as literary works.³ However, the UK CDPA 1988 defines a database as: A collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way; and (b) are individually accessible by electronic or other means.⁴ Furthermore, database is defined in Article 1(2) of the European Union Directive on Legal Protection of Database as a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means.⁵ A similar definition is contained in the Database Regulations. The significant elements in this definition are the references to 'independent works, data or other materials', to arrangement in a 'systematic or methodical' way, and to individual access 'by electronic or other means'.⁶ Database protection applies to electronic and non-electronic databases.⁷ A fully developed database is an interrelated set of components capable of generating value from the collection,

2 Nandita Saikia, 'Exploring copyright, content and related issues from an Indian perspective...', see, 101 <http://copyright.lawmatters.in/2011/06/protection-afforded-to-facts-and-data.html>, ; as on Sep 21, 2013.

3 Section 2(o), Indian Copyright Act, 1957 as amended in 2012

4 Section 3A, Copyright, Designs and Patents Act, 1988 (CDPA) (as amended by regulations).

5 Council Directive 96/9, March 11, 1996 O.J. (L 77) 20 (EC);, see, <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html>; as on April 23rd 2011.

6 Reed, Chris and Angel, John, "Computer Law –The Law Regulation And Information Technology", 2007, pp. 232.

7 Smith, Graham JH. (2002) "Internet Law & Regulation", p. 24.

processing, merger, storage, or dissemination of data.⁸

Impact of Technology

The emergence of digital technologies towards the concluding decades of the twentieth century as the defining paradigms of new age communication raised a whole new set of challenges to copyright regimes. All works can now be digitalized whether they comprise texts, images, sound or diagrams and once digitalized the various elements such as images are all 'equal' and can be merged, transformed, manipulated or mixed to create an endless variety of new works. The new technologies brought in non-material reproduction and distribution of data and information. Physical reproductions have been replaced by digital reproduction.⁹ Electronic storage and transmission of data are ever faster and more efficient methods of data mining, and found new ways of storing vast quantities of digital information on small and transportable devices. Communications devices like camera/video enabled mobile phones are now used as media players, games consoles, location aware devices and interfaces to payment systems. Their memory capacity is growing, and individuals are increasingly storing a great deal of personal information on their mobile phones. Individuals can become publishers permitting audio-visual recording of data to be collected and transferred to the internet for limitless onward transfer and persistent storage. The expanded capacity to store data is complemented by an increased capacity to access and use it. It is facilitated by computer programs that enable quick and reliable searching and retrieval of

data.¹⁰ Databases play an important role in the development of information market and its products. The pressure to provide specific legislative protection for databases has arisen from the increase in mass of raw data available in almost every area of commerce and science, the increased technological ability to create databases containing those data and to provide easy access to them.

Database developers seeking to protect the data compiled by them face a unique challenge, because database rights are essentially rights conferred in recognition of labour and investment, rather than creativity or innovation

Application of Principle of Originality

Traditionally, databases have been classified as literary works and protected in many countries by copyright. Database developers seeking to protect the data compiled by them face a unique challenge, because database rights are essentially rights conferred in recognition of labour and investment, rather than creativity or innovation.¹¹ The strongest argument in favour of database protection is the prevention of copying by a competitor as compiling a database is an expensive and time-consuming proposition. There are three basic models for legal protection of databases that can

⁸ Brown Mary, Bryan Robert M & Conley John M, Database protection in a digital world, *Richmond Journal of Law & Technology*, 6 (1) (1999) 2-10.

⁹ T C James, Indian Copyright Law and Digital Technologies, *Journal of Intellectual Property Rights*, Vol 7, September 2002, pp 425

¹⁰ Mark J. Davison, *The Legal Protection of Databases*, Cambridge University Press, 2003, page 2

¹¹ See, Anderman Steven D, *EC Competition Law and Intellectual Property Rights: The Regulation of Innovation* (Oxford University Press, United Kingdom), 2001, p. 247.

be easily identified.¹² *First*, Copyright protection is provided at a low level of originality. Under this module, copyright protection is provided for compilations on the basis that a substantial investment has been made in the compilation. The effect is that a database user cannot take a substantial amount of the data contained within the database. This module applies in UK and some other common law countries. *Second*, Copyright protection is provided for the creativity in the selection or arrangement of the database material. No protection is provided for the data contained within the database. This module operates in the United States. *Finally*, Copyright protection is provided if there is some creativity in the selection or arrangement of the database material, coupled with a sui generis right. Copyright prevents the taking of the selection or arrangement. The sui generis right protects the investment in obtaining, verifying and presenting the data within the database. It does so by prohibiting the unauthorized extraction or re-utilisation of a substantial part of the data, conferring exclusive property rights in the data as it exists in the database upon the owner of the database.¹³

Protection of Databases as Tables and Compilations in UK

Database protection under UK law will be discussed in two distinct phases: the analysis of database copyright as it is conceived by applying existing copyright rules and then, the evaluation of a new database regime provided by the

Database Regulations¹⁴ implementation and its implication on the current database copyright law. The UK CDPA-1988 is a comprehensive codification of copyright law, under which the commonly held opinion is that a database, for the purposes of protection under the CDPA, is a compilation. Since, the implementing of the Database Regulations, a definition of the term 'database' has been inserted into the CDPA. Consequently, the meaning of a literary work within the CDPA now includes a 'database' and has been distinguished from a compilation. A database maybe protected as a literary work under the category of tables or compilations as it has a lot in common with compilations.¹⁵ There are two different opinions on the effect of the meaning of "tables" and "compilations". First, the two terms clearly overlap. However, to distinguish the essential characteristics of these two, the former depends on the arrangement of the items contained in the table, while, the later lies in the gathering together of the items. Secondly, is suggested that there is room to argue that there is a difference between tables and Compilations. Tables are described as "...the inclusion of tabulations of facts or data and other non-works with an element of selection or arrangement...", while compilation implies elements of "...selection or arrangement or both..."¹⁶ The difference between them can be found in the fact that a compilation does not in all cases have to be arranged as long as there is

12 See, Mark J. Davison, 'The Legal Protection of Databases', Cambridge University Press, UK, 2003, Pg – 10.

13 Directive 95/46 of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Directive contains 33 articles in 8 chapters. The Directive went into effect in October, 1998.

14 The Copyright and Rights in Databases Regulations 1997, came into force on 1st January 1998.

15 Section 3(1) (a) of the UK Copyright, *Design and Patent Act* 1988.

16 S. Chalton, "The Effect of the E.C Database Directive on United Kingdom Copyright Law in Relation to Databases: A Comparison of Features," [1997] 6 EIPR 278.

some selection, while, an important element in tables is arrangement. If tables are not arranged it is doubtful that it can be called a table. Selection is not sufficient as without an arrangement of the content it is highly unlikely that anyone could understand and use it. This argument is supported by the fact that a literary work must be able to offer information, instruction or pleasure¹⁷ and importantly, it needs to be understood at least by a class of persons.¹⁸ In referring to the meaning of database, such interpretations can be concluded as a collection of information stored in certain methods and capable of being retrieved by the user of the database. The element of a table in a database can be seen in the arrangement of factual information in the work. In the United Kingdom, copyright has been allowed in the works of compilations¹⁹ such as street directories,²⁰ trade catalogues,²¹ football fixture lists,²² examination papers,²³ a timetable index,²⁴ racing information service,²⁵ the listing of programmes to be broadcast,²⁶ business letters,²⁷ and consignment notes²⁸. In the United Kingdom, a database was formerly protected as a literary work by virtue of being a type of compilation. At that juncture, the UK CDPA-1988 made no

specific provision for database but in general, they were protected as literary work since that category included compilation. Copyright at that time may subsist in a compilation on two levels; firstly in individual works of the compilation and secondly, the database as a whole as a result of the skill, labour and judgment in the selection and arrangement of the work.²⁹ The originality of tables and compilations (other than databases) may arise through the application of the appropriate skill, labour, and effort in the creation of the work, i.e. quality of the labour used in creation of the work. It seems that the requisite labour may be employed either in the way the information to be included is selected, or in the way that it is arranged. In *Cramp v. Smythson*,³⁰ Viscount Simon LC, suggested that the making of a chronological list which is 'auto-matic and only requires painstaking accuracy' would not, of itself, be original. The reason for this is that the making of a chronological list requires no element of 'taste or selection, judgment or ingenuity'.³¹ On this basis it seems that where a list is organized alphabetically, it would not give rise to an original work³². The British Courts

17 *Exxon Corporation v. Exxon Insurance Consultants International Limited* [1982] Ch 119, [1982] 3 All ER 241 at 248.

18 *Apple Computer v. Computer Edge* [1984] FSR 481.

19 W. R. Cornish, *Intellectual Property*, 3rd edn, Sweet and Maxwell, UK, pp. 333, 1996.

20 *Kelly v. Morris* (1866) L.R 1 Eq.697.

21 *Collins v. Cater* (1898) 78 L.T 613; *Purefoy v. Sykes Boxall* (1955) 72 R.P.C 89

22 *Football League v. Littlewoods* [1959] Ch. 637; *Ladbroke v. William Hill* [1964] 1 W.L.R. 273.

23 *University of London v. University of London Press* [1916] 2 Ch 601.

24 *Blacklock v. Pearson* [1915] 2 Ch. 376.

25 *Portway Press v. Hague* [1957] R.P.C 426.

26 *Independent Television Publications v. Time Out* [1984] F.S.R 64.

27 *British Oxygen Co. Ltd v. Liquid Air Ltd* [1925] Ch 383.

28 *Van Oppen & Co. Ltd v. Van Oppen* (1903) 20 RPC 617.

29 D. I. Bainbridge, 'Introduction to Computer Law', 4th Edition, Pearson Education, UK, 2000, pp 55.

30 (1944) AC 329.

31 *Football League v. Littlewoods* (1959) ch 637, 654.

32 Although originality might arise through the quantity of labour used in creating the compilation.

have acknowledged the various stages, types of information and labour expended in each part of the process of preparation of the compilation. But the skill and labour has been the key to the protection of these compilations as it is the standard by which originality has been judged; it is only those compilations which attain the requisite standard which have been accorded protection. Most often the Courts have considered the overall degree of the skill, labour and judgement involved³³ throughout the process to determine whether the resultant compilation is original and thus the proper subject for copyright protection.³⁴ In *Bookmakers' Afternoon Greyhound Services Ltd v. Wilf Gilbert Ltd*³⁵ the question was whether copyright subsisted in advance programmes for greyhound races and race cards. Court found that there was considerable skill is used to select appropriate dogs for appropriate races and to provide both novel and competitive races. Hence held considerable skill, labour and judgment were involved in preparing both the advance programme and the race cards and that copyright subsisted in each case. What is noticeable is that the Courts have been unwilling to distinguish clearly between the labour involved in the creation of the information and the reduction of that information to tangible form, there is much emphasis on the skill, industriousness and expense in the creation of the information by the body responsible for scheduling the event. Hence, it should be noted that, in the UK, routine labour has only been used to confer originality on the resulting work in a limited number of situations.

Protection as Collection of Information/works

The UK's CDPA-1988 was amended in 1997 to meet the requirements of the European Council Directive on Database. With the amendment of that section, a "database" is protected as a separate category of work and not as tables and compilations. In addition to that, tables or compilations are treated differently from "a database" if they do not fit the database definition in Section 3A (1) of the CDPA 1988. A database is defined in section 3A (1) as: A collection of independent works, data or other materials which- (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means. In Recital 17 of the European Directive on the Legal Protection of Databases, the term "database" is understood to include: literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed, this means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive. The UK CDPA 1988 has indirectly divided a compilation into two different categories, *firstly*, as a work of tables or compilations which excludes database (non database compilations), and *secondly*, as a database. Therefore, to differentiate which compilations come under the meaning of database, and which do not,

33 Originality in the context of literary works, copyright has been said in several cases to depend upon the degree of the skill, labour and judgement involved in preparing a compilation.

34 See, Paul Torremans, 'Copyright Law; A Handbook of Contemporary Research, Edward Elgar Publishing Limited, UK. 2007, Pg – 113.

35 [1994] FSR 723.

the elements of database described in the CDPA, which were derived from the EC Directive must be fulfilled. A database must possess the following three elements; independence, systematic or methodical arrangement and individual accessibility of the elements.³⁶ If a compilation has all these three elements, it is considered as a database. A non database table or compilation must be something which is lacking of human creativity and disqualified from protection under Section 3A(1) of the CDPA 1988 and the Directive, but may continue to be protected as a literary work under Section 3(1)(a) of the CDPA 1988. These non-database works can be categorized into:

A. tables and compilations which are collections of works, or other materials not themselves being mutually independent;

B. collection of works, data or other materials, whether mutually dependent or independent, which are not arranged in a systematic or methodical way; and;

C. Collections of works, data and other materials, whether or not mutually dependent or independent or whether or not arranged in a systematic or methodical way but which are not individually accessible by electronic or other means.³⁷

The “independent” work as referred in the *first category* means that the work or information involved must not be dependent on each other. These types of works cannot be seen as databases because their components are not

independent. The *second type* of non database tables or compilation refers to collection of works, data or other materials which are not arranged in a systematic or methodical way. For such tables or compilations, it has been suggested that this work is protected as a literary work of tables and compilations as long as there are skill, labour and judgment in collecting and arranging the data. The *third category* refers to the element of lack of individual accessibility. Individual accessibility is not interpreted by the UK CDPA 1988 as well as the EC Directive. The word “individual” means single or separate, which denotes that “individual accessibility” is something that can be reached or used or understood separately. From the definition of database as mentioned above, it is said that if any of the required elements is missing, a table or compilation would not be regarded as a database but classified as a literary work. In implementing the Database Directive,³⁸ the UK Database regulations explicitly amended the originality requirement of the CDPA-1988 in relations to databases to include the new criterion of the ‘author’s own intellectual creation’.³⁹ In particular, Section 3A(2) says that ‘a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database constitutes the author’s own intellectual creations.

Sui Generis Right

The standard of originality in database, which is author’s own intellectual

36 P. Torremans, Holyoak and Torremans Intellectual Property Law, (2001), p. 185, who argues that the criterion of originality is included in the definition. He concludes that a subject-matter that fulfils the three requirements can be protected as a compilation or table by sweat of the brow.

37 S. Chalton, “The Effect of the E.C. Database Directive on United Kingdom Copyright Law in Relation to Databases: A Comparison of Features” [1997] E.I.P.R. Pg - 280;

38 UK Copyright and Rights in Databases Regulations 1997 SI 1997/3032 (‘the 1997 Regulations’).

39 CDPA 1988 Sec- 3A(2), introduced by Database Regulations 1997, rule 6.

creation, demonstrates a higher standard of originality than it is presented in the UK. It can be said, however, that when a work fail to comply with the definition of database and its standard of originality, it might be protected as a table or compilation or by the so-called the 'Sui Generis' Right. In a radical departure from the copyright paradigm, the European Commission took a *sui generis* approach to database protection in Article 10(2) which confers upon the database creator the right to 'prevent the unauthorized extraction or reutilization', from that database, of its contents in whole or substantial part, for commercial purposes. The sui generis protection model has been manifested only in the EU Directive on legal protection of databases.⁴⁰ It would be pertinent to review the extent of protection being afforded to databases under this Directive. The Directive defines a 'database' as including both, a paper and an electronic database. All such databases would qualify for sui generis protection as long as substantial investments (qualitatively or quantitatively) have been made in obtaining, verification or presentation of the contents of the database.⁴¹ Such protection would extend to the right of the database owner in preventing a substantial (qualitatively or quantitatively) extraction⁴² or re-utilization⁴³ of the contents of such

database without his consent.⁴⁴ The extent of protection under the Directive is very broad, extending even to activities as nominal as extraction.

Skill and labour

On 1st March 2012 the European Court of Justice (ECJ) gave judgment on the much-anticipated Football Dataco case⁴⁵ stating that football fixture lists are not protected by copyright if the compilation is not the author's own intellectual creation even if the compilation itself required significant labour and skill. In *Football Dataco and Others v Yahoo! UK Ltd and Others*⁴⁶, the UK company Football Dataco, which is responsible for protecting the rights acquired in the English and Scottish football league fixtures, and the organisers of those leagues accuse Yahoo! UK, Stan James (a bookmaker) and Enetpulse (a sports information provider) of having infringed their intellectual property rights in the football fixture lists by having used those fixture lists without paying financial compensation. The fixture lists are prepared in accordance with several 'golden rules'. The process of preparing is in part automated but requires very significant labour and skill in order to satisfy the multitude of requirements of the parties concerned whilst respecting the rules. Football Dataco claimed the use of this data by

40 Articles 7 to 11.

41 Article 7.1. However, failure of the Directive in defining 'substantial investments' has led to considerable confusion within member states and the consequent emergence of the spin-off theory; Estelle Derclaye, Databases sui generis right: Should we adopt the spin off theory, European Intellectual Property Review, 26(9) (2004), 402-413.

42 Article 7.2 (a): 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.

43 Article 7.2 (b): 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.

44 Article 7.5 further clarifies that the extraction/re-utilization of insubstantial parts from the contents of the database may not, in certain circumstances, be allowed.

45 Case C-604/10, Court of Justice of the European Union, PRESS RELEASE No 16/12, Luxembourg, 1 March 2012.

46 Id,

YAHOO! without a licence breached their rights by infringing copyright under the Copyright Design and Patents Act 1988 (CDPA) and Articles 3 and 7 of Database Directive.⁴⁷ The Court of Appeal held the football fixture lists were protected by Article 3 but no right could be established under Article 7. YAHOO! appealed this decision and the Court of Appeal made a preliminary reference to the ECJ to clarify:

1. What is meant by “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation”; and
2. Whether the Database Directive precludes national rights in the nature of copyright in databases other than those provided for by the Directive.

The Court states, first, that *the copyright protection provided for by the Database Directive concerns the ‘structure’ of the database, and not its ‘contents’*. That protection does not extend to the data itself. The Court then observes that *the notion of ‘intellectual creation’, which is a necessary condition in order to be eligible for copyright protection, refers to the sole criterion of originality*. Further, *“the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill on the part of its author does not justify, as such, the protection of it by copyright if that labour and that skill do not express any originality in the selection or arrangement of that data”*.⁴⁸ Second, it is for the national court to assess, in the light of the considerations set out by the

Court, whether the football fixture lists concerned are databases which satisfy the conditions of eligibility for copyright protection. Finally, the ECJ confirmed that the Database Directive precludes Member States from affording copyright protection to databases that do not meet the requirements of Article 3. In other words, if a database created after the Database Directive was implemented in the UK (1 January 1998) is not protected under Article 3, it cannot instead be protected as a literary work under the CDPA 1988. The Court states that, given that the directive harmonises the protection given by copyright to databases, national legislation which grants copyright protection under conditions which are different to those set out in the directive is incompatible with European Union law”. Traditionally UK law has granted copyright protection to a wider range of products or creations than those protected under civil law regimes, on the basis of the ‘significant skill and labour’ expended on their creation. It is now up to the Court of Appeal to apply the ECJ ruling to the facts of this case. However, the ECJ has set the bar high and the ruling seems to quite clearly lead national courts down the road of ruling that fixture lists are not protectable under the Database Directive.

Databases in United States

American copyright law distinguishes between three categories of copyright works: creative works, derivative works and compiled works or compilations. A

47 EU Database Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *Article 3* affords copyright protection to databases that in some form constitute the author’s own intellectual creation in regards to the selection or arrangement of its contents. For such protection to exist, evidence of labour and/or skill in the creation of the database itself is not sufficient. *Article 7*, known as the sui generis or database right, subsists whether or not the database or its contents are a copyright work but clear evidence of substantial investment in either the obtaining, verification or presentation of the data is required.

48 The crux of the judgment comes at paragraph 42 when the court clearly states that skill and labour in the selection or arrangement of the data, even if significant, is not sufficient as such to trigger copyright protection. The labour and skill must express the originality in the sense defined by the court (i.e. creativity) for it to give copyright protection to the database.

creative work is a composition that owns its origin to his author. A database, as an organised collection of materials, do not fall under these types of works. Derivative works are works which are based on previously authored and originated works. Databases do not seem to be caught by this definition, although it is common for materials to be incorporated into a database that are considered derivative works. The United States protects databases through copyright law and does not provide for a system of *sui generis* protection.⁴⁹ The United States Congress has repeatedly considered implementing a distinct system of database protection.⁵⁰ As a result, databases are subject to the same standard of originality as other copyrightable works.⁵¹ The mandate that works must exhibit some degree of originality before copyright protection will adhere to them is firmly rooted in the U.S. Constitution.⁵² The Supreme Court has held that the terms “authors” and “writings” as used in the Constitution “presuppose this degree of originality.”⁵³ The Copyright Act of 1976 included a definition of “compilation” which, for the first time, drew an express statutory connection between compilations and “original works of authorship”: A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that

are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.⁵⁴ The definition compels a court to examine the nature of a compilation’s “selection, coordination, or arrangement” in order to determine whether the compilation is “an original work of authorship” protectable under Section 102(a). In other words, the same originality requirement applies to compilations as to all other works. A separate section clarified the scope of protection for compilations, specifying that: the copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.⁵⁵ The 1976 Act also codified the idea/expression dichotomy that had been developed by the courts.⁵⁶ Section 102(b) provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or

49 See, Daniel J Gervais, The Protection of Databases 82 CHI.-KENT L. REV. 1134,(2007).

50 See, Joseph J. Beard, Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary (2001) 16 BERKELEY TECH. L.J. 1165, 1169, 1180. See also Daniel Gervais, The Protection of Databases 82 CHI.-KENT L. REV. 1142,(2007). There has also been a debate about the constitutionality of these congressional attempts to provide protection for databases beyond that granted by copyright, based on the premise that such protection would “alter the balance between protection and public access/competition embodied in the Copyright and Patent Clause” of the U.S. Constitution.

51 See, Daniel J Gervais, The Protection of Databases 82 CHI.-KENT L. REV. 1134 (2007)

52 U.S. CONST, art. I, § 1, cl. 8. See also Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346–347 (1991).

53 Feist, 499 U.S. at 346–347.

54 17 U.S.C. § 101. See, further, A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

55 17 U.S.C. § 103(b).

56 See Baker v. Selden, 101 U.S. 99 (1879).

discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” This language has been interpreted to exclude protection for facts as well.⁵⁷ Cases under the 1976 Act were divided about the continuing viability of the sweat of the brow doctrine. Some circuits continued to apply sweat of the brow.⁵⁸ Other circuits rejected sweat of the brow, requiring instead that compilations contain sufficient creativity in their “selection, coordination or arrangement” to render them “original works of authorship” entitled to copyright protection.⁵⁹ On both sides of this doctrinal divide, however, there was a consistent line of cases upholding the copyrightability of directories.⁶⁰ The stage was thus set for Supreme Court consideration of the issue when it granted certiorari in a Tenth Circuit case routinely applying the sweat of the brow doctrine to protect a white pages telephone directory against wholesale copying.⁶¹

Concept of Originality and Creative ‘Feist’

According to ‘Creative Originality school’, finding of originality without

creativity is impossible. A minimal creativity is a must for a standard originality. Only labour is not sufficient. The main requirement of this ‘Creative Originality’ doctrine is originality. The compilation done should offer something new, i.e. something original to the world. A “modicum of creativity” should be there.⁶² The main point is that the compiler should create the compilation himself, and not just rehash the pre-existing public domain information. The compiler is needed to use his knowledge in addition to the facts available so as to have protection of copyright. Facts are not copyrightable and the compiler should select and arrange the factual information in a unique way along with his subjective knowledge with it. The motive behind this is that the compiler should add to the knowledge of the world. They should increase the public domain knowledge by limiting protection to compilations displaying a modicum of creativity. On March 27, 1991, the U.S. Supreme Court decision in *Feist Publications v. Rural Telephone Service Company, Inc.*⁶³ was hailed both as a landmark decision⁶⁴ and a legal “bomb.”⁶⁵ It was said the Court had gone out on a limb.⁶⁶ After all, it did

57 See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

58 See, *Illinois Bell Tel. Co. v. Haines & Co.*, 683 F. Supp. 1204 (N.D. Ill. 1988), *aff’d*, 905 F.2d 1081 (7th Cir. 1990), *vacated and remanded*, 499 U.S. 944 (1991);

59 See, *Financial Info., Inc. v. Moody’s Investors Serv., Inc.*, 808 F.2d 204 (2d Cir. 1986), *cert.denied*, 484 U.S. 820 (1987); *Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984); *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 572-73 (9th Cir. 1987).

60 See, *Hutchinson Tel. Co. v. Frontier Directory Co. of Minnesota*, 770 F.2d 128 (8th Cir. 1985); *Southern Bell Tel. and Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985).

61 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 916 F.2d 718 (10th Cir. 1990), *cert. granted*, 498 U.S. 808 (1990).

62 *FEIST publications, inc. V. Rural telephone service Co.* 499 U.S. 340, 342 (1991)

63 499 U.S. 340 (1991).

64 See, e.g., Tracy Lea Meade, *Ex-Post Feist: Applications Of A Landmark Copyright Decision*, 2 J. INTELL. PROP. L. 245 (1994).

65 An expression used by former Register of Copyrights, Ralph Oman, in his testimony before the House of Representatives, quoted in Paul Goldstein, *Copyright*, 38 J. COPYR. SOC’Y 109,188 (1991).

66 See Marci Hamilton, *Justice O’Connor’s Opinion in Feist Publications, Inc. v. Rural Telephone Service Co.: An Uncommon Though Characteristic Approach*, 38 J. COPYR. SOC’Y 83, 88.

not establish a new originality paradigm as such but only ended a long division among federal circuits concerning the protection under copyright of factual compilations. In sum, factual compilations would no longer be protected and without adequate protection, investments necessary for the creation and maintenance of databases would dry up. Professor Goldstein describes Feist as a “landmark decision” and “a defining event for copyright in the information age.”⁶⁷ Feist relied on the “bold and largely unprecedented premise” that creativity is part of copyright law’s originality requirement.⁶⁸ A second extraordinary premise, that copyright’s originality requirement is constitutionally grounded, also underlay the decision.⁶⁹ A third striking feature of the decision was its flat rejection of the sweat of the brow theory of copyright in favor of the creative selection approach.⁷⁰ The *Feist*’s creative originality doctrine encourages compilers to enhance information that already is in the public domain and also encourages the creation of socially beneficial works. Its originality requirement insists that a compilation offer something new, that is, something original, to the world. By requiring compilations to display a “modicum of creativity,” *Feist* ensures that compilers will build upon and not simply rearrange pre-existing public domain information. Because facts are not protected, compilers are encouraged creatively to select and

arrange factual information and to add their subjective judgments to facts in order to ensure protection. The doctrine of creative originality thus promotes progress by spurring compilers to enhance public domain information. The aggregate effect of the doctrine, however, is to encourage compilers to contribute to the store of knowledge in the world. Meanwhile, by limiting protection to compilations displaying a modicum of creativity, the doctrine promotes progress by allowing compilers to use freely any material that does not meet *Feist*’s threshold originality requirement.

Present interpretations of the Concept of Originality

After the decision of *Feist*’s case, the doctrine of sweat of the brow was discarded. The Supreme Court defined creativity negatively by describing how a compiler’s work might fail to satisfy the requirement; selections and arrangements that are mechanical, routine, common place, typical, garden variety, obvious, inevitable, time-honored, age-old, or dictated by law will fail to pass muster.⁷¹ Not novelty but, originality was held to be the indispensable requirement for the work to be copyrightable. The work is not considered to be creative, if there is impact of industry standards, customary practices, and regulatory requirements. The blank form doctrine is a limitation on protection.⁷² *Feist* ruled out that copyright cannot be used as a tool by the

⁶⁷ Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC’Y 109, 116 (1991).

⁶⁸ See Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 331, 333 (1992) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.01[A] (1991)).

⁶⁹ Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC’Y , 119 (1991).

⁷⁰ See Leo J. Raskind, *Assessing the Impact of Feist*, 17 U. DAYTON L. REV. 332, (1992).

⁷¹ The opinion does not make clear whether originality is to be found by looking at the work or by evaluating the mental processes that went into producing it.

⁷² Blank forms that are designed to record information rather than to convey it are generally not copyrightable.1 NIMMER & NIMMER, § 2.18[B][4].,as quoted in Shipley David E’s *Thin But Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, University of Georgia School of Law, Research Paper Series, Paper No. 08-001, December 2007

factual compiler or low authorship writer to prevent others from using his collected facts. Since for Feist, more courts have analyzed creative selection than any other aspect of compilation for copyright protection. Courts find creative originality in selections that reflect the compiler's subjective judgment and personal knowledge and experience and that are not obvious in the underlying data. According to Feist's principles, subscriber's information arranged in alphabetical manner in standard white pages telephone directory is not copyrightable. This rule was applied in various cases after Feist. Seven months after Feist, in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*⁷³, Key Publication published an Annual Classified Business Directory for New York City's Chinese-American community. In 1990, Galore Publication published the Galore Directory, a classified directory for the New York Chinese American community. Key brought a suit against Galore Directory charging that Galore Directory infringed Key's copyright in the 1999-90 Key Directory. The United States Court of Appeal held that individual components of compilation are generally within the public domain and thus available for public. The Court discarded "sweat of the brow" notion of copyright law and considered subjective, evaluative choices based on the selector's personal knowledge and experience and involving a degree of arbitrariness or uncertainty to be creatively original selections. In *Nester's Map & Guide Corp. v. Hagstrom Map Co.*,⁷⁴ decided shortly after Key Publications, the District Court for the Eastern District of New York held that the selections of both street Address

listings and out-of-town destinations in a New York City taxi-driver's guide were copyrightable.⁷⁵ *Nester* had shown creativity in assigning approximate numbers to building addresses at the chosen intersections. Further, In *Sparaco v. Lawler, Matusky, Skelly, Engineers LLP*,⁷⁶ A land surveyor, Albert Sparaco, sued an engineering firm and others for using his site plan to design a building in violation of his copyright and also of a written contract. The Trial Court held that some Defendants did not infringe Plaintiff's copyright and granted summary judgment to those Defendants. On appeal, Sparaco argued that copying "the existing physical characteristics of the site" and "proposals for physical improvements to the site" from a map was prohibited by copyright law. Judge Leval of the Second Circuit, a recognized expert on copyright law, writes that, To the extent that the site plan sets forth the existing physical characteristics of the site, including its shape and dimensions, the grade contours, and the location of existing elements, it sets forth facts; copyright does not bar the copying of such facts.⁷⁷ "Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.

Cases in which selections were held not to be Creative

Courts have rejected claims of creative selection in several cases decided since Feist. In respect of charts, forms and judicial reports are non copyrightable. Applying Feist's rule, mere giving information is not copyrightable. A compilation would be original, only if the "choices as to selection and arrangement are made independently by the compiler and entail a minimal degree

73 945 F.2d 509, 511 (2d Cir. 1991). See, Mark J. Davison, "The Legal Protection of Databases", Cambridge University Press, 2003, Pg 164.

74 796 F. Supp. 729 (E.D.N.Y. 1992).

75 See, Id 732

76 (Sparaco) 303 F.3d 460, 465-467 (2d Cir. 2002), cert. den., 538 U.S. 945 (2003)

77 See [Feist] at 350-51, 111 S.Ct. 1282

of creativity" in the selection and arrangement of the compiled data.⁷⁸ Five months after the Feist decision, in *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*,⁷⁹ the Second Circuit affirmed the District Court's pre-Feist holding that a chart containing thirteen months of winning numbers in New York City's illegal "numbers games" was not entitled to copyright protection.⁸⁰ Victor Lalli Enterprises' ("Lalli") chart contained numbers calculated from simple formula that were used by all publishers of numbers charts. All charts shared the same format for displaying their data, and the data themselves did not vary from publisher to publisher. Lalli's charts were not protected, according to the court, because they did not display the minimal creativity required by Feist. With regard to selection, the court wrote that "Lalli work was neither selectivity in what he reports nor creativity in how he reports it." About the same time that the Second Circuit denied copyright protection to Lalli's numbers chart, the Sixth Circuit in *Sem-Torq, Inc. v. K-Mart Corp.*⁸¹ denied protection to a set of five double sided lawn signs on the grounds that the set was not a compilation.⁸² Although Sem-Torq, Inc. ("Sem-Torq") arranged the signs as a set for store display, they were neither packaged nor sold as a set to retailers or to consumers. The Court held that the set of signs was no greater than

the sum of the individual unprotected signs. Rather than find that Sem-Torq's selection was not creative, the Sixth Circuit found no selection at all. Further, in *Bellsouth Advertising & Publishing Corp. v. Donnelly Information Publishing, Inc.*,⁸³ the Eleventh Circuit held that the selection of a geographic scope and closing date for a yellow pages directory was not sufficiently original to deserve copyright protection.⁸⁴ The above cases in which creatively original selections were held not existed, and which differ with respect to the importance of the selection method as opposed to the ultimate selection of data. In compilations, there must be fulfillment of Feist rule, ie. involvement of creatively original selection and arrangement to get copyright protection.

The Persistence of the Sweat of the Brow Doctrine

Despite Feist's affirmation of the creative originality doctrine, courts persist in emphasizing the effort expended in creating compilations. Two courts have equated effort with originality. Hence, some cases in which courts invoking Sweat of the Brow by another way/name, by recognizing labour or industrious collections. Faced with Feist's flat rejection of sweat of the brow, courts have in effect invoked the doctrine under the rubric of originality. In *U.S. Payphone, Inc. v. Executives Unlimited of Durham, Inc.*,⁸⁵

78 Howard B. Abrams, "Originality and Creativity in Copyright Law", Journal of 'Law and Contemporary Problems', [Vol. 55: No. 2], 1992, Pg 10, also See, 111 S Ct 1282 (1991).

79 936 F.2d 671 (2d Cir. 1991)., See also Polivy Denise R.'s *Feist applied: imagination protects, but perspiration persists—the bases of copyright protection for factual compilations*, *Fordham Intellectual Property, Media and Entertainment Law Journal* Spring ,1998, 8 Fordham Intell. Prop. Media & Ent. L.J. 773) Pg no 810

80 See, Id 673

81 936 F.2d 851 (6th Cir. 1991). See also, Polivy Denise R., pg no- 810

82 See, Id 855

83 999 F.2d 1436 (11th Cir. 1993). See also, Polivy Denise R.'s *Feist applied: imagination protects, but perspiration persists—the bases of copyright protection for factual compilations*, *Fordham Intellectual Property, Media and Entertainment Law Journal* Spring ,1998, 8 Fordham Intell. Prop. Media & Ent. L.J. 773) , Pg no-809

84 See, Id 1441

85 18 U.S.P.Q. 2d 2049 (4th Cir. 1991).

the Fourth Circuit, an “unaligned” circuit before Feist, held that U.S. Payphone’s (“Payphone”) guidebook to the coin-operated telephone market was copyrightable. The District Court had found that “the Guide was the result of hundreds of hours of reviewing, analyzing, and interpreting state tariffs and regulations of the fifty states and the District of Columbia.” Based on these findings, the Appellate Court held that Payphone’s selection and organization of the material met the minimal standard for creative originality enunciated in Feist. Further, in *Publications International, Ltd. v. Meredith Corp.*,⁸⁶ the Seventh Circuit, a sweat of the brow circuit before Feist, clearly invoked sweat of the brow in the guise of originality after Feist. The Court held that the ingredient lists in recipes contained in a cookbook holding a compilation copyright were not protectable because they were statements of fact.⁸⁷ Furthermore, the directions for combining ingredients were not protectable because they were procedures or processes. Discussing the basic principles of compilation copyrights, the Court cited Feist for the proposition that “the creative energies that an author may independently devote to the arrangement or compilation of facts may warrant copyright protection for that particular compilation.”⁸⁸ This proposition focuses on the effort involved in creating the compilation, not the creativity of the result. Furthermore, the Court stated that “a compilation’s originality flows from

the efforts of ‘industrious collection’ by its author.” As a policy matter, it is desirable for courts to have authority to selectively apply sweat of the brow in the limited number of situations in which the equities of the situation mandate its use. But one cannot expect the same verdicts from the US Courts.

*In India, databases are
protected under the generic
category of compilations*

Indian Scenario

In India, databases are protected under the generic category of compilations.⁸⁹ Indian Courts have constantly relied upon the ‘sweat of the brow’ doctrine for the protection of compilations/databases. That is, the author had devoted time, money, labour and skill in creating it, even though there was no uniqueness in the arrangement of the data. In the Indian Copyright Act there are no specific meanings attached to the word ‘databases’⁹⁰ or ‘computer databases’. Compilations including databases are defined as literary works⁹¹. The term “literary work” includes computer databases as well. Therefore, copying a computer database, or copying and distributing a database amounts to infringement of copyright. However, it is difficult to differentiate between data protection and database protection under the Copyright Act. Data protection is

86 See, *Publications International, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996).

87 See *id.* at 480.

88 Denise R. Polivy, “Feist Applied: Imagination Protects, But Perspiration Persists—the Bases of Copyright Protection for Factual Compilations”, *Fordham Intellectual Property, Media and Entertainment Law Journal* Volume 8, Issue 3, 1998. Pg 830.

89 Section 2(1)(o) r/w Section 13(1) of Indian Copyright Act, 1957; compilations form part of literary works.

90 Indian Information Technology Act 2000 defines “database” as the “representation of information, knowledge, facts, concepts, or instructions prepared in a formalized manner.” However the database protections provided under the act is fairly limited. Though this section can be applied for electronic databases, its effectiveness is still to be tested for granting protection to databases or data on the Internet.

91 Section 2(o), Indian Copyright Act, 1957

aimed at protecting the informational privacy of individuals, while database protection has an entirely different function, namely, to protect of the creativity and investment put into the compilation, verification and presentation of databases. In India, a member of the Berne Convention and TRIPS Agreement, the requirement of originality in selection or arrangement of the contents of the database is required to attract copyright protection.⁹² The Indian courts seem to uphold the “sweat of the brow” theory or the skill, labour and judgment test in deciding copyright infringement of databases. In *Gangavishnu Shrikisondas v. Moreshwar Bapuji Hegishte*,⁹³ the Court held that a compilation developed through devotion of time, capital, energy and skill, though taken from a common source, amounted to a literary work and was therefore protected under copyright. The courts based their decisions on the point that no person was entitled to appropriate for oneself the fruits of another’s skill, labour or judgment and even a small amount of creativity in a compilation was protected.⁹⁴ The Delhi High Court, the sections of Copyright Law applicability to database protection was examined in *Diljeet Titus, Advocate & Ors v. Alfred A. Adebare & Ors*⁹⁵ where the Delhi High Court held that the copyright in a database prepared by an advocate working under and in the office of another advocate by using the latter’s resources, expertise and investment, would vest in

the employer advocate. The Court reasoned that under Section 17(1)(c) in case of a work made in the course of the author’s employment under a contract of service or apprenticeship, the employer shall, in the absence of any agreement to the contrary, be the first of the copyright therein. The same court, in *Eastern Book Company v. Navin J Desai*,⁹⁶ said that in the case of compilations, another person can make a similar compilation, but cannot infringe upon the copyright of the previous compiler by appropriating the fruits of his labour.⁹⁷ The Court speaks of the requirement of modicum of creativity in selection and arrangement, later it states that if the plaintiffs prepare head notes with their own skill and labour, there can be copyright in such head notes. This decision speaks both about the modicum of creativity and the labour and skill test.⁹⁸ It is only a matter of time before the courts in India recognize the above mentioned difficulties of the ‘sweat of the brow’ doctrine and shift to the ‘modicum of creativity’ rule. This transformation would result in copyright protection being granted only to those databases, which satisfy the creativity criterion, irrespective of the investments made for the creation of such databases. The Indian position underwent a radical change with the Supreme Court’s ruling in *Eastern Book Company v. D.B. Modak*,⁹⁹ wherein it was opined that in matters relating to the compilation of certain facts, the standards that are required are a minimum level of creativity and the exercise of skill and

92 Article 10(2), Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C, Marrakesh Agreement Establishing the World Trade Organization) (Apr. 15, 1994), 33 I.L.M. 81 (1994); Article 2(5), Berne Convention for the Protection of Literary and Artistic Works (July 24, 1971), (amend. Sept. 28, 1979).

93 I.L.R. 13 (Bom.) 358, 363 (1889);

94 Also held the same in *Shyam Lal Paharia v. Gaya Prasad Gupta Rasal*, 1971 A.I.R. 58 (All) 192, 195, 199;

95 2006 (32) PTC 609 (Del).

96 *Eastern Book Company v. Navin J Desai*, A.I.R. 2001 Delhi 185.

97 *Id.*, [The Court referred to the US Supreme Courts Feist decision *Feist Publications, Inc. v. Rural Telephone Service Co.*,]

98 *Id.*, in Para 41.

99 AIR 2008 SC 809

judgment. This pronouncement means that the Court has now adopted a combination of the U.S. and Canadian positions as the Indian position on this issue. The Court stated, "No doubt the appellants have collected the material and improved the readability of the judgment by putting inputs in the original text of the judgment by considerable labour and arranged it in their own style, but that does not give the flavour of minimum, requirement of creativity. The exercise of the Skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterized as purely a work which has been brought about by putting some amount of labour by the appellants. Although for establishing a copyright, the creativity standard that applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity." The "sweat of the brow" principle was held to be too low a standard and hence this test was adapted by the Indian Supreme Court which required the derivative work to "possess skill and judgment...together with a flavour of minimum requirement of creativity."¹⁰⁰ It's a landmark judgment of Indian Supreme Court in this *D.B. Modak case*, departed from both 'sweat of the brow' and 'minimum modicum of creativity' approaches and for the purposes of Indian law, established a standard of originality that fell midway between 'sweat of the brow' and 'minimum modicum of creativity'.

Conclusion

A database is eligible for copyright protection if it is a result of great deal of

effort, skill and labor. For getting such protection it has to satisfy the test of 'originality'. Compilation of non-original works may also possess the requisite originality. Further, original does not mean the expression of original or inventive thought. In UK 'sweat of the brow' is a long standing doctrine practiced by British Courts. But in March 2012 the European Court of Justice, created a history, by stating that, no copyright can be granted, if the compilation is not the author's own intellectual creation even if the compilation itself required significant labour and skill. The Court observes that the notion of 'intellectual creation', which is a necessary condition in order to be eligible for copyright protection, refers to the sole criterion of originality. The notion of 'significant skill and labour' is no longer enough to constitute 'originality'. In USA, since *Feist* decision, it has been identified that the doctrine of creative originality guides Courts to reward compilers who do not simply repackage pre-existing information in predictable ways but who add content, in the form of useful subjective evaluations, to unprotectable facts. The post-*Feist* cases indicate that subjective, arbitrary judgments are generally protected, while objective, predictable decisions are not. In India, the Supreme Court, departed from both 'sweat of the brow' and 'minimum modicum of creativity' approaches and for the purposes of Indian law, established a standard of originality that fell midway between 'sweat of the brow' and 'minimum modicum of creativity'. In reality, it is felt and perceived that; this midway standard is extremely difficult to practice and implement.

¹⁰⁰ It is alleged that this test is not much different from the *Feist* test as the application of either in any situation leads to the same result: the compilation is protected not the raw data. This has been reiterated in *Dr. Reckevag and Co. GmbH v. Adven Biotech Pvt. Ltd.* MANU/DE/0961/2008 decided on 1st July, 2008 wherein a entire compilation of literature on homeopathic medicine was said to be copyright protected though its individual components constituted facts and did not satisfy the above test.