The Doctrine of Sweat of the Brow

Chinmaya Kumar Mohapatra
Asst.Professor, Faculty of Legal Studies, Siksha O Anusandhan
chinmayamohapatra@soa.ac.in

ABSTRACT

The research paper clarifies doctrine of 'Sweat of the Brow' which basically stipulates that the copyright law must protect a production in which much effort has been put into it. In a copyright dominion that recognizes brow sweat, a pure development would be protectable under copyright law.In the United States the theory was dismissed by one of the seminal decisions and innovation was considered to be of utmost importance. Though in India, there is no conclusiveness regarding the doctrine and the doctrine has been rejected sometimes and has been accepted the other times. The paper talks about the creation of databases as a copyrightable subject matter and is judged in the basis of originality as to its arrangement. The paper then concludes with talking about the need of clarity regarding the validity of the doctrine in India.

Keywords
Copyright, Doctrine, Intellectual Property, Law

Article Received: 10 August 2020, Revised: 25 October 2020, Accepted: 18 November 2020

Introduction

Copyright has the primary function of safeguarding works that result from one's creativity. The work which is sought protection in the Copyright Act must be original. Originality is a core requirement of the copyright law. This originality has to be with respect to the expression of a work, and not with the idea. Things such as the procedure of doing something or a method of operating something is not the subject matter of copyright but the way that idea or that procedure or method has been expressed in is what is protected under the Copyright Act. "The TRIPs Agreement stipulates that copyright safeguards shall extend to words and not to the principles, processes and operating methods."
Originality is the requirement for copyright protection. The 'Sweat of the brow' theory takes the dimension of innovation above all else, including the dimension of creativity. This doctrine holds that the hard work involved in compiling a work, irrespective of the compiler's use of imagination, is a protectable topic underneath copyright regulation. According to this theory a pure work that is devoid of any sort of artistic imagination but has been placed into any practice is thus copyrightable.
An instance for the better understanding of the doctrine would be that if a person collects the poems written by a renowned poet whose poems were already in the public domain and this person simply published them altogether, his work is not copyrightable because no creativity has been shown by this person. He has merely put together the work that was already in public domain and thus his work cannot be copyrighted.
Now, if this person, along with compiling the poems, had also presented his views on the poems and laid down his understanding and interpretation of these poems, his publication would have been copyrightable. This would be because, although the poems put together by him were not original, he penned down his views on paper regarding each of the poems in the compilation and therefore displayed some creativity along with the hard work and thus this work would have become copyrightable.
The brow's Sweat theory, however, tried to preserve the hard work even though this hard work was devoid of imagination or originality of any sort.Thus, in a regime of Copyright law which accepts the sweat of the brow, the creation wherein the person merely compiled the poems would be protectable under the Copyright law.
The doctrine was in fact practiced in order to decide whether a work was a copyrightable subject matter for a long time wherein the labour undertaken by a person was awarded while the aspects such as creativity were neglected.
The Sweat of the brow principleis out rightly forbidden by the land mark judgement of the U.S Court in the year 1991 in Feist Publication v. Rural Publication . The law courtapprehended that the mere fact that some amount of hard work went in the creation of a work does not make it copyrightable, there has to be a display of creativity coupled with originality.

Origination Of The Doctrine

This doctrine makes the requirement of creativity unnecessary for the protection under the Copyright regime. According to the Sweat of the brow, all that is needed is proof that a certain amount of hard work was put in the creation of a work for that creation to come under the ambit of copyrightable work. "It is not feasible to decide the position and time of this doctrine, but this can be said to have arisen from the reading of earlier laws, thereby banning second-comers from riding easily on the labor of others."
Previously the statutes protecting the copyright encouraged the doctrine of sweat of brow. There is a reason why such creations were given such importance in the earlier times. The dissemination of knowledge was not as rampant earlier as it today is. Thus, if any facts were compiled earlier even without the showcase of creativity, the mere act of the compilation of data had to be acknowledged and thus, the doctrine gave validity to such creations.
U.S. copyright law has covered works such as factual compilations since its inception. The 1909 Act safeguarded

"books, including composites and plays on cyclopedias, directories, gazetteers and other compilations" as the first form of work on which a copyright may be asserted.

There has been made a modification in the law now and thus now, Section 103 of the Copyright Act protects the material only that is original to the creation and does not protect the elements which already exist in the public domain. The protection is thus only given to the selection and arrangement and does not grant it to the pre-existing material.

"Yet the labor conquers the necessity of imagination in a work due to the advent of state Misappropriation Act. Unlike federal copyright law, which focuses on the importance of rewarding new ideas, state misappropriation legislation is specifically intended to protect the research that goes into a job20 State laws on misappropriation require knowledge technology companies to prohibit their rivals from stealing goods such as recent news items ('hot news')."

There has been the existence of two schools which clash with each other and thus there has always existed a confusion regarding the subject matter of the copyright regime.

The Sweat of Brow School maintains that the hard work must be remembered even if imagination or originality is absent in a production. "The labor has invested in gathering the data that forms an ordinary telephone manualvital to make available copyright safety. This is unique in that it wasn't replicated from another human's function. The fact is creating an alphabetically organized phone manual is merely a mechanical and automated operation which requires no imagination does not affect the copy."

Creative originality school relies upon the concept of creativity. This school preaches that creativity and originality go hand in hand. There has to be a minimum standard of creativity for a work to be original. Irrespective of the standard of it, the creativity has to be there.

Both of the doctrines were applied to the Copyright regimes worldwide. Under the sweat of brow principle, courts allowed complete copyright rights because the recording was a result of substantial work. Since its collection and organization is mechanical, every compilation of facts containing a vast number of facts was covered.

A lot of tribunals have found the artistic originality. This became the basis of several court judgments around the world. This was the innovative selection approach's view that the future compilers could use the previously generated facts but both the structure and the selection needed to be different and original.

The doctrine was started to be rejected after Fiest's case. The judgement laid down that "The work of a compiler may fail to meet the requirement; selections and arrangements that are procedural, normal, commonplace, traditional, garden variety, obvious, unavoidable, time-honored, age-old, or legally required may fail to comply with the requirement."

The ruling held originality to be the most important factor for a work to be copyrightable. It was held that the protection granted under the copyright law cannot be used as a mean of stopping others from copying the facts collected under a compilation. There was a sequence of judgements on the subject after the Feist decision. The existence of the directories has been determined by Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc. This was held that the compilation's individual components are within the public domain, and can thus be used by the public.

If it met certain requirements, a compilation might fall under the scope of copyrightable subject matter. Gathering and organizing pre-existing data; choosing, managing or arranging data; and the subsequent work is unique by choosing, managing or arranging the data found in the task.

Brow Sweat In India

Indian Copyright Act bequests copyright to all unique works of literature, fiction, music, and sculpture. Therefore a work would have to be original for being covered, but the thing is that the original concept was not specified anywhere in the Act.

"As regards compilations, the "Copyright Act of 1957"will not restrict safeguardcompletely to compilations which 'constitute intellectual creations because of the selection or arrangement of their contents". Nor does it specifically prescribe the collection and organization of additional requirements. The commonwealth republic i.e. India, and thus follows the doctrine of "sweat of the brow"."

It was apprehended that "a gathering of addresses created by anyone dedicating time, resources, labour, and skills, although the source may be commonly found, amounts to a 'literary novel' in which the author has copyright."

Indian Express Newspaper (Bombay) Pvt Ltd v JagmohanIs the case decided by the Bombay High Court where it was claimed that 'there is no copyright for events and events that may be news reports, and the writer can not claim copyright in respect of these events since he / she first recorded them.The ideas, facts, natural phenomena and events on which an author expends his / her expertise, energy, money, judgment and literary talents are common property and are not subject to copyright. Therefore, the copyright does not exist in news or information per se.Nevertheless, the manner in which these are expressed may obtain copyright due to the skill and labor involved in writing stories or features and in selecting and arranging the material"

In RG Anand v Delux Films and Others, It was determined that 'there can be no copyright of concepts, subjects, themes, plots or historical or legendary details, and when different individuals create the same idea of different ways, it is apparent that similarities are bound to occur because the source is common. The copy must be significant and content to be actionable."

In the case of Eastern Book Company V. DB Modak, the court deviated from the previous positions taken by the other courts and inclined towards the doctrine of modicum of creativity. The court stated that "The derivative work created by the author must have some distinguishable characteristics and flavor to the raw text of the court judgments. The trivial deviation or inputs put into the decision does not satisfy an author's copyright test. "Innovation or invention or creative concept is not the prerequisite for copyright protection, but it requires limited imagination."

Dr.Reckeweg and Co. Gmbh. and Anr. Vs.Adven Biotech Pvt. Ltd. The Plaintiff's work was determined in 2008 and was considered to be a pure compilation and thus not protectable under copyright law. In this judgment, the Delhi

High Court did not agree with the brow's doctrine of sweat, and held that imagination was a necessary consideration for a work to be covered under the copyright regime.
Worksthat has come to life on the basis of an already published work but is not a pure reproduction of the original work but includes some elements that are mew and unique, showing some kind of imagination are the copyrightable works. There may not be much imagination but it has to be there.
For the initial work a significant degree of competence must be applied. This is up to the courts to see whether or not the initial research inside the development is significant. The court will see that the originality is not insignificant or meaningless but is of some substantial value.

Protection Of Database

Server has no clear description. It is defined in the European Directive as' a set of autonomous works, data or other resources organized methodically and accessible individually by electric or other means".
"Server security is in India has been checked in the conventional copyright protection system for intellectual property. In 1994, the Indian "Copyright Act of 1957" was amended to make available more effective rights to copyright holders by allowing for the peculiar status of computer programs as literary works."
A database is judged for the persistence of granting it copyright protection on the grounds of uniqueness nonetheless. The Act coverssound recording, original literature,cinematographic films, dramatic and musical artistic works by way of "Section 13". Due to the nature of Section 2(o), security of databases falls under literary work and works such as computer programs, tables and compilation include computer databases.
Now that a database iscovered, the thing is that the Act does not shield the content from the databases but rather from the original content collection or arrangement.
In McMillan v Suresh Chunder Deb, Govindan v Gopalkrishna, "It was apprehended that a compilation produced by dedication to time, money, energy and expertise, while taken from a common basis, amounted to a literary work and was consequently covered underneath copyright no person was permitted to claim for himself the fruits of another's ability, labor or judgment and even a trivialaggregate of creativity was covered in a compilation."
With regards to the possession and privileges of the software in it,the Delhi High Court in Diljeet Titus &Ors v Alfred A Adebare&Orsheld that "The copyright in a database equipped by a lawyer working for and in another lawyer's office, via the latter's money, expenditure and experience, will be owned by the employer's lawyer.An individual can make a similar compilation but cannot contravene on the copyright of the previous compiler by appropriating the fruits of his labour. Protection is expanded to gain copyright rights in the form of a modicum of ingenuity in the collection, arrangement or organization of a database's contents."
"Unless there is some imagination involved in making the work, a "sui generis" right is expected to be granted to the database developer. This privilege may only be given to the database owner, who must show that there has been a significant investment qualitatively and/or quantitatively in acquiring, verifying or presenting the contents. It is simply a 'eye sweat' security regime."

Conclusion

Copyright's primary purpose is not to honour the creator's hard work but to protect the creation of an idea while permitting others to use the idea to create something novel and unique from it.
The creativity displayed in the work does not necessarily need to be extra ordinary but it should indeed be a prominent part of the creation and should be noticeable. In the Fiest Decision, which was the first step towards removing the Sweat of the Brow doctrine, it was said that there is no substitute for imagination and that a work does not become copyrightable merely because the author has used a significant amount of money and considerable time.
Even though the doctrine was discarded after the judgement, there have been cases where the hard work and efforts put in merely compiling a database have been acknowledged and although the Fiest judgement is applicable in U.S, the doctrine has not been entirely ruled out in other countries like India and Canada.
In India, the requirement of creativity has been emphasised upon time and again but the amount of creativity required for a work to become eligible for copyright is not present. There have been occasions where the brow's Sweat theory has been alluded to, and the imagination criterion has been put at the back burner. There is a need to understand the central purpose of copyright law and what is supposed to be covered.
There is a need of clarity regarding the copyrightable subject matter with respect to the amount of creativity put into the creation of a work. Creativity is an important aspect of not just copyright but whole of the ambit of intellectual property and the same should be protected in copyright especially as it deals with works that display immense creativity. The protection just on the basis of hard work put into a creation infiltrates the domain and the purpose of the law to encourage the creativity is defeated.

References

[1] Article 9(2) of the TRIPS Act, 1994

[2] 499 U.S. 340, 342 (1991)

[3] Tracy Lea Meade, Note, Ex-Post Feist: Applications of a Landmark Copyright Decision, 2 J. Intell. Prop. L. 245, 250 (1994).at 248

[4] Financial Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 209 (2d Cir. 1986)

[5] University of London Press v. University Tutorial Press [1916] 2 Ch 601

[6] See Rural Tel. Serv. Co. v. Feist Publications, Inc., 916 F.2d 718 (10th Cir. 1990) (mem.), rev'd, 499 U.S. 340 (1991); Illinois Bell Tel. Co. v. Haines & Co., 905 F.2d 1081 (7th Cir. 1990); Hutchinson Tel. Co. v. Fronteer Directory Co. of Minn., 770 F.2d 128 (8th Cir. 1985)

[7] http://academiccopyright.typepad.com/403copyrightcourse/2005/10/assignment_3_or.html

[8] Burlington Home Shopping v RajnishChibber,(1995 PTC (15) 278)

[9] (AIR 1985 Bom 229)

[10] (AIR 1978 SC 1614)

[11] 2002 PTC 641

[12] Section 2 (o), Copyright Act.

[13] Navin. J.desai vs. Eastern Book Company (2002) 25 PTC 641.