Legal Protection of Databases: An Indian Perspective

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Many countries have proposed introduction of a sui generis form of protection for ‘non-creative’ databases. This issue has sparked off a debate regarding protection beyond intellectual property and has exposed limitations of copyright law. Further, such protection also has wide implications for the scientific community and also the general right of people to information publici juris. It is, therefore, important to provide protection to such databases without unnecessarily impeding the free flow of information. This paper deals with the issue from an Indian perspective and studies existing copyright protection available to such works in India and analyses the protection models available for ‘non-creative’ databases.

Keywords: Non-creative databases, copyright protection, sui generis protection, unfair competition model

In this era of development and greater foreign investment, competition has grown manifold. To gain extra edge, companies are now using information more effectively than ever before. As substantial amount of investment is required for the collection of data, most companies draw up elaborate databases for their core business activities and for their remaining data requirements rely on already existing databases. Discounting the commercial aspect of such works, databases are also central to scientific research and other educational purposes. Further, compilations like the telephone directory and television programme schedules have become household utilities. This has made the collection and systematic recording of data, a very lucrative business option. This raises the question regarding protection of such databases. This paper makes a study into this area. While, the first part of the paper deals with copyright protection of databases examining the existing deficiencies and misnomers in copyright jurisprudence with respect to databases in India, the second part deals with the issue of non-creative and/or non-original databases and proposes a protection model for these in view of the developing markets of India.

Databases: Copyright Protection

Traditionally, copyright law, being subject to the requirements of originality, has protected collections of data as literary works. In India, databases are protected under the generic category of compilations. An accepted norm among nations (with respect to copyright protection of databases) is that copyright exists in the selection or arrangement of the database irrespective of any copyright in the constituents forming part of such database. In other words, although facts are not copyrightable, compilations of facts generally are copyrightable.

For purposes of copyright law, a database has been defined as a compilation of data or other material, whether in machine readable or other form, which by reason of the selection or other arrangement of their contents, constitute intellectual creations. It is well known, that copyright law protects only original databases. In other words, copyright protects only the original contributions of an author to a database i.e. his efforts and creativity with respect to the database.

Now, as to the interpretation of the word ‘original’ two distinct schools of thought exist. While one school interprets ‘original’ as including a minimum level of creativity (called modicum of creativity rule), the other treats creativity to be alien to the concept of originality (called sweat of the brow doctrine). It would be pertinent to note here that the interpretation of the word ‘original’ does not merely determine what works are copyrightable but also determines the extent of copyright protection available to a work. This is obvious, because ultimately copyright protects only the original contributions of the author.

According to the ‘modicum of creativity’ rule, though the creativity required is minimum, it is nonetheless integral to attract copyright protection. In other words, it does not matter that a person has spent a million dollars in creating a database, if the work...
lacks the minimum level of creativity required by copyright law, it will fail to qualify for protection.

For instance, in *Rural Telephone Service Co v Feist Publications Inc* ⁹, the United States Supreme Court refused copyright protection to the white pages of a directory created by Rural on the ground that it did not satisfy the minimum creativity criteria. The Court did not find anything original in the selection or arrangement of the white pages. Such databases, which fail to meet the ‘creativity’ criteria, have been termed as ‘non-original’ or ‘non-creative’ databases. Recently, many nations have raised concern over the protection of such databases.¹⁰

On the other hand, according to the ‘sweat of the brow’ doctrine, creativity is a concept that is alien to the requirements of ‘originality’. A database is ‘original’ merely by reason of the fact that the author has invested time, money, labour or skill in its creation. In other words, as long as a person has spent a million dollars in the creation of a database, the database would be entitled to copyright protection, even if such database lacks in creativity. This doctrine is based on the principle that what is worth copying is definitely worth protecting.

A general trend seen in the past is that countries, which had earlier relied on the ‘sweat of the brow’ doctrine, have now transformed to the ‘modicum of creativity’ rule.

Jurisprudence in USA, for instance, has repeatedly insisted on a modicum of creativity requirement to satisfy originality.¹¹ However, this was interpolated by various decisions following the ‘sweat of the brow’ doctrine. The position was finally settled in favour of the former by the decision of the Supreme Court in *Rural Telephone Service Co v Feist Publications Inc*.¹²

In the European Union, before 1996 various member-states had different levels of protection being afforded to databases/compilations. While the UK recognized and applied the ‘sweat of the brow’ doctrine,¹³ Germany required a higher level of creativity in order for works to qualify for copyright protection.¹⁴ The 1996 Directive, however, unified the copyright criteria in the European Community and adopted the ‘modicum of creativity’ rule in granting copyright protection.¹⁵

In India, the Courts have constantly relied upon the ‘sweat of the brow’ doctrine for the protection of compilations/databases.¹⁶ For instance, in the *Burlington Home Shopping Pvt Ltd v Rajnish Chibber & Anr*,¹⁷ the Delhi High Court allowed copyright protection to a database solely on the ground that the author had devoted time, money, labour and skill in creating it, even though there was no uniqueness in the arrangement of the data.¹⁸

However, questions have recently been raised on the viability of this doctrine. In *Eastern Book Co v Navin J Desai*,¹⁹ the Court refused to apply this doctrine and insisted on a modicum of creativity to satisfy the test of originality.²⁰

This renunciation of the ‘sweat of the brow’ doctrine is a result of some inherent defects in its applicability in the context of copyright law and it is only a matter of time before the Indian Courts realize the same. Firstly, the doctrine fails to distinguish the original contributions of the author to a work. Therefore, copyright protection afforded to a database by virtue of this doctrine would extend beyond such original contributions of the author, to the data itself and violate the most basic principle of copyright law - ‘Facts are not copyrightable’.²² Secondly, the object of ‘sweat of the brow’ doctrine is to protect the hard work of an author which is inconsistent with the object of copyright law to promote the advancement of knowledge.²³ Also, protecting works in which labour, time, money or skill has been invested may also lead to absurdities in law. For instance, two identical works derived from a common source may gain copyright protection alike, as criteria on which they are judged is ‘hard work’. This is especially true of those ideas which can be expressed only in a limited number of ways.²⁴ For such ideas, the Courts in USA²⁴ have taken the view that the idea and expression are inseparable and therefore, in public interest, copyright is refused to such works.²⁵ Obviously, such a result would stand negated by the ‘sweat of the brow’ doctrine. Thirdly, the realm of copyright law is limited to intellectual properties. There must be a requirement of intellectual input or creativity into a work or else copyright law would end up protecting works other than intellectual property.

It is only a matter of time before the courts in India recognize the above mentioned difficulties of the ‘sweat of the brow’ doctrine and shift to the ‘modicum of creativity’ rule. This transformation would result in copyright protection being granted only to those databases, which satisfy the creativity criterion, irrespective of the investments made for the creation of such databases. This raises the question regarding protection of such works, which fall outside the ambit of copyright law.
Non-Creative Databases: Protection Models

The adoption of the ‘modicum of creativity’ rule would require a minimum level of creativity from every compilation/database to qualify for copyright protection. Although the level of creativity required is minimum, there may yet be a considerable number of works, which may fail to fulfill this requirement. This is especially true of works, which have only a few commercially viable modes of expression. Such works are highly susceptible to free riding by competitors in view of the high amount of investments (of capital and labour) required for their creation. Companies or research institutions which draw up databases are often concerned only with the data forming part of the compilation and do not concern themselves in imparting creativity to the database.26 As the main asset of these databases is their content, any protection model in this respect should directly/indirectly create certain proprietary interests in the data.27

Although many ancillary protection systems exist for the protection of such databases like trade secrecy,28, shrink wrap/click-wrap licenses and other technological means, the same are very restricted in their ambit and can at best be used only in conjunction with a mainstream protection system. On a review of the jurisprudence in this respect, two broad approaches to such a mainstream protection model may be inferred:

Sui Generis Protection

This protection regime involves the conferment of certain proprietary rights in the contents of the database, independent of any rights accruing under any other law. Unlike copyright law, the accrual of such rights is independent of the requirement of originality/creativity and therefore non-creative databases, as aforesaid, fall within the ambit of such protection. The sui generis protection model has, till date, been manifested only in the EU Directive on legal protection of databases.30 It would be pertinent to review the extent of protection being afforded to databases under this Directive. The Directive defines a ‘database’ as including both, a paper and an electronic database. All such databases would qualify for sui generis protection as long as substantial investments (qualitatively or quantitatively) extraction or re-utilization of the contents of such database without his consent.32 The extent of protection under the Directive is very broad, extending even to activities as nominal as extraction. Although, certain exceptions have been carved out from this broad based protection,33 the same remain very narrow in ambit.34 This reduces the free flow of information to a mere exception and hampers easy access of data. Further, the term of protection under the Directive is fifteen years from the completion of the making of the database. Making a substantial change to the contents can further renew this term. This may lead to evergreening, as contents of databases are more likely to be updated from time to time than not.

All these factors make the sui generis protection model unsuitable to the conditions of developing markets in India where information sharing is central to the enhancement of knowledge and growth.

Unfair Competition Model

The unfair competition model is based on the premise that no one should be allowed to piggyback on the efforts and investments of another. This model finds its best exposition in the (‘doctrine of misappropriation’) as formulated by the US Supreme Court in the case of International News Service (INS) v Associated Press (AP)35. In this case, INS and AP were two competing news services. During World War II, due to a prohibition levied on INS for reporting certain war news, INS began picking up news being supplied by AP and modifying it and presenting it as their own work. As INS picked up merely facts (which are not copyrightable), therefore nothing was per se illegal. In Justice Pitney’s majority opinion, he found that AP had a quasi property right in the news it had gathered. This right existed not against the world at large, because news is based on unprotectable facts, but against competitors. However, Justice Holmes limited such quasi-proprietary protection to only a limited period after publication allowing enough time to recoup its initial investments. However, the scope of the doctrine was severely curtailed by subsequent decisions.36 As the doctrine is not a clearly articulated one, its application has often been held to be unique to the INS case itself.37 On a review of the jurisprudence in this respect, it can be inferred that unlike the sui generis model, the unfair competition/misappropriation model limits the very protection being extended to databases. Therefore,
instead of creating exceptions in public interest etc., this model carves out a space, restricted to only a few commercial activities, for protected database.\textsuperscript{27} For instance, the Consumer and Investor Access to Information Bill\textsuperscript{22} (the only legislation which incorporates the misappropriation model), extends protection only to the extent of prohibiting the sale and distribution of duplicates of a database and nothing more. Obviously, such a model strikes the correct balance between maintaining easy access to information and providing protection to non-creative databases. However, many authors criticize the doctrine as lacking in analytic underpinnings. This is primarily because the doctrine lacks a definite form.\textsuperscript{43}

It has been suggested that a protection model based on the misappropriation doctrine must particularly be tailored to the context of databases.\textsuperscript{44} In this regard, it is essential to look at the protection model adopted by the Nordic nations\textsuperscript{55}—also known as the Nordic Catalogue Rule. These nations protect investments of capital and labour in non-creative databases by instituting a system of ‘neighbouring rights’.\textsuperscript{46} Although, the Nordic catalogue rules are contained in the Copyright Act, the protection given is intended to be of competition law character rather than copyright. This is because it does not require creativeness manifested in either individuality or originality.\textsuperscript{47} Herein lies the solution to the problem of a balanced non-creative database protection model - a hybrid between a \textit{sui generis} model and an unfair competition model. In other words, we must recognize a proprietary interest in the contents of a non-creative database so as to confer a definitive right on the creator, but at the same time the right must be limited only to a few essential commercial activities so as not to restrict access to information.

**Conclusion**

In view of the growing importance of databases, it is imperative that the position with respect to its protection is clarified at the earliest. The basis for copyright protection as elaborated by the Courts in India is inconsistent with the basic axioms of copyright law and a review is called for in this respect. The ‘sweat of the brow’ doctrine has been proven to be jurisprudentially incorrect in its application to copyright law and it is time that the Indian Courts took note of its innate defects. The ‘modicum of creativity’ rule lends more value to a copyright and is well aligned in its analytical underpinnings. Further, another issue that needs to be dealt with is the protection of non-creative/non-original databases. A limited right on data needs to be created in favour of database owners. This right must, however, be only an exception to the general rule of free access to data by the public and not vice-versa. Such an approach would strike a correct balance between the rights of a database owner and the general right of the public to access public domain information.

**References**

1. Various firms and companies now specifically provide services in this respect. For example, many market research firms have cropped up which provide exclusive services for collection and recording of information regarding consumer behavior, competitor products etc.
2. Every literary work or compilation to be copyrightable must be original. The interpretation of this word differs across jurisdictions as the discretion in this respect vests with the states party to either of the international treaties on intellectual property laws.
3. Article 2(5) of Berne Convention, Article 10.2 of TRIPS, Article 5 of WIPO Copyright Treaty (WCT).
4. Section 2(1)(o) t/w Section 13(1) of Indian Copyright Act, 1957; compilations form part of literary works under the Act.
5. Article 10, TRIPS.
7. Article 10.2, TRIPS; Article 5, WCT.
8. It is not required that the work be novel or innovative, it suffices that the work be not copied from another and have a modicum of creativity.
10. As substantial investments (of both money and labour) are often made for the creation of such databases, it has been argued that refusal to protect such databases would jeopardize such investments and allow free copying of such databases by competitors and users alike.
11. The Trademark Cases, 100 US 82; Burrow-Giles Lithographic Co v Sarony, 111 US 53; Miller v Universal City Studios Inc, 650 F.2d 1365, p 1368.
18. This case may also be distinguished on its facts in as much as the impugned database was a list of customers of the plaintiff. The contents of the database, being personal to the plaintiff, this may have influenced the decision of the Court.
The decision of the Court in not granting copyright protection was largely influenced by Section 52(1)(q) as the work in question was a compilation of the judgments of the Court, the copyright in which existed with the state.


The purpose of ‘sweat of the brow’ doctrine is one-sided and highly biased towards the copyright owner, whereas the actual purpose of copyright protection is to recognize certain exceptions to such rights so as to balance the interest of the owner of copyright to exploit his work with the right of the public to access such works.

Frank Morrissey v The Procter & Gamble Company, 379 F.2d 675.

This rule has been termed as the ‘doctrine of merger’.

This is mainly due to the fact that such databases are mostly a spin off to a larger interest. For instance, a company may make investments in a database for their business expansion plans or a research institution may use it for re-using the data so compiled for further research.


The ambit of this remedy is restricted only to such databases, which are not made public. Obviously, it does not apply to compilations of data picked up from the public domain.

These are licenses that a user of a database is said to have entered into by his conduct of accessing the work i.e. in case of an electronic database, by clicking on it. The enforceability of such contracts is very doubtful and hence the effectiveness of such contracts is flimsy. Besides such license being enforceable only between the parties to the contract, its effect is nullified against third party actions.

Articles 7 to 11.

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

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

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

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

Article 9; the Directive creates 3 exceptions: private use, teaching or scientific research and public security or administrative or judicial procedure.

Amongst the greatest criticisms of the sui generis protection is that it threatens scientific study and research. The exception as stipulated in Article 9(b) seems ineffective in this regard as it requires such research to be circumscribed by a non-commercial purpose. This again adds to the ambiguity of the provision in view of the differing theories as to commercialization. National Research Council. A question of balance of private rights and public interests in scientific and technical databases, Chapter 3, 1999.

248 US 215 (1918).

The learned judge justified his conclusion on the ground of 3 theories: labour desert theory, market value theory and the utilitarian theory.


This, however, does not mean that the doctrine has not been applied in any other case. For application of doctrine of misappropriation, City of Chicago v Dow Jones & Co Inc, 98 III 2d 109 (1983), US Sporting Products Inc v Johnny Stewart Game Calls Inc, 865 S W 2d 214 (Texas Court Appeal, 10th Dist, 1993).

H R 1858, 106th Cong (1999).

This can be seen in the numerous decisions following the INS case, which have modified the ambit of the doctrine; see ref 37.


Denmark, Finland, Iceland, Norway and Sweden.

These are rights, which are analogous to copyright and subsist for shorter periods. They generally subsist in works, which are analogous to copyrighted works. e.g. performers’ rights, broadcasters’ rights etc.