Journal of Intellectual Property Rights
Vol 27, July 2022, pp 266-276
DOI: 10.56042/jipr.v27i4.50594

Originality for Copyright Protection in Literary Works: After *EBC* v *DB Modak*

Sparsh Sharma

Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur — 721 302, West Bengal, India

Received: 31st May 2021; accepted: 6th April 2022

Originality, can be termed as the grund norm (the basic norm) for copyrightability. However, no one-size-fits-all formula is adopted by countries on this aspect, and this article first explores the position and benchmarks to determine original literary work (because even for different 'works' the criteria differs). Pursuant to this inquiry of identifying the ambit of the respective thresholds, the Indian perspective is analysed with special emphasis on the decision delivered by Indian Supreme Court in *DB Modak*. The judgement is critiqued to identify lacunae and absurdity in determining the law laid down and its application in the factual matrix. Finally, subsequent Indian decisions are looked upon by the author to find out the underlying approach by the courts wrt interpretation of *DB Modak* and what common threads emerge from them.

Keywords: Copyright, Original Literary Work, *EBC* v DB *Modak*, Copy-Edited Judgements, Copyright Act 1957

Originality is simply a pair of fresh eyes
-Thomas Wentworth Higginson[1]

The aspect of "fixation" and "originality" for copyrightability[2] is a common thread in almost all jurisdictions. The copyrightability, therefore, requires originality of expression with some minimal creative element. It is like a rewards-based system to encourage the creator. One of the most cited works of Landes and Posner stress the economic rationale of copyright, i.e., copyright protection as an incentive to create more work otherwise, an unscrupulous person may simply copy the work as it entails no cost as such.[3] Therefore, a link exists between copyrightability and originality, i.e., originality corresponds to copyright protection (to the creator to protect his work from getting his work copied) and liability (from getting sued by the creator of earlier work). To substantiate this 'universality' of originality in national regimes, few provisions are reproduced as hereunder –

1. Canadian Copyright Act[4]

"*Conditions for subsistence of copyright*

5 (1). Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met…"[5]

2. Also, similar provision can be traced in The Copyright Act of India, 1957.

"13. Works in which copyright subsists.—

(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—

(a) original literary, dramatic, musical and artistic works…."[6]

3. Corresponding provision from the Copyright Act of the United States

"§102 Subject matter of copyright:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression….." [7]

Also, few attached clauses are mentioned below,

"(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music…." [7]

(emphasis supplied)

The understanding of "original" by Nimmer is well established, i.e., something that is independent creation of the author (non-copying requirement); and requirement of *de minimis* creativity- "contribution" by author.[8] The former is an undisputed aspect, generally speaking, whereas the degree of variation occurs due to the interpretation of the latter, as to how low a contribution is too low to be original- the dilemma.

The International Order

The standard of originality, albeit universal, is not standardised. The main international obligations like

†Email: sparsh_2020@yahoo.com

the Berne Convention[9] and the TRIPS Agreement[10] leave it to the member countries to their discretion. The closest provision in Berne convention viz., Article 2(1)[11] does not mention "original" criteria, as such, and hence the courts and national statutes assume the responsibility onto themselves to set the scope and bounds of the word. However, the hint of originality to enjoy copyright is indicated in Article 14 bis.[11]

"Article 2(1)-

The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

Article 14bis-

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as anoriginal work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an originalwork, including the rights referred to in the preceding Article…."

(emphasis supplied)

UK - Sweat of the Brow (SOTB)

In *University of London Press Ltd.* v *University Tutorial Press Ltd*[12] the issue before the court was wrt the subsistence of copyright in examination question papers- whether they qualify as original literary works or not?

The court observed that the question papers qualify as literary works since they are in print/ writing format and it does not matter whether they are of high quality/style or low (just that non - copying requirement is met); they should originate from the author. For instance, Meredith's novel, a work of high creativity and quality would be considered as a literary work as much as a list of registered bills of sale protected as "books" under the Copyright Act of 1892. Also, the papers prepared by the examiner were work of skill (selection), judgement and experience and not mere compilations as per the Court (the position earlier set in *Walter* v *Lane*[13] was on the similar lines-labour of a reporter in taking down the speech) and prima facie something which is worth copying is worth protecting, and therefore they qualify as original literary work. This came to be known as SOTB doctrine or "industrial collection". It was also observed that novelty and inventive step are applicable to patents, and not to copyright.[14]

US- Modicum of Creativity (MOC)

Essentially, it refers to creativity as an additional rider beyond the classic skill and labour requirement (SOTB). *In Feist Publications* v *Rural Telephone Service Co*[15]('*Feist*'), the primary issue before the apex court was should telephone directory whitepages be entitled to copyright protection and the court highlighted the mandate of Article 1 Section 8 Clause 8 of the US Constitution which lays down the idea of promotion of Science and Technology.

Article 1, Section 8, Clause 8 of Constitution of US[16], gives power to the Congress,

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Hence, based on this, it was held that not mere labour but intellectual labour qualifies for copyright protection. The lessons learnt from Feist (O'Connor J.) were -

(i) *de minimis* creativity for originality ('no matter how crude, humble or obvious'[17])

(ii) summarily rejected SOTB doctrine as a very low threshold

Thus, the Court observed that "first to discover" (telephone numbers; data) does not mean that the data is owned by the discoverer (Rural here).

To understand this position in perspective consider the figure shown below and imagine it to be an apparent balloon. If one part is squeezed beyond a

point, the other will expand. Therefore if almost everything is copyrightable (as standard set in the UK), the public domain shrinks. That was the premise of the US position.[18]

Post-*Feist*

Influenced by the scrutiny in the *Feist,* from skill-labour qualification to a creative spark, several courts (for instance in Australia) eventually sided away from the SOTB approach. In *Desktop Mktg Sys Pty Ltd* v *Telstra Corp*[19] the creativity was held unnecessary, which later changed in *Ice TV Pvt Ltd* v *Nine Network Australia Pvt Ltd*[20] to skill, labour and intellect (choice) requirements. There is a catena of other cases where SOTB was no longer the acceptable approach (post-*Feist* jurisprudence).[21] Note that in civil law countries, the standard is similar to that of *Feist* and less lenient. Typically it refers to- "must express or reflect the author's personality"; "the internal turmoil" of the author.[22] This threshold is akin to the "creative spark" of *Feist.*

The Fine Tuning

In CCH Canadian Ltd. v *Law Society of Upper Canada*[23], primary issue was whether the law reports of the publisher were original work and thereby the activity of the library by providing the photocopy service being of the nature of copyright infringement.

In light of both the extreme thresholds of originality, the court chose a synthesis (a mid path) between both the extremes given by UK (SOTB) and US (MOC) to decide upon the originality and observed certain riders to qualify originality (other than non-copying requirement),

(i) there needs to be sufficient "skill and judgement" employed in the the work
(ii) it should not be trivial or a purely mechanical exercise

To decide as to what exactly was the mid-path, the court held that in order to qualify copyrightability, the word/modification should be a *"non-trivial, non-mechanical application of labour, skill and judgement."* Merely creativity is not the requirement to make the work original (as was said in the US decision), i.e., creative work by definition will be original and thereby copyrightable; but to be original, it need not be creative. In this regard, quoting the ratio of the case from the relevant paragraph of the judgement clearly brings out the position of the Canadian Supreme Court as follows,

"*I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean 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. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work 'must not' be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.*"[24]

(emphasis supplied)

Putting the major thresholds into perspective (roughly) based on the judgements above (Fig. 1).

***Eastern Book Company* v *D. B. Modak*:[26] The Indian Perspective**

Till the year 2007, SOTB was the accepted standard applied across the courts in India.[27] For instance, the customer database in 1995 was considered as copyrightable by the Delhi High court as it involved labour, capital and skill.[28] Many such cases rewarding the labour existed till then.[29] However *DB Modak* marked an apparent paradigm shift in the Indian jurisprudence.

The appellants were involved in publishing Supreme Court Cases (SCC), the copy-edited

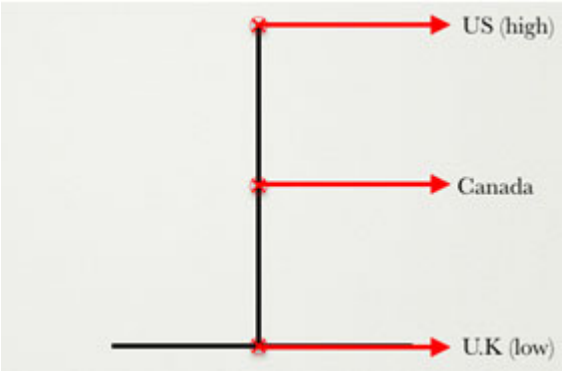

Fig. 1 — Degrees of threshold[25]

judgements, in their journal. The respondents, on the other hand, copied the text of these copy-edited judgements and reproduced in their CD-Roms with the help of software ('Grand Jurix' and 'The Laws' respectively).

The issue before the hon'ble Court was- by adding inputs into the raw text of a judgement does the copy-edited judgement become original and get entitlement of copyright protection? And, has the defendant-respondent infringed the copyright therein, and should he be injuncted from selling the CD-Roms?

The High Court in DB Modak

The plaintiff-appellant moved before the Delhi High Court,[30] but the single judge bench did not grant an interim injunction and instead vacated the stay as prayed by the respondent, which were earlier passed on in the form of interim injunctions from time to time. The court held that no copyright subsisted appellant's work as no creative element could be attributed *vis a vis* originality. It was considered a work of mere re-arrangement without substantial input or creativity and reiterated the position of Nimmer on this.[31] Relevant excerpt -

> *"Para 40*
>
> *...Nimmer on Copyright has observed that the changes consisting of elimination, changes of spelling, elimination or addition of quotations and corrections of typographical mistakes being trivial are not copyrightable. I am fully in agreement with the observations of Nimmer mentioned above. It is claimed by the plaintiffs that there is uniformity in style of writing and they have, therefore, a copyright in their style of writing. I am unable to agree with the plaintiffs. As already held, the judgments published in the journal of the plaintiffs are only reproduction of the judgments of the Courts with certain additions of commas, full stops, correction of errors, etc. in which, in my opinion, the plaintiffs cannot claim any copyright."*
>
> (emphasis supplied)

The appellant was aggrieved by the decision of the single-judge bench of the Delhi High Court and approached the division bench[32], which slightly modified the earlier order. Now, the respondent was prohibited to copy the head notes and editor notes of the appellant while selling its CD-Roms. However, the raw judgements, with their own headnotes could be sold by the respondent and the application for interim relief, as such, was disposed of by the Court.

Both the benches were clear on main aspects wrt copyrightability like, Firstly, a copy-edited judgement was a mere work of correction, arrangement and compilation. This implies that certain inputs added by the appellants in order to make the raw judgement user-friendly cannot be granted copyright protection because it is materially similar to the raw judgement. Secondly, and most importantly, if someone has a right to seek a certified copy of raw text from the court registry office (common source) and reproduce it vide Section 52(1)(q), it does not mean that he has no right to take the same from some journal where it is published. Thirdly, the appellants may be first to publish (much like- first to discover), but it does not imply that they own it because of the swiftness (similar to *Feist*).

The Indian Supreme Court in DB Modak

The Apex Court discussed the two competing views with respect to aspects of "original literary work" primarily put forth in decisions like *University of London Press Ltd.* v *University Tutorial Press Ltd*[33]and *Feist Publications* v *Rural Telephone Service Co.*[34] The former focussed upon "industriousness approach" consistent with the *Lockean theory of justice,* that said, "although persons belong to God, they own the fruits of their labor. When a person works, that labor enters into the object. Thus, the object becomes the property of that person."[35] The latter highlighted that a minimum standard of creativity is necessary for copyrightability to the expression. However, the Court came to a conclusion and adopted the position taken by the Canadian Court where it was held that,

> *37 "....in a compilation, the author must produce a material with exercise of his skill (use of once knowledge, developed aptitude or practiced ability in producing the work) and judgment (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) 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".*
>
> xxx

38"....Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Indian Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court..."
(emphasis supplied)

The appeal was partly allowed and additional relief was granted to the appellants other than the already granted relief. The respondent was not just now not allowed to copy the headnotes, footnotes and editorial notes but it was extended to internal references and use of phrases like dissenting or concurring. In a nutshell, parts of copy-edited judgement in which copyright subsists as per the ruling are (quoted from plaintiff-respondent averments in *Relx India Pvt. Ltd.* v *Eastern Book Company, para 6* [36])-

"(a) Creation of paragraphs in their copy-edited version by segregating existing paragraphs in the original text by breaking them into separate paragraphs and/or by clubbing separate paragraphs, and in the paragraph numbering.

(b) Internal referencing, after providing uniform paragraph numbering to multiple judgments.

(c) Inputs in respect of the editor's judgment regarding the opinions expressed by the Judges by using phrases like "concurring", "partly concurring", "dissenting", "partly dissenting", "supplementing", etc.

(d) Editorial notes.

(e) Head notes in the paragraph numbering."

Critique of DB Modak

The judgment delivered by the Court in *DB Modak* has several shortcomings and seems confusing. In India, the copyright flows from the statute (the Copyright Act, 1957[37]) and it is necessary to fall back to some crucial provisions and interpret them as:

1. The author is the "first owner of copyright" *vide* Section 17(d) of the Copyright Act, 1957 and in the case of govt. work- it shall be the first owner of copyright since "government work" as defined in the interpretation clause of Section 2(k)(iii) includes work published by any judicial authority in India. Further, "work" as per Section 2(y) includes a literary work (in sub-clause (i)). Therefore the harmonious reading of above-mentioned clauses gives a clear picture that government is just like any other owner of the copyright subsisting in the judgements delivered by the courts in India

2. The presence of an exclusionary section *viz*., Section 52(1)(q) presupposes the fact that copyright subsists, which is exempted by way of the provision

3. It is noteworthy that in Para 14 of the judgement, the court discusses the copyright in derivative work, "*...copyright protection in a derivative literary work created from the pre-existing material….*"
(emphasis supplied)

In exploring this balance, the fallacy lies in the basic aspect of defining what constitutes a "derivative work". The court borrowed the understanding from the US (Section 101 of Copyright Law of the United States)[38] of something which is inherently absent in the Indian Copyright Act, 1957.

"101.

xxx

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work'."[38]
(emphasis supplied)

Instead, what is mentioned in Indian law is "adaptation" which the court simply ignored (deviation from set practice of law that a statute ought to be interpreted to its fullest before filling the gap, if any). Section 2 of Copyright Act, 1957, i.e., the Interpretation clause defines it as follows,

"(a) 'adaptation' means,-

(v) in relation to any work, any use of such work involving its re-arrangement or alteration"
(emphasis supplied)

Hence the act of alteration/modification/cosmetic re-arrangement of raw judgements (a literary work) into copy-edited ones is not mere reproduction of a work in the public domain but instead falls well-within the definition of "adaptation"; and a valid permission (license) of the owner of the copyright (i.e., Court/Govt.) by the appellant was required. Because, Section 14(a)(6) of Copyright Act, 1957- which explains copyright, allows only the owner/author to adapt the work.

4. Also, Section 52(1)(q)(iv) is limited torepublication (or reproduction) of the judgements delivered by the court but not "adaptation", and the argument of the appellant, therefore, falls flat, as the exception laid in this provision is inapplicable in present facts.

"52. Certain acts not to be infringement of copyright.—

(1) The following acts shall not constitute an infringement of copyright, namely:—

.....(q) the reproduction or publication of-

.....(iv) any judgment or order of a court, Tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the Tribunal or other judicial authority, as the case may be"

(emphasis supplied)

5. Some other questions remain unanswered, like why the government, who is the first owner of copyright here, was not even impleaded as a party. This also raises the pertinent question wrt "moral right of the author", which is wide enough to cover all "acts" (includes adaptation) prejudicial to the owner regardless of copyright/assignment. Hence, appellant's act had brazenly violated this provision,

"57. Author's special right -

(1) Independently of the author's copyright and even after the assignmenteither wholly or partially of the said copyright, the author of a work shall have the right -

xxx

(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyrightif such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation

..."

(emphasis supplied)

6. If the govt. can be an infringer it can also be an owner of copyright on par with any other author/owner and enjoys rights granted under the Copyright Act, 1957. Like in *Amar Nath Sehgal* v *Union Of India*[39] the government paid the sum of 5 lakhs to the parties as an infringer of copyright. Relevant excerpt -

"Para 62 (d) - Damages in the sum of Rs.5 lacs are awarded in favor of the plaintiff and against the defendants (GoI)"[40]

(emphasis supplied)

7. In light of the above-mentioned arguments, it is a well-established principle in law that one who seeks equity must come with clean hands; but EBC (publishers) here sought relief when they adapted the work without permission. Landes and Posner in their analysis, discussed the non-copying requirement which perhaps eclipses in certain cases like- the lifetime of copyright protection is expired (or) costs are entailed in the form of licensing of the existing work (or) disguising the copying through engaging in costly searches, ultimately going out of the radar of infringement.[41] The present facts perhaps did not fit in this criteria and, hence, the bonafide and intent of the appellants was itself on a shaky ground.

8. The act of respondent ought to be exempted in toto because judgments should be accessible to the general public keeping in mind the Indian knowledge system of the passing of learnings (of the Vedas, the Upanishads, the Puranas etc.). Otherwise, the very purpose of making the judgements publicly available is exhausted *vis a vis* dissemination of information, which is a vital concern of copyright.[42]

9. For the sake of argument, even if it is assumed that reproduction can be extended to adaptation, the larger question will then boil down to- are judgements really an original work of the judge?[43] Undoubtedly, it involves skill and judgement, but some judges may even reproduce the pleadings, book excerpts etc., verbatim in the judgement. In that case, how can a law journal dealing with copy-edited judgement use the provision to their use and get copyright over the protected work unscrupulously, is a thoughtful discussion.

10. On the aspect of operational paras of the judgement, the court contradicts itself in adopting the originality standard and confusing even the ratio of the decision. While considering *cross-citations to the citation, names of cases, giving exact page and paragraph number as in the original case, etc*. the

court applied the *Feist* threshold of creativeness; whereas, for *para segregation, internal referencing and including words like concurring, dissenting etc*. it applied *CCH Canadian* threshold, highlighting the "skill and judgement" and more than pure mechanical process criteria in the work.[42]

11. This is further complicated by use of phrases like "flavour of creativity" (four times in the judgement to be precise) to decide as to what element of copy-edited judgement qualifies as a copyrightable element. Such phrases, without defining, only add to the ambiguous nature of the language used by the court.

12. It is also not logical to charge over the judgements delivered by courts just by making few cosmetic changes here and there and not prudent to pay for mere references and cross citations. It does no good but only increases the social cost to go to the common source and carry out the citation/reference search as it also entails time and energy.

13. Adding onto the last point, even if one looks from Idea-Expression point of view, if an idea (here raw text) can be expressed only in a limited manner (citations/cross citation/partly dissenting etc.), then granting copyright to that expression would tantamount to a virtual monopoly. Like in *Herbert Rosenthal Jewelry Corporation* v *Kalpakian,*[44] the Court held that manufacture of "bee shaped jewel pins" could not be possible in many ways and copyright protection was consequently refused. In this regard, terms like citation/partly dissenting (concurring) etc. would remain same (with similar arrangement) qua all publishers/editors, more or less.

The work of the publisher is basically cosmetically rearranging and adapting the judgements (*public juris*), and it is amply clear from the decision in *R.G. Anand* v *M/s. Delux Films,*[45] that facts are uncopyrightable.

"46.

..There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work."

(emphasis supplied)

Hence the author agrees with the position taken by T.G Agitha, describing the judgement as "knotty analysis of originality threshold" which is a valuable criticism.[42]

The Ghost of *DB Modak*

A review petition was filed to this judgment but was dismissed as there was an "unsatisfactory explanation wrt delay of 2162 days in filing review" (the words used by the court while dismissing). Subsequently, a curative petition[46] was preferred by the aggrieved party vide mandate laid in *Rupa Ashok Hurra*v *Ashok Hurra* (Article 32 of Indian Constitution[47]) which met with a similar fate as that of the review. One plausible reason perhaps could also be the importance given to such disputes against other "serious" issues.

Post Modak Indian Jurisprudence

Notwithstanding the decision delivered in DB Modak, which had a limited scope wrt literary work in the public domain, its essence has vastly been extended to other artistic works like designs[48], non-compilations and works which are not in the public domain, as such (indicated and discussed hereunder).

In *Chancellor Masters & Scholars of The Univ. of Oxford* v*Narendera Publishing. House*[49], the Delhi High Court held the math textbook to be unprotectable as questions, answers, and arrangement did not exhibit "the minimum degree of creativity".[27] Also the defendant's work was exempted under "fair use" as it was for addressing substantially different purposes.

In *Mattel, Inc.* v *Jayant Agarwalla*[50], the Court held that the game of scrabble *vis a vis* the tile and board designs (the collocation of lines; diagonal colour scheme combo) did not show a "modicum of creativity" and was thus unprotected and not entitled to copyright protection. Also, expression of Idea which can be expressed in limited fashion cannot be extended copyright (Merger doctrine).

In*Servewell Products Pvt. Ltd.* v *Dolphin*[51] the court performed the visual comparison test between the literary work and the infringing work (of Dolphin). The artistic works by the plaintiff-appellants wrt the flowers were taken from the book ("The Planimetric Design Cyclopedia 2004" and "Japanese & Korean Graphic Materials Design Dictionary"). Therefore this was not separately copyrightable. The plaintiff contended that the manner of portraying colours and seen as a whole constituted an original artistic work. The court reiterated the mandate of *DB Modak*- minimum creativity and uniqueness of colour combination to show a creative spark; and found that plaintiff's work

lacked such uniqueness. It was also observed that a mere combo of non-copyrightable elements by itself does not entitle to copyright protection; hence no infringement as such was found.

In *Syndicate of The Press of The Universtiy of Cambridge on Behalf of The Chancellor, Masters and School* v *B.D. Bhandari*[52], issue before the court was whether protection of copyright could be extended to composing grammar sentences/ exercises or not (plaintiff's work- "Advance English grammar"), which the defendant used in his book- "MBD English Guide". Div bench of Delhi High court upheld the single judge bench decision and held that copyright did not subsist in work in public domain and the purpose of the respondent's book was altogether different and his own (which is the requirement of 'fair use' in Indian law), i.e., step by step process of arriving at solutions. Guidebooks were work of creativity, skill and judgement and hence not an infringing copy of question papers.

The Delhi High court in *Ravinder Singh & Sons* v *Evergreen Publications (India) Ltd.*[53] upheld the injunction granted by the lower court against the appellant-defendant for infringing upon the question Papers of ICSE Examinations for 10th standard of respondent ("Examination Question Papers ICSE March 2006 under arrangement with *The Council for the Indian School Certificate Examinations New Delhi* -all rights reserved) as it was reproduced verbatim by appellants (with punctuations) from the guidebook of respondents. The court reiterated the position of *Syndicate of The Press of The University of Cambridge on Behalf of The Chancellor, Masters and School* v *B.D. Bhandari*[52]and *DB Modak*wrt originality, i.e., labour-skill-judgement to hold the copyright.

*Dr.Reckeweg*v*Adven Biotech Pvt. Ltd*[54] dealt with the copyright in the catalogue consisting of the composition of homoeopathic medicines of the plaintiff. The alphanumeric selection was considered too common by the court, and the mandate of *DB Modak*wrt "somewhat different in character" fell short. On other counts too, where the copyright over sequencing was claimed, the court held it to be a derivative work. No creative inputs were added to qualify the copyrightability.

Tech Plus Media Private Ltd. v *Jyotijanda*[55] copyright in customer databases with contact points of clients was databases and pertaining to the running of the business of information technology publications was in question. The argument that it constituted the trade secrets of the plaintiff was rejected, and no copyright protection was extended.[27] — the position in *Dr.Reckeweg*v*Adven Biotech Pvt. Ltd*[64] was reiterated by the court.

The Delhi High Court in *Navigators Logistics Ltd.* v *Kashif QureshiTech Plus Media Private Ltd.* v *Jyotijanda*[56] held that a "list" did not fall into the copyrightable subject matter (an original literary work) as it was no more than a compilation. Also, no technique as such in compiling the list of customers was highlighted in this case (much like *Tech Plus Media Private Ltd.* v *Jyotijanda*[55]).

Emergent Genetics India Pvt. Ltd. v *Shailendra Shivam*[57], the Court categorically held that copyright protection in databases (some techniques and information) could not subsist and lacked exclusivity/confidentiality as it was pre-existing material and without an iota of novelty as such. Court observed-

"*35....Plaintiff does not claim exclusivity in respect of any particular technique or process; it is the result, i.e.., the documentation of elimination, and the attributes of the different strains which are claimed to have been compiled. If such techniques were already available, and were practised, they were capable of observation, and similar documentation…*"

(emphasis supplied)

In *Institute for Inner Studies and Ors.* v *Charlotte Anderson*[58], the issue before Delhi High Court pertained to copyright over- "Pranic Healing Techniques and Literary works therein". The court on the aspect of copyright protection to historic works reiterated position of *Baigent & Leigh* v *The Random House Group Limited.*[59] The idea-expression dichotomy was explained by the court (which excluded facts from the ambit of protection) and originality for such works was limited to- language employed, selection, arrangement and compilation of data only. It thus observed-

> *"93. After understanding the rule of law laid down in Baker (Supra) and Feist (Supra) decision, it is beyond the cavil of any doubt that in cases relating to literary work describing useful arts, science or based upon pre-existing data and facts, the copyright shall be extended only to the manner of description of the said art principles or facts in the language employed by the author and it is substantial copying by the infringer and not in the facts in generality*."
>
> (emphasis supplied)

Hence, only "way in which facts are presented" is protectable and it held,

"106. Therefore, the plaintiff in the instant case cannot be heard to say that the protection to performance of Pranic Healing techniques can be accorded on the basis of the copyright claim in the book describing, illustrating and compiling the exercises or Asanas of Pranic Healing."

In *Dart Industries Inc.* v *Techno Plast*[60] issue before the Div bench of Delhi High court was wrt copyrightability of drawing sheets based on which the moulds were made (copyright as artistic works) as significant capital was invested to produce such moulds. On the issue of copyrightability, the court refused to grant protection on 2 counts, viz., the lack of minimum creativity vide the decision of *DB Modak*; and use of Idea-Expression doctrine in holding that depiction of some articles could not per se be treated as protected under copyright. Relevant excerpt –

"*32.*

...plaint nowhere discloses that the drawings (i.e.. the artistic works here) have any inherent capability of art: it is evident that these drawings are of commonplace everyday articles used in households..."

(emphasis supplied)

In *Pearson India Education Service Pvt. Ltd.* v *New Rubric Solutions LLP*[61]*,* the plaintiff created literary work in the form of some charts which involved skill-analysis of students (known as "Kaleido"). The defendant alleged copyright infringement for the use of its work (promo purposes- "PearsonsMyPedia Launch" youtube video) by the defendant. However, it is noteworthy that the work of the plaintiff was based upon the defendant's book. The Court upheld the originality of the derivative work by again going back to the age-old "skill-labour-capital" approach (more than a mere copy of the work sufficient to get copyright). SOTB was inherently signified to grant injunction for the copyright infringement. Relevant excerpt in judgement which followed the ghost of *DB Modak* -

"26. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make profit out of the skill and labour of the original author and it is for this reason, the Copyright Act gives to the authors certain exclusive rights in relation to the literary work. The Apex Court in the case of Eastern Book Company and Others v *D.B. Modak and Another - MANU/SC/4476/2007 : (2008) 1 SCC Page 1 has held in paragraph 46 that the work that has been originated from an author and is more than a mere copy of the original work, would be sufficient to generate copyright.The creation of the work which has resulted from little bit of skill, labour and capital are held to be sufficient for a copyright in derivative work of an author. Catena of decisions have propounded a theory that an author deserves to have his or her efforts in producing a work, rewarded. The work of an author need not be in an original form or novel form but it should not be copied from another's work, that is, it should originate from the author."*

(emphasis supplied)

In *Salgunan N.* v *Ram Gopal Edara*[62] the plaintiff himself copied compilations from various law books (since the mistakes were also verbatim copied). The Court highlighted the aspect that for derivative work, "selection and arrangement" coupled with modicum of creativity is needed in derivative works which was absent here (plaintiff's work comprised compilation of books- titled "Review of Post Graduate Medical Entrance Examination"). Hence the case of infringement was not made out in the first place and further the work taken was in the public domain.

Khaidem Jacko Meitei v *Union of India,*[63] the Manipur High Court highlighted the importance of non-copying requirement *vis a vis* originality quoting famous precedents. The case pertained to instances of plagiarism by the PhD students under a professor in Manipur University. The Court directed University to take appropriate action to deal with the issue quickly as originality is sine qua non for copyrightability and "*Copying or plagiarism is an anathema to creativity and invention."*[64]

*DilipLoyalka*v *Assistant Commissioner of Income Tax*[65] is a peculiar case where the question of whether a book on Income Tax in question-answer form was a literary work or not arose in an income tax dispute. Assessee (appellant-plaintiff) filed an appeal against the decision of CIT(Appeals) which confirmed the disallowance of deduction as per Section 80QQB[66] amounting to Rs. 99,000/- (this provision allows deduction for "literary work"). The Court allowed appeal and held that the author was entitled to deductions as his book was recognised by GoI and he had received "royalty". Quoting *DB Modak*, the Court held it to be a work of intellectual labour coupled with adequate skill.

Conclusion

Some remarkable and pragmatic jurisprudence came out of Indian High courts (except few which fell back on 'industrial collection'[67]) notwithstanding the ghost of *DB Modak*. Many of the judgements were forward-looking, highlighting that mere skill and labour to create work is insufficient and some intellectual effort to create work which is somewhat different in character is essential to qualify originality. The classic underlying position of JAL Sterling (English position on originality) can be seen wrt non-copying requirement, and trinity of skill-labour-judgement.[68] A bent towards post-*Feist* jurisprudence is seen unlike the earlier SOTB approach, pre-2007. In rest of the cases, originality discussion did not arise as such, because of exemptions under Section 52(1) of the Copyright Act 1957 (like 'fair use'), i.e., the infringement suits were not decreed in favour of plaintiffs.

Finally, in the year 2016, the apex court (a co-equal bench like *DB Modak*) again met with a similar question pertaining to originality in copy-edited judgements.[69] The appeal this time came from Allahabad High Court[70] which upheld the Trial Court's temporary injunction order and applied the ratio of *DB Modak*wrt selling of the CD Roms by appellant-defendant (raw text without respondent's inputs). Even the Apex Court simply disposed of the appeal in a two para order by applying the ratio laid down in *DB Modak*, i.e., permitting appellants to sell subject to the qualification (restricted to raw judgements). Therefore an opportunity to relook and clear the ambiguity was missed yet again leaving it to the wit of individual courts to apply the law.

Summing up, the basic idea of copyright or any Intellectual property for that matter is to stand on the shoulders of the giant, i.e.,, "*nanos gigantumhumerisinsidentes",* which means "discovering truth by building on previous discoveries*"*. Landes and Posner in their analysis highlighted that the more the creator (or author) borrows from an existing work (copyright in which has not lapsed), the less extensive will be the copyright protection. Simply put, the copyrightable content here is minimal. Therefore, at least a clear determination of originality (and copyrightability) based on the past and cultural roots, specific (and individually) to a country ought to be carved out to avoid subjective analysis with such a wide variation as discussed. However, the latest Indian court decisions have held compilations to be unoriginal (unless value addition is creative/ substantial) and have analysed such works by comparison (with experts sometimes) to carve out inequivalence/ value-addition/ sameness much like "reward based" sliding continuum system as proposed by Parchomovsky and Stein[71], i.e., putting a positive or negative premium on originality. In this journey itself, the court looks at- if the work can be expressed in another way (Merger doctrine) or how it stands apart (purpose) from the pre-existing work and thereby the scale and extent of protection to be granted, if any.

References

1 Quoted from - Judge E F & Gervais D, Of silos and constellations: Comparing notions of originality in copyright law, *Cardozo Arts & Entertainment Law Journal*, 27 (2) (2009) 375.
2 Olson D P (1983), Copyright originality, *Missouri Law Review*, 48 (1) 29.
3 Landes W M & Posner R A An economic analysis of copyright law, *Journal of Legal Studies*, 18 (2) (1989) 325.
4 Canadian Copyright Act, R.S.C., 1985, c. C-42.
5 https://laws-lois.justice.gc.ca/eng/acts/C-42/page-3.html#h-102747 (19 May 2021).
6 http://copyright.gov.in/Documents/CopyrightRules1957.pdf (19 May 2021).
7 https://www.copyright.gov/title17/title17.pdf (19 May 2021).
8 Nimmer M &Nimmer D, Copyright §§ 2.01[A], [B] (1990).
9 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 1161 U.N.T.S. 3.
10 Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 33 I.L.M. 1197.
11 https://wipolex.wipo.int/en/text/283693 (19 May 2021).
12 [1916] 2 Ch 601 (Eng.).
13 [1900] AC 539 (HL) (appeal taken from Eng.).
14 Hariani K &Hariani A, Analyzing originality in copyright law: Transcending jurisdictional disparity, *IDEA: The Intellectual Property Law Review*, 51 (3) (2011) 491.
15 111 S Ct 1282 (1991).
16 https://www.usconstitution.net/xconst_A1Sec8.html (19 May 2021).
17 Nimmer 1 M &Nimmer D, Copyright § 1.08 [C] [1] (1990)
18 Keynote, a presentation application by Apple Inc. was used.
19 (2002) 119 FCR 491.
20 (2009) 239 CLR 458.
21 Fisher W, Recalibrating originality, *Houston Law Review*, 54 (2) (2016) 437.
22 Gervais D J, Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law, *Journal of Copyright Society of the U S A*, 49 (2002) 949, 968.
23 2004 SCC 13, 2004 CSC 13 in the Supreme Court of Canada.
24 *CCH Canadian Ltd.* v *Law Society of Upper Canada*, 2004 SCC 13, para 16.
25 Keynote, a presentation application by Apple Inc. was used.
26 MANU/SC/4476/2007

27 Fisher W, Recalibrating originality, *Houston Law Review*, 54 (2) (2016) 437.
28 *Burlington Home Shopping Pvt. Ltd.* v *Rajnish Chibber*, 1995 (15) PTC 278.
29 *Govindan* v *Gopalakrishna*, 1955 A.I.R. Mad. 391, paras. 8-10; *McMillan* v *Suresh Chunder Deb*, I.L.R. 17 (Cal.) 951, 961.
30 *EBC* v *Navin J Desai*, 2001 PTC 57.
31 Nimmer M B &Nimmer D, *Nimmer on Copyright* (Matthew Bender ed., LexisNexis), 2010.
32 2002 (25) PTC 641 (Del.) (Div Bench).
33 1916 U. 119., (1916) 2 Ch 601.
34 111 S.Ct. 1282 in the Supreme Court of the US.
35 https://en.wikipedia.org/wiki/Labor_theory_of_property#cite_note-1 (19 May 2021).
36 MANU/SC/1723/2016.
37 No.14 of 1957.
38 https://www.copyright.gov/title17/title17.pdf (18 May 2021).
39 2005 (30) PTC 253 Del.
40 *SehgalAmar Nath* v *Union Of India*, 2005 (30) PTC 253 Del.
41 Landes W M & Posner R A, An economic analysis of copyright law, *Journal of Legal Studies*, 18 (2) (1989) 325.
42 Agitha T G, Idea-Expression Dichotomy and Originality Requirements for Copyright Protection: An Analysis of the Jurisprudential Underpinnings of the Judicial Pronouncements in India, Sinha M, *Mahalwar* v (eds) *Copyright Law in the Digital World*., (Springer Nature Pvt Ltd, Singapore), (2017) 1.
43 Stern S, Copyright originality and judicial originality, *University of Toronto Law Journal*, 63 (3) (2013) 385.
44 MANU/FENT/0484/1971 : (1971) 446 F2d738.
45 MANU/SC/0256/1978 : (1978) 4 SCC 118.
46 Curative Pet. (C) No. 261/2014 in R.P. (C) No. 376/2014 in C.A. No. 6472/2004.
47 https://www.constitutionofindia.net/constitution_of_india/fundamental_rights/articles/Article%2032 (19 May 2021).
48 *Servewell Products Pvt. Ltd.* v *Dolphin,* MANU/DE/1019/2010.
49 2008 (38) PTC 385.
50 2008 (38) PTC 416.
51 MANU/DE/1019/2010.
52 MANU/DE/7256/2011.
53 MANU/DE/5012/2018.
54 2008 (38) PTC 308 (Del.).
55 2014 (60) PTC 121.
56 MANU/DE/3355/2018.
57 MANU/DE/3012/2011.
58 MANU/DE/0084/2014.
59 MANU/UKWA/0098/2007: (2007) FSR 24.
60 MANU/DE/1699/2016.
61 MANU/KA/4066/2015.
62 MANU/TN/9246/2019.
63 MANU/MN/0047/2018.
64 *Khaidem Jacko Meitei* v *Union of India*, MANU/MN/0047/2018, Para 7.
65 MANU/IK/0380/2015.
66 Income Tax Act 1961 [43 OF 1961], Section 80QQB.
67 *Pearson India Education Service Pvt. Ltd.* v *New Rubric Solutions LLP*, MANU/DE/1699/2016.
68 Sterling J A L, *World Copyright Law*, (Sweet & Maxwell) 2nd ed., 303.
69 *Relx India Pvt. Ltd.* v *Eastern Book Company*, MANU/SC/1723/2016.
70 *Reed Elsevier India Pvt. Limited* v *Eastern Book Company*, MANU/UP/2321/2014.
71 Parchomovsky G & Stein A, Originality, *Virginia Law Review*, 95 (6) (2009) 1505.