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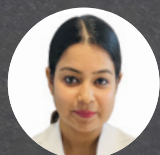
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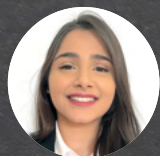


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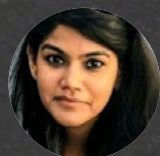
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YOUR WITNESS PLEASE!

Originality in Copyright Law - A Booster Within

■ **Sudeep Chatterjee & Aamna Ahmad**

Originality in its present position in Copyright Laws is intended to promote and encourage Intellectual Property which results from human intellect and not one that free rides on someone else's intellectual property. In order to evaluate the intangible aspects of creative works as well as in assessing the availability of copyright protection to the same, the basic yardstick adopted by various copyright regimes in the world is the 'Test of Originality'. The Indian Copyright Act, 1957 in Section 13(1) states that "copyright shall subsist throughout India in original literary, dramatic, musical and artistic works". However, the act fails to give a substantial definition or a test of originality. For this purpose, the courts determine 'Originality' on the basis of different doctrines sprouting from two different schools of jurisprudence.

According to the theory of 'Sweat of Brow' which is based on the Lockean Theory of Property¹, the rationale of providing copyright to an author or inventor lies in the labor that the author/inventor invested into her

work. Thus, the 'Sweat of Brow' theory is completely relying on skill and labor of the author while giving no heed to the aspect of 'creativity'. This was reiterated by Lord Halsbury's judgement in the landmark case of *Walter v. Lane*² where he opined that wherever there is considerable labor involved to produce a work which may not be entirely original or may even be a compilation of someone else's original work, will be eligible for copyright and shall not amount to infringement. This doctrine was adopted in India in the Hon'ble Delhi High Court judgment of *Burlington Home Shopping v. Rajnish Chibber*³ where it was held that a copyrightable work may include compilation as it was a result of devotion of time, labor and skill.

The other doctrine of Originality known as 'Modicum of Creativity' has its roots in the 'Personhood Theory' of Intellectual Property which believes that when a person works on anything, he expresses his personality on the subject. This can be seen in the case of *Feist Publication Inc.*⁴ whereby the United States Supreme Court negated the 'Sweat of Brow' theory and stated that for a work to be considered original, it should not only be original but also exhibit a 'modicum of creativity' or certain



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minimum standards of creativity. This gave rise to the new test of ‘Creative Originality’ where not only skill and labor, but also sufficient intellectual creativity and judgement has been invested by the author.

The concept of “flavor of the minimum requirement of creativity” was introduced in the landmark case of *Eastern Book Company*⁵. Through a special leave petition the Appellants, Supreme Court Case reporter (SCC) were seeking remedy against copyright violations by other parties that launched a software containing judgments edited and published by SCC along with various additions made by the editors of SCC. The major issues addressed in this case were what should be the standard of originality with respect to the derivative

works to make the work eligible to be called the author’s original work and hence get protection under Copyright Act of 1957 and whether the whole copy-edited version of the judgment will be entitled for copyright or only entitled to some of the inputs made in the judgement. The Supreme Court of India adopted a midway approach between the two doctrines taking inspiration from *CCH Canadian Ltd. case*⁶ where the Court stated that an ‘original’ must be a “product of an exercise of skill and judgment”, where skill is “the use of one’s knowledge, developed aptitude or practiced ability in producing the work” and judgment is “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work”. It was stated by the

Hon’ble Supreme Court that paragraph numbering, internal referencing, 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 require skill, judgement and the capacity for discernment. This was reiterated by Hon’ble Delhi High Court in the case of *Syndicate of Press of the University of Cambridge*⁷.

A defence to a charge of copyright infringement is the Doctrine of merger, also known as the doctrine of idea-expression. Such a doctrine was mapped out to ensure that the execution of an idea is protected, not the idea itself. The doctrine postulates that when there is only one way to express an idea, the



idea merges so well with the expression, intrinsically connecting the two and making them indistinguishable and thus hindering the growth of creativity. As a result such an expression is deprived of copyright protection preventing authors from exercising monopoly over such kind of work.

The idea-expression dichotomy has been dealt with through the doctrine of merger in a landmark judgment, *Mattel, Inc. & Ors. v. Mr. Jayant Agarwalla & Ors.*⁸ The Hon'ble Delhi High Court stated, "Applying this doctrine courts have refused to protect (through copyright) the expression of an idea, which can be expressed only in a very limited manner, because doing so would confer monopoly on the ideas itself".

Originality is one of the most important factors in understanding copyrightability of a work. The standard of originality is extremely low under 'Sweat of Brow' doctrine causing an imbalance in copyright protection and failing to protect and nurture the production and availability of intellectual works, whereas the standards of originality in the doctrine of 'Modicum of Creativity' pay no heed to skill or labor. Indian Courts through their judicial precedents have departed from both the doctrines and adopted a practical approach in establishing the true essence of 'original work', ensuring that both skill and judgement are exercised by the author in the creation of an original work. This makes each case open to scrutiny based on its degree of originality. [W](#)

¹Lockean Theory of Property, Locke 1960, *Second Treatise*, § 27-28

²*Walter v. Lane* (1900) A.C. 539

³*Burlington Home Shopping v. Rajnish Chibber* (1995) IVAD Delhi 732

⁴*Feist Publications v. Rural Telephone Service Co.* (1991) 111 S Ct 1282

⁵*Eastern Book Company v. D.B. Modak*, AIR 2008 SC 809

⁶*CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 (1) SCR 339

⁷*Syndicate of Press of the University of Cambridge on behalf of the Chancellor Masters and School v. B.D. Bhandari & Anr.*, 2011 (185) DLT 346

⁸*Mattel, Inc. & Ors. v. Mr. Jayant Agarwalla & Ors.*, 2008 SCC OnLine Del 1059



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