Proprietary Rights or Common Property? — The Dilemmas of Copyright Protection of Case-Law Reporters

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Received 1 September 2005

Law reporters have long been an integral part of the legal fraternity, being the principal source of communicating judicially evolved laws; forming fundamental basis for academic research as well as locating precedents within the litigation arena. Their enhanced electronic availability has led to obvious questions regarding their ambiguous status under copyright legislations, both with respect to protection afforded for individual components like headnotes, indices, etc., as well as of the entire reporter. Such deadlocks in statutory law have spawned extensive litigation in countries like US, Canada, UK, India, etc.

In an attempt to put forth a comparative legal analysis, this paper looks into foreign jurisdictions to unravel the flux in the Indian copyright law on law reporters, preceded by a cursory understanding of macrocosmic standards of originality and the consequent qualification for copyright protection. The paper concludes with an assessment of the various reasons for which law reporters must be accorded copyright or some other form of proprietary rights over their databases, thereby assisting in the proliferation of technically superior reporters.

Keywords: Case-law reporters, proprietary rights, copyright

Importance of the realm of copyright law within the corpus of intellectual property (IP) has stemmed from the requirement to protect existing expressions of creativity and assist in future burgeoning of the same. However, inclusion of wide-ranging works like charts, compilations, fact-based works, etc., into the domain of ‘literary works’ has necessitated the evolution of copyright law into a tool that carefully gauges the level of protection that must be granted to this vast body of written works. This coupled with the overhaul that computer databases have brought into the world of legal reporting, has led to a jurisprudential transformation that has found cogent expression in the field of copyright protection for law reporters, both in its entirety as well as in the individual protection granted to its component parts, such as, headnotes, footnotes, indices, pagination, etc. Although the divergent stands taken by Courts on these relevant questions provide endless fodder for legal academic writing, this theme has to date virtually escaped scholarly attention resulting in a lack of legal writing on differing standards of copyright protection granted to law reporters all over the world— either as a whole or to its individual component parts.

This paper reviews theoretical underpinnings of copyright law qua case-law reporters and headnotes, attempting to shed light on emerging issues, pivoting around the Delhi High Court judgment in *Eastern Book Company v Navin J Desai*. However, in order to better appreciate the copyright concerns vis-à-vis judicial opinions and published headnotes, the paper also deals with the concept of originality as evolved in the world of copyright. This is followed by an appraisal of the copyright protection accorded to law reporters in different jurisdictions, the comparative stance being necessitated by the symbiotic relationship that Indian law in general and its copyright law in particular has shared with its common law roots in the Britain (UK), United States of America (US) and Canada. The last provides a legal critique of the *Eastern Book Company* case and assesses the tenor of Indian jurisprudence on this point.

The Realm of Originality and its Changing Parameters

Copyright, defined in the most elementary terms, is “the exclusive right given by law for a certain term of years to an author, composer, (or his assignee) to print, publish and sell copies of his original work”5. Thus, to sustain a copyright claim of any nature, much
pivots around the requirement of originality in the claimant’s work. The requirement of originality, as stated earlier, is closely related to the objective of copyright law and must be interpreted accordingly. An identification of this objective calls for an understanding of the breadth of originality in cases involving compilation/arrangement/selection of factual works.

At the very outset, it warrants mention that there exists a divergence in the objectives of copyright law in civil and common law countries, especially qua the concept of originality as a prerequisite for copyright protection. The crux of these differing standards hinges around the adoption of either of the two approaches—the labour approach, christened as ‘sweat of the brow’ in the western legal tradition, or the emerging notion of ‘modicum of creativity’. If the reward theory, i.e., copyright protection when viewed as a reward for the labour expended by the author, were the basis of copyright then the subsistence of copyright in factual works and those involving an arrangement of data based on a prior selection or compilation would be justified by the application of the ‘sweat of the brow’ principle. But if its real objective is intellectual advancement, which necessarily involves a certain degree of creativity in work, then no claim for copyrightability of compilations and arrangement of data in general can be sustained. The shift from ‘sweat of the brow’, which dominated the legal frontiers till overruled by the US Supreme Court in favour of the principle of ‘modicum of creativity’, raises pertinent questions concerning the topic under study. Thus, under the new regime mere disbursement of time and effort to create a written work, including compilations, is not sufficient, if unaccompanied by the required spark of creativity, or a degree of originality. In attempting to define originality in this context, Courts have created and applied several doctrines, with varying degrees of success, making the interpretation of originality the subject of numerous debates.

The ‘Creativity’ Stipulation

The level of originality required under copyright laws is generally considered to be at a low threshold. Moreover, since the protection afforded by copyright is limited in contradistinction to other forms of intellectual property protection, there is no need for a stricter level of originality. Even though the low threshold of originality in copyright is universally recognized, there exist varying standards of originality in different jurisdictions. This is primarily due to the divergent objective of copyright laws in different countries. For instance, in US, originality is a constitutional requirement, but however is minimalist and essentially aimed to prevent the protection of nondescript efforts. When viewed in isolation, this standard may seem in effect, no standard at all; nonetheless, there is a point at which an effort is considered too trivial to qualify for protection.

The originality standards in copyright law, especially in the US, have for long been tilted towards the parameters set out by the reward/labour theory of copyright protection. The sole requirement of ‘independent creation’ to satisfy originality standards, divorced from any considerations of creativity, was highlighted in *Sheldon v Metro-Goldwyn Pictures Corp.* where it was noted that: “If by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author’ and, if he copyrighted it, others might not copy the poem, though they might of course copy Keats’s.” This statement exemplifies the traditional approach to originality as a standard of copyright protection.

The US Supreme Court, further, placed a significant gloss on the originality requirement in the landmark decision of *Feist Publications Inc v Rural Telephone Services Co.* involving the copyrightability of alphabetically sequenced white pages of a telephone directory. Departing from the conservative and broad definition of originality under the labour theory, the Court observed that in addition to ‘independent effort’, originality required a ‘minimal degree of creativity’. The *Feist* case extended the creativity requirement to works of a factual nature but arranged or sequenced in a unique manner such as a telephone directory. This twofold requirement of originality as crystallized in this case denotes the modern approach utilized by the Courts and the changing notion of originality in US copyright jurisprudence.

Contrasting Pictures of Originality

In line with US jurisprudence, UK law mandates originality as a necessary pre-requisite to copyright protection. Due to the absence of a statutory definition, however, the concept of originality has been left open for the Courts to interpret. This definitional vacuum in UK copyright law has resulted in the Courts displaying an unambiguous bias in
favour of the labour theory approach to originality. A case supporting the above assertion is the House of Lords ruling in *University of London Press v University Tutorial Press Ltd*, wherein a discussion revolving around this issue, Peterson J concluded that originality requires “only that a work should not be copied but should originate from the author.” In other words, a work is original and may command copyright protection, even if it is similar to a prior work, provided it was not copied from such prior work but is rather a product of the independent skill, labour and judgment of the author. Thus, it emerges that to claim copyright in a work under UK law, two essentials have to be met—firstly, skill and labour involving a degree of originality; and secondly, the work not amounting to an infringement of an existing work.

Having said thus, one must appreciate that the position in UK remains ambiguous and probably at odds with the decision in the *Feist* case. Creativity has never been a *sine qua non* for the subsistence of copyright in a work and Courts have shown no overt departure from this interpretation of originality. Yet, in the absence of any guiding principles as to the quantum of skill and judgment required, the question of subsistence of copyright in a work has to be determined on the facts of the particular case. This allows the Court some flexibility while gauging originality, which creates inconsistency in judicial rulings and makes it difficult to classify the standard of originality in this jurisdiction. In sum, it is possible to conclude that, the law here is representative of the traditional approach, requiring merely an independent creation to be original.

While the copyright law in India has borrowed from this construct of originality, UK has been distancing itself from a strict traditional approach and begun to show inclination towards accepting the modern notion of an element of creativity, as evolved by the *Feist* judgment. Thus, the traditional view, as depicted in UK common law, has not received any degree of widespread acknowledgement since copyright law does not seek to reward an author merely for the effort he has expended in authoring a work. On the contrary, the modern approach to copyright wherein the reward is merely a means to an end appears to be more logical and principles deriving from these objectives are consistent with the ultimate purpose of copyright law, which must, therefore require some degree of creativity before an author may claim exclusive rights to a work. This requirement is not a demanding one, but it is one that nonetheless must be met. It appears that the question of copyright over case-law reporters and their various components needs to be viewed in this perspective.

**Protection of ‘Law’ as a Subject Matter of Intellectual Property: Some Comparative Trends**

The issue of copyright in official materials such as judicial reports has attracted a substantial volume of attention in developed countries—especially where IP enjoys a fair degree of protection. A natural corollary of the high level of scientific and creative development in Western countries is well-developed judicial precepts and accurate statute laws in the field of IP. While the protection of official legal material has been left open-ended in the Berne Convention, one of the earliest international instruments on IP protection, most countries decline copyright status for official government material, including judgments of courts and tribunals, thus establishing absolute prohibition on protecting the ‘law’ as a subject-matter of IP. However, with respect to copyright protection of works like law reporters, which embody the corpus of judicially fashioned law, many disputes have emerged to defend the innovative inputs of publishing houses into the bare texts of certified copies of judgments. A study of a few select jurisdictions in this regard shall elucidate upon these emerging issues.

**The Activist Approach of US**

*The Initial Positioning of Judgments within Publico Juris*

US is one of the first jurisdictions where copyright protection found constitutional patronage. While the initial notion of US judges was that they enjoyed a copyright monopoly over judgments authored by them, the view underwent a drastic change after the observations in *Wheaton v Peters*, which formed one of the classic rulings with respect to copyright subsistence in judicial decisions. This case concerned the unauthorized re-publication of Wheaton’s Law Reports by the defendant in its reports, which led the Court to consider the fundamental nature of copyright law as well as the scope of protection of published judicial opinions. Here McLean J, writing for the majority, held that:

“It may be proper to remark that the courts are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”
This case has been recognized as the foundation stone of American copyright law with respect to case-law reporters and has been recalled in a score of subsequent decisions. One such case is in point is Banks v Manchester, where the issue was a dispute over the copyright on printed decisions of the Ohio Supreme Court. In furtherance of the propositions laid down in the Wheaton case, the Court here recognized the public's right of access to the opinions of state Court judges and sub-divided various materials contained in the original reports into two classes, firstly, those which the judges produced themselves (i.e., the opinions, statements of cases, etc); and secondly, those which were the reporter's independent work (such as the indices, tables of cases, and summaries of counsel's arguments). Thus, the Supreme Court opined that, since the reporter could claim no authorship on the judicial opinions, there was no infringement that had taken place when the case reports were copied by someone and the judges themselves could have no proprietorship in the fruits of their judicial labour as against the public at large. Upholding the observations in Wheaton v Peters, the Court proceeded to hold that the whole work done by judges constituted an authentic exposition and interpretation of the law, which was free for publication to all, thus forming public domain materials ab initio.

After the above elucidation on case reports, a marked shift arose in this ruling itself when the Court conceded to a possible copyright grant for a volume of reports, taken as a whole, because other portions of the volume may satisfy the requirement of authorship cumulatively even though the bare text of a judgment was outside the protective umbrella of copyright. This legal interpretation was adequately illustrated in later years by the US Supreme Court in Callaghan v Myers wherein it was held that reporters were copyrightable, due to the presence of copyrightable elements like case arrangement, pagination, index, etc. The position of the Court in this case is perhaps best explained by Prof Eaton S Drone, in his intellectual property treatise wherein he stated that:

“No protection is given to the component parts of a compilation independently of their arrangement and combination. Of these, the compiler is not the author, and he can have no exclusive property in what is common and open to all. Nor is the arrangement and combination, independently of the materials themselves, a proper subject of copyright... The copyright vests in the materials as combined and arranged; in the union of form and substance. Any one may use the same materials in a different combination, or adopt a similar arrangement for different selections. But no person can copy both the substance and the arrangement of a compilation, and use the same materials in the same form, without committing piracy.”

Thus, it came to be a settled proposition in US that a law reporter did consist of both copyrightable and non-copyrightable elements, leading to a further inquiry regarding the presence of those original copyrightable works in the law reporter were in fact sufficient to grant a copyright on the compilation as a whole. This query was impliedly addressed in the Wheaton case, where the Court affirmed to the effect that while its judicial opinions per se were not subject to copyright, books composed of these judgments and other original material could be granted protection.

Mathew Bender and the Dawn of ‘Modicum of Creativity’

The decision of the US Supreme Court in the case of Feist Publications Inc v Rural Telephone Services Co, as discussed earlier, marked the demise of the ‘sweat of the brow’ doctrine in copyright law. This naturally raised a fresh debate on the copyrightability of fact based works in general and partially led to the two Mathew Bender cases which redefined the parameters of IP protection over works like case reporters.

The first of the Mathew Bender cases concerned the copyrightability of reporters, wherein the Court held, consistent with the Feist case originality rule, that law reporters published facts and the mere addition of factual information in the form of parallel citations to cases, attorney information, and data on subsequent procedural history, etc., did not meet the required standard of creativity and hence, a reporter in its entirety, was not subject to a copyright grant.

The first Mathew Bender ruling only partly succeeded in crystallizing the law on the issue of reporter copyrights. The second Mathew Bender case dealt with the usage of pagination in West’s reporters by Matthew Bender’s computer software wherein the Court held that compilations of legal material were copyrightable, but only to the extent of the material contributed by the author, with at least a ‘modicum of creativity’ involved and which embodied the original creation of the compiler, and appendages like star-
paginations did not qualify as original creative works of the publishers. 43

Presently, US statutory law affords express copyright protection to compilations. 44 To qualify for protection as a compilation, any material added to a prior work or the method of rearranging an existing work must be a distinguishable variation and involve more than a trivial contribution. 45 The rationale for this protection generally falls into one of three categories—arrangement, industrious collection, and subjective selection. 46 If an original arrangement reflects some intellectual labour, that is, creativity, the compilation will qualify for copyright protection. 47 But, to meet this creativity requirement is not always easy for compilations of factual material, which are often alphabetical, numerical or chronological and thus display little or no creativity. The doctrine of industrious collection has, on the other hand, been recognized as a means to protect the substantial effort involved in collecting facts from possible usurpers of another’s labour. 48 However, the doctrine seems to be gradually losing favour with Courts since copyright is said to protect ‘works’ and not the effort involved in creating such works. 49

In sum, the above discourse reveals that in US, copyrightability of law reporters does not extend to the entire publication as a whole, as was pushed for by the West Publishing Co in Mathew Bender cases. If, however, does extend to certain component parts in the case reporter, such as headnotes, editorial comments, etc., which reflect the author’s creative and intellectual input.

From Judicial to Legislative—The Shifting Paradigm in UK

In sharp contrast to US copyright law, the debate on case reporter copyrightability has come to be settled in UK, where the Copyright Act of 1911 grants express protection to compilations of any form, thereby bringing case reporters within the fold of copyright protection. The judicial view on this point can be gauged from the majority ruling in the case of Sweet v Benning. 50 Here, the question of copyright protection of headnotes under UK law was exhaustively dealt with by Crowder J, who overtly acknowledged the need for such a form of protection. In holding the defendants’ use of the plaintiff’s headnotes as piratical, he stated thus:

“... the headnote or the side of a marginal note of a report is a thing upon which much skill and exercise of thought is required, to express in clear and concise language the principle of law to be deduced from the decision to which it is prefixed or the facts and circumstances which bring the case in hand within some principle or rule of law or of practice...however useful and meritorious the defendants’ work may be, they were not justified in making the use they did of the plaintiff’s work”. 51

This dictum launched a number of collateral disputes concerning the copyrightability of law reporters into the legal domain. 52 The position of law in UK on case reports has witnessed a fair deal of transformation over what was expounded over a century ago in Sweet v Benning. Currently, UK follows the EC Database Directive, 53 a two-tiered system that differentiates between compilations that are worthy of full copyright and accompanying moral rights, and compilations that are less worthy but still protected based on the investment of labour and resources expended in their creation. 54 Giving effect to the above EC Directives, UK has promulgated the Copyright and Rights in Databases Regulation, 1997 conferring property rights in a database in the event of “substantial investment in obtaining, verifying, or presenting the contents of the database”. 55 This illustrates an apparent shift from a judicial to a legislative solution of copyright related concerns in UK’s attitude towards judgment reporters.

The Divergent Approach of Canadian Law

The Canadian position on the issue is influenced by both its own traditional UK law roots as well as neighbouring US legal tradition. The protection of factual compilations in Canadian law, as in all other jurisdictions, has emphasized the difficulties in determining originality in this form of subject matter. In this regard, the position in Canada, however, stands in sharp contrast to the dominant view taken by the US Courts. In direct conflict with the Mathew Bender ruling, the volume of the entire case report is copyrightable matter in Canada, although, in line with the predominant view, no copyright could be claimed over the bare judgment text itself.

The recent case of CCH Canadian Ltd v Law Society of Upper Canada 56 is one of the most prolific judgments in this regard. In this case, a research library of a Law Society, which provided a request-based photocopy service for Law Society members, the judiciary and other authorized researchers, was sued for copyright infringement by publishers, claiming subsistence and ownership of copyright in specific works available for access to the members and sought a declaration that the Law Society had
infringed copyright when the library reproduced a copy of its publications.

Following the line of reasoning taken by US Courts, The Federal Court of Appeal went on to state that the headnotes, case summary, topical index, etc., were all original works in which copyright subsisted, stating further that summary of the case, statement of the case, case title and case information, were more than mere copies and consisted of independently composed features. As a consequence, the Court expanded the ambit of copyright over judicial reports and asserted that published judgments were ‘original’ works in which copyright subsisted\(^57\).

From the above ruling it emerges that reported judicial decisions, when properly understood as a compilation/arrangement of the headnotes and accompanying edited judicial texts, were original works enjoying copyright protection. The arranger, though, could claim copyright in the form represented by the compilation itself for the specific manner in which the case title, case information, case summary, etc., are arranged\(^58\). This case, therefore, the Canadian Court recognized two important principles of copyright law and applied it to the field of law reporters—firstly, that the ‘de-minimis’\(^59\) requirement of originality must be satisfied and the absence of a ‘modicum of creativity’, as in the case of the judgment texts, disentitles a copyright claim; and secondly, and most notably, the Court laid emphasis on the ‘manner of arrangement’ of the case in the reporter, a feature distinct from early US jurisprudential analysis which focused on the fact that presence of original works along with public domain material qualified a law reporter to seek copyright, and stressed that the compilation as a whole is eligible for copyright monopoly only on the basis of the novelty in arrangement of the case reporter.

The comparative discourse presented above provides for an interesting assessment when viewed in the backdrop of the emerging Indian copyright jurisprudence on the question of copyrightability in case reporters. The Indian law, till date, has failed to evolve an independent approach on the issue of the likely protection required to be afforded to case reporters and its component parts.

**Indian Law and the Gamut of Protection to Law Reporters**

The corpus of IP law in India, in line with the other branches of law here, is still at a nascent stage of development. Its dominant principles, as a consequence, imbibe strongly from the ruling principles in more advanced jurisdictions. Thus, at some places, one may also view a strong attempt by the law makers to evolve indigenous rules to govern the domain of IP protection of law reports. The Indian copyright law provides for detailed rules on the treatment of government and official works \(^{qua}\) copyright protection. The Indian Copyright Act of 1957, under Section 17 (d) expressly states that ‘unless otherwise stated, the first owner of any governmental work is the government itself’.\(^60\) Further, the copyright statute makes the reproduction or publication of ‘any judgment or order of a Court, Tribunal or other judicial authority unless otherwise prohibited by the court’ permissible and exempts the same from the realm of infringement.\(^61\) Thus, the effect of these two clauses is that although it is the government that has ownership over all governmental works, including judicial pronouncements and decisions, every person has the right to reproduce or publish them without being liable for infringement. This implies that a judgment of the Court is a matter within the public domain, i.e., not subject to copyright regulations and can be utilized by anyone.

Instances of controversy that have occurred in India arose from situations where the publisher himself added something more to the value of the judgment he published in the form of specific style of pagination, mode of citation, case summaries and headnotes. This brings us to the next pertinent question—Is the entire compilation itself subject to rules of copyright? The questions that arise in granting abridgements like headnotes copyright protection under the Indian Copyright Act are, firstly, whether headnotes fulfil that minimum amount of requirement of creativity which is a prerequisite for claiming copyright; and secondly, whether a headnote will fulfil the criterion of an original work itself given the scope of “originality”.

**Early Indian Copyright Jurisprudence on Case Law Copyrightability**

Indian Courts have, over the years, worked towards evolving rules operating to plug the above crafted legal dilemmas. The absence of cases touching upon copyright issues \(^{qua}\) case-law reporters has been one long-standing constraint before the judges towards a definite channelling of jurisprudence on the subject matter. In one such ruling in \(N\ T\ Raghunathan\ v\ All\ India\ Reporter\ (AIR)\ Ltd\)\(^{62}\), the Bombay High Court made an attempt to defog the copyright status of
headnotes in case reporters. In this case, the AIR publications, besides usual publications of High Court and Supreme Court judgments, along with their points of law and headnotes, also printed the bare headnotes of unreported judgments as ‘Notes of Unreported Cases’ or ‘NUC’. The headnotes of the judgments reported in these journals were being directly taken by another journal known as Madras Weekly Notes. Accordingly, a suit for copyright infringement was filed in the matter. The High Court, in consideration of the broad issues, compared the fact situation in this case to that of the case of Sweet v Benning and affirmed UK English Court’s dictum laid down therein. It thus becomes patently clear from this ruling that initial disputes regarding copyrightability of law reporters were limited only to the protection granted to its constituent parts like headnotes, marginal notes, etc., and not to the entire reporter itself. Such questions were, however, to arise specifically in later cases on copyright infringement in law reporters. The initial position in India was thus reflective of British jurisprudence, with Indian Courts rigidly adhering to the copyright standard set by UK Courts and not evolving any distinct indigenous standards. This trend, however, gradually underwent a change as Indian law came out of the Englishman’s shadow and began to evolve laws according to changing needs and fast-developing technology.

The Eastern Book Company Case and the Law Thereafter

The question of copyright protection to law reporters was dealt with in Eastern Book Company v D B Modak & Navin J Desai, which threw light on one of the most neglected areas of Indian copyright law. The conspectus of facts was that Eastern Book Company (hereinafter EBC), a publishing house of the renowned ‘Supreme Court Cases’ (SCC) journal developed a case-finding software package on CD-ROM containing exhaustive database on law reports called the ‘SCC Online Case-Finder’. The publishing house filed two separate petitions against the makers of ‘Grand Jurix’ and ‘The Laws’ software packages, which were priced at substantially reduced rates, alleging that the two software packages had infringed their copyright on the CD-ROMs by copying headnotes, short notes and the entire text of judgments verbatim, including certain mistakes made inadvertently in its journals. It further claimed copyright on the headnotes, selection, manner of arrangement, manner of presentation of the judgments in both printing and electronic form, in the paragraph numbering introduced by the editorial staff, in the copy-edited portions judgment of the Supreme Court and in the style and form of printing adopted by them for publication of the judgments of Supreme Court in the law reports. They claimed this to be in violation of the copyright and moral rights of the creators of the SCC Online software and thus sought an injunction restraining sale as well as claims for damages.

The Ruling of the Single-Judge Bench

The single-judge bench of the Delhi High Court went into a detailed exposition regarding the concept of originality, referring to a plethora of Indian as well as foreign dicta on the subject matter. In accordance with the provisions of the Indian Copyright Act, the Court observed that judgments were in the public domain and any person was free to engage in publishing the same. However, if this was accompanied by “extensive reading, careful study and comparison and with the exercise of taste and judgment”, the person could be entitled to copyright protection. Proceeding on this premise, the Court held, imbibing from Bellsouth Advertising & Publishing Corporation v Donnelley Information Publishing Inc that if such changes involved mere typographical corrections and additions to the certified copy of the judgment text, there could clearly be no original creative input by the author, thereby not satisfying the requirement for the grant of a copyright on the same. The Court in its majority view pronounced that judgments/orders published by the Eastern Book Company were by no means original literary works but mere reproductions of the judgments of the Court, thereby denying the plaintiff’s claim for copyright protection and the consequent prohibition on the respondents to sell their software packages.

In terms of the headnotes of judgments the Court granted a limited copyright by protecting them only if they were products of originality and creativity of the publishers/authors and could qualify as abridgements of the judicial opinion. Since mere verbatim extracts in the form of headnotes could not be termed as ‘abridgments’, Mahajan J held that the same would not be eligible for copyright protection.

The above analysis reveals that the view taken by the single bench was that Indian law differs on the question of copyright protection in headnotes since even headnotes, which in contemporary legal tradition are taken as original, are ex facie not conferred copyright protection in India.
The Reformulation by the Division Bench

On appeal, the Division Bench upheld the single-judge’s reasoning subject to a few caveats. Sinha CJ and Sikri J elaborated upon the principle of copyright grant to headnotes, asserting that headnotes were *per se* copyrightable and thus rejected the creativity qualification imposed by the single-judge. Expanding upon the same reasoning, the Court stated that preparation of headnotes, even those with verbatim reproductions of the judgment, required skill and labour on the part of its author for identification of those extracts that reflected the true nature of the judicial decision, and therefore, all forms of headnotes, footnotes and editorial comments were subject to copyright protection. This had the effect of bringing our law in sync with the contemporary legal tradition on this point.

With respect to extracts of judgments in long notes, the Division Bench made a departure from the single-judge’s opinion, and granted limited copyright to the same, on the basis of their arrangement in the publication. Nonetheless, the plea for copyright on judgment-texts, as printed in the Supreme Court Cases journal with their distinctive style, method of printing, arrangement etc., was rejected by the Division Bench as well, averring that this would frustrate the very purpose of keeping judicial opinions within the public domain. An appeal against the same is currently pending before the Apex Court.

The law in India, therefore, when contrasted with the copyrightability status of law reporters in Western legal systems clearly indicates that the question of copyright in headnotes seems to be globally settled, with all Courts cutting across legal systems unanimously declaring the same to be an original, copyrightable input by publishers. However, the question of arrangement, style of presentation, printing format, etc., have yet not merited any consideration by the Indian Courts which still deem that the arrangement and creative presentation of law reporters evolved by publishing houses do not meet the originality criterion warranted for a copyright monopoly. The *Eastern Book Co* case, though presented the Court with an opportunity to rectify this anomaly, did not do enough for the cause of case-law reporters, their editors and publishers. Unlike the position in Canadian law, where a law reporter in its entirety is a copyrightable entity, the situation in India is leaning more towards the one adopted in the US where the inputs made by the publishers to the bare judgment-text are deemed to fall short of the creativity mandate of copyright law, and thereby not granted any form of protection. The reason for this skewed nature of copyright jurisprudence in India can be, in addition to the absence of firm jurisprudence on the point, lack of high-quality case reporting, unlike in the West, where superior case reporting raised greater concerns for their adequate protection and hence, litigation aimed at the same.

**Conclusion**

The question of a grant of copyright on legal materials like case-law reporters in India is essentially representative of a clash of interests, i.e., a conflict between protecting the rights of the copyright owner to control the work for profit on the one hand, and protecting the rights of the public to the most *laissez-faire* possible use of the work's public domain contents on the other. Although this inquiry will not resolve all questions of copyright in case reporters and the role of the Courts in such actions, this article has attempted to sketch a framework of the existing positions on IP protection for headnotes as well as case reports and understand the prevailing norms in Indian jurisprudence in light of the same. While this principle of public access has been enhanced by speedier information dissemination brought about by technological development, this has but naturally brought with it economic transformations and resultant changes in copyright policies. This need for a sea-change in legal strategy has, to a great extent, been recognized in the European Union, which provides for a form of proprietary right upon databases which are not completely original but involve plenty of investment, labour and skill, thereby creating an incentive for publishing houses and yet not eroding the sanctity of the creativity criterion in copyright law.

Therefore, in conclusion, it is submitted by the authors that widely acclaimed and indispensable Indian law reporters like All India Reporter (AIR) and Supreme Court Cases (SCC) must receive some form of recognition, whether by incorporating their compilations into the realm of copyright or enacting *sui-generic* legislations in this regard in order to endorse better and more innovative legal reports and encourage more players to approach the market, establish a distinct style and arrangement of their own, without the fear of encroachment upon their expression. Moreover, protection given to market players against any intellectual theft of their innovative headnotes, paginations, arrangements, etc., will encourage the entry of more players within the market.
and thereby ensure sale at competitive prices.

Additional academic participation in resolving the many uncertainties enveloping subject matter addressed in this paper is required. This paper does not claim to have resolved all the interpretative questions qua the degree of protection accorded to law reporters and their independent intellectual inputs to the existing scheme of judgments, but endeavours to have provided a useful starting point for future discussion and analysis of one of the important concepts in the fold of copyright protection—both in India and abroad.

Acknowledgements

The authors are grateful to their colleagues Mr Shubhankar Dam, Ms Maneesha Kongovi for their insightful comments on the successive drafts to this paper. However, all errors and omissions remain the responsibility of the authors.

References

1. For a discussion over copyright in compilations, arrangements, and fact-based works, see Lumi Sarah, Copyright protection for factual compilations—Reviving the misappropriation doctrine, Fordham Law Review, 56 (1988) 933.
4. Originality is a statutory requirement in various copyright legislations. See Indian Copyright Act, Section 13 (1957); Copyright Act, Section 11(1)(a) (1988) (UK) and US Copyright Act, Section 102(a) (1976).
8. Goldstein Paul, Copyright, 2nd edn (Aspen Law & Business, New York), 2000 (The aim of copyright law is to ensure the production of information, while patent law attempts to produce efficient information. This results in a relatively lax originality standard which aims at the first object, while patent law’s strict novelty and non-obviousness criteria aim at the second).
10. Universal Athletic Sales Co v Salteld, 511 F.2d 904, 907 (3d Cir 1975), held that creativity requirement was minimal yet necessary; Bleistien v Donaldson Lithographing Co, 188 US 239, 251 (1903) per Oliver Wendell Holmes, J (The rationale for this low level of originality is in that “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits”).
11. Kitchens of Sara Lee Inc v Nifty Foods Corp, 266 F.2d 541, 544 (2d Cir 1959) (Serving directions and lists of contents and ingredients did not fall within the ambit of copyright protection due to the absence of creative thought); Consumers Union of United States Inc v Hobart Mfg Co, 199 F.Supp. 860, 861 (SDNY1961) (No copyright can be granted to statements describing facts due to lack of creativity).
12. 81 F.2d 49 (2d Cir 1938)
14. Goldstein v California, 412 US (1973) 546, 561 (Interpreting the term “writings” as used in copyright clause to “include any physical rendering of the fruits of creative intellectual and aesthetic labour”); L Batlin & Son Inc v Snyder, 536 F.2d 486, 490 (2d Cir 1976) (Held that the concept of originality requires creativity, which is separate and distinct from the requirement of independent effort) as quoted in Khanna Aditya, Changing Concepts of Originality in Copyright: An Analysis of the ‘Sweat of the Brow Principle’(28th July 2003; in file with the National University of Juridical Sciences).
15. Feist Publications Inc v Rural Telephone Services Co, (1991) 499 US 345, Creativity as an essential element of originality can be traced in earlier decisions of the US Courts as well, but took a backseat until the Supreme Court revived it in Feist.
17. (1916) 2 Ch 601.
18. Ladbroke (Football) v William Hill (Football), (1964) 1 WLR, 291(Eng); Walter v Lane, 1900 AC 539 (HL).
19. Macmillan & Co Ltd v K & J Cooper & Co Ltd (1923) 93 LJPC 113; Copinger & Skone James, Copyright, Iowa Law Review, 74 (1989) 55 which states that “In other words, a work is original and may command copyright protection, even if it is similar to a prior work, provided it was not copied from such prior work but is rather a product of the independent skill, labour and judgment of the author”
27. Article 2(4) of the Berne Convention states—“It shall be a matter of legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and the official translation of such texts.”
28. Copyright Act, Section 105 (1976) (US); German Copyright Statute, Article 5; Copyright Act, Article 8 (1936) (Austria).
29. The copyright clause of the US Constitution under Article 1 Section 8 empowers the Congress to provide copyright protection to the writings of ‘authors’.
31. Joyce, The rise of the Supreme Court reporter: An institutional

32 33 US (8 Pet) 668. All of the Justices were in concurrence on this point.

33 Banks v Manchester, 128 US (1888) 244.

34 128 US (1888) 253.


36 128 US (1888) 617.

37 128 US (1888) 661-662.

38 Drone E, A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States, (1879) p. 156, as quoted in Patterson Ray and Joyce Craig, Monopolizing the law: The scope of copyright protection for law reports and statutory compilations, University of California Law Review, 36 (1989) 719. However, the issue regarding copyrightability of pagination and arrangement was later dealt with again in Banks Law Publishing Co v Lawyers’ Co-operative Publishing Co, 169 F 386 (2d Cir 1909) where protection was denied to arrangement of cases and pagination on the basis of lack of original input by the reporter.

39 This view was later affirmed in Emerson v Peters, 8 F Cas 615 (CC Mass 1845) (No 4,436).


41 Matthew Bender & Co v West Publishing Co, 158 F.3d 674 (1998) (Both judgments were consolidated and handed down together).


44 17 USC Section 101 (1982). It reads: “compilation is a work formed by the collection and assembling of pre-existing 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.”


47 Flick-Reedy Corp v Hydro-Line Mfg Co, 351 F.2d 546, 548 (7th Cir 1965) (“Arrangement, expression and manner of presentation” of public domain material is subject to copyright protection); Edwards & Deutsch Lithographing Co v Boorman, 15 F.2d 35, 36 (7th Cir 1926) (Exercise of skill and discretion in arrangement of existing materials into new form enables a copyright claim); PIC Design Corp v Sterling Precision Corp, 231 F.Supp. 106, 111 (SDNY 1964) (Tabular arrangements of facts and formulae for precision instrument components in trade catalogue cannot infringe upon a previously copyrighted tabular arrangement of same) as cited in Sanks Terry M, Database Protection: National and International Approaches to provide Legal Protection for Databases, Florida State University Law Review, 25 (1998) 991.


50 Sweet v Benning, 16 CB 458 (1855).

51 16 CB 851 (1855).


55 Copyright and Rights in Databases Regulation, Regulation 13 (1) (1997). In order to qualify for such a ‘database right’ protection for a period of fifteen years it is immaterial whether or not the same or any of its contents qualify for copyright grant. Copyright and Rights in Databases Regulation, Regulation 13(2),17(1)(1997) cited in Copinger & Skone James On Copyright, by Garnett 14th edn (Sweet & Maxwell, London),1999, pp. 319-323


58 The court referred to the following cases in this regard: Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co (1984) 3 CPR (3d) 81, 84 (BCSC); Ladbroke (Football) Ltd v William Hill (Football) Ltd, (1964) 1 All ER 465, 469 (HL).


60 Copyright Act, Section 17(d) (1957). Further, Section 2(k) of the Act defines ‘Government work’ as ‘a work, which is made or published by or under the direction or control of the Government or any department of the Government; (i) Any Legislature in India; (ii)Any Court, Tribunal or other judicial authority in India.’

61 Copyright Act, Section 52(q)(iv) (1957).


63 (1855) 139 All ER 838.

64 Macmillan & Co v K and J Cooper, AIR 1924 PC 75 (where the question of copyright over an abridgement of an author’s work was discussed).

65 AIR 2001 Del 185 196 (para 5).

66 AIR 2001 Del 185 197-210 (paras 12- 54).

67 Indian Copyright Act, Sections 17 and 52 (1957).

68 33 IPR 587; see also Ref 26 (paras 25-27).