

## Reporters' Copyright in Verbatim Transcription and Audio Record of an Extempore Speech: Why the UK Act is more lenient than India's?

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The article delves into a detailed comparative legal analysis of the requirement of fixation of an extempore speech and the test of originality for its record in English and Indian copyright jurisprudence. While a mere verbatim transcription or audio record of an extempore speech may entitle a reporter to claim copyright protection in UK, the same is not true in India. As per Indian law, the reporter is required to expend intellectual skill and judgement sufficient to lend minimal degree of creativity in substantively differentiating his written record from the speech. Indian Copyright law, unlike UK's law, also requires the reporter to obtain prior authorization from the speaker to transcribe or audio-record his speech. In essence therefore, the article highlights how English copyright law is much more lenient than its Indian counterpart in providing copyright protection even for a minimal effort on part of the reporter.

**Keywords:** Reporter, copyright, creativity, extempore speech, UK copyright, Designs and Patents Act 1988, Berne convention, Indian copyright Act, 1957

Reporters<sup>1</sup> provide a written, spoken or photographic<sup>2</sup> account of an event, a situation, or an interview. Such an account is then communicated to public<sup>3</sup> either through publication<sup>4</sup> in online or print media (*viz.* newspapers) or broadcast<sup>5</sup> through television, radio, etc., thereby generating revenue. This marketability renders such accounts worth copying and thus, *prima facie* worth protecting.<sup>6</sup> Additionally, reporters encourage learning by enhancing accessibility of information about the underlying situation/event and stirring public debate and discussion.<sup>7</sup> Therefore, it is only fair that the copyright law incentivizes reporters by protecting their works *in rem* from unjust commercial exploitation.

Post 1911, it was well settled that copyright law must encourage originality and stifle duplicity.<sup>8</sup> Copyright's objective to encourage learning through increased accessibility conflicts with its emphasis on originality and creativity, particularly evident concerning reports that merely transcribe extempore speeches (*i.e.* speeches delivered in public without their prior fixation in writing or otherwise). While the former objective is *prima facie* in consonance with conferring copyright protection to reporters in their verbatim transcription or recording of an extempore speech, the latter requires detailed examination of the test of originality in copyright

law, and the bearing idea-expression dichotomy has on derivative works such as transcription or audio of an extempore speech. This article delves into a detailed comparative legal analysis of the requirement of fixation of an extempore speech and the test of originality for its record in English and Indian copyright jurisprudence.

The author concludes that while a mere verbatim transcription or audio of an extempore speech may entitle a reporter to claim copyright protection in UK (as per *Walter v Lane*),<sup>9</sup> the same is not true in India.

### Extempore Speech as a Literary Work

Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) defines 'literary work' as including every production in the literary domain, notwithstanding the mode or form of its expression. Absent any requirement as to a particular form of expression, a literary work may also exist in spoken form such as "lectures, addresses, sermons and other works of the same nature".<sup>10</sup> Therefore, Article 2(1) of the Berne Convention considers an extempore speech as a literary work.

Similarly, as per Section 3(1) of the UK Copyright, Designs and Patents Act 1988 (UK CDPA), a literary work includes any work in spoken form, except dramatic and musical works. Therefore, an extempore speech qualifies as a literary work even in UK.

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Contrarily, status of an extempore speech is uncertain in the Indian legal scenario. As per the ICA, only a 'work' is copyrightable.<sup>11</sup> Subject to Section 17 of the ICA, author<sup>12</sup> of a work is also the first owner of copyright therein.<sup>13</sup> Clause (cc) of Section 17 confers the speaker with the right of first ownership in his publicly delivered speech; thereby favoring copyrightability of an extempore speech delivered in public.<sup>14</sup> In so recognizing the copyrightability of an extempore speech, Section 17(cc) of the ICA apparently creates a legislative incoherency – as stated above, only a 'work' is copyrightable in India and ICA nowhere categorizes an extempore speech as a 'work'.

Section 2(y) of the ICA defines 'work' to mean, "(i) a literary, dramatic, musical or artistic work, (ii) a cinematograph film and (iii) a sound recording". Out of these, only the category of literary or dramatic work can conceivably include extempore speeches. Let us consider each individually –

Section 2(h) of the ICA defines a dramatic work as including a 'piece of recitation'. A speech may qualify as a piece of recitation only if repeated from memory of its record in writing or otherwise. An extempore speech, on the other hand, is spontaneously delivered in public without previously recording it in writing or otherwise. An extempore speech, therefore, cannot be a dramatic work as per ICA.

Section 2(o) of the ICA inclusively defines a literary work without any requirement as to its expression in a particular form. Similar to Article 2(1), Berne Convention, and Section 3(1), UK CDPA, one can argue that in ICA also, a literary work may include work in spoken form (*viz.* extempore speeches). This is partly because of India's ratification of the Berne Convention<sup>15</sup> (and consequent extension of the Berne Convention's definition of literary work to the ICA) and partly because of the need to categorize speech as a 'work' to remedy any legislative incoherency (*supra*). Arguably therefore, extempore speeches are literary works in India.

### **Requirement of Fixation for Extempore Speeches**

Generally, a work is copyrightable if its expression<sup>16</sup> is reduced to (or, fixed in) some material form *viz.* writing, sound-recording, etc.<sup>17</sup> Berne Convention itself does not prescribe any such requirement of fixation, and favors granting copyrightability to all literary works, including an extempore speech.<sup>18</sup> However, Article 2(2) of the

Berne Convention allows its signatories to legislatively mandate this fixation requirement for all or any categories of works. Correspondingly, UK has mandated recording a literary work in writing or otherwise as prerequisite to its copyrightability. As per Section 3(2) of the UK CDPA, fixation is thus, prerequisite to copyrightability of an extempore speech.

Unlike UK CDPA, requirement of fixation apropos literary works is not explicit anywhere in the ICA. This is quite contrary to a dramatic work, the scenic arrangement or acting form of which is expressly required to be fixed in writing or otherwise by Section 2(h) of the ICA. Literary works expressed in print or in writing are inherently fixed and are accordingly copyrightable. Controversy may arise only in relation to extempore speeches that are literary works in spoken form. However, as it has already been stated, Section 17(cc) of the ICA recognizes copyrightability of the extempore speeches. Then, reading in a requirement of fixation for extempore speeches, where none is explicit in ICA (apropos literary works), will disregard express wording of Section 17(cc). Therefore, under ICA, an extempore speech is copyrightable as a literary work notwithstanding its fixation.

As per ICA, reproduction of a literary work in any material form, including its storage in any medium, is an exclusive right of its copyright owner.<sup>19</sup> As argued before, an extempore speech is a literary work, and its speaker is the first owner of copyright therein. A reporter who is transcribing in verbatim or recording the audio of an extempore speech is actually reproducing it in material form.<sup>20</sup> And, without any prior authorization to that effect, the reporter is committing infringement of speaker's copyright in his extempore speech.<sup>21</sup>

This is unlike Section 3(3) of the UK CDPA, that considers a writer of a speech in verbatim as merely fixing it and not possibly infringing any copyright of the speaker in the speech itself. This is because, vide Section 3(2), UK CDPA, speech becomes copyright-protected as a (spoken) literary work only upon fixation (unlike in India). Therefore, while Section 3(3) of the UK CDPA renders it immaterial as to who fixes a publicly delivered speech, transcription/fixation of a speech by any person other than the speaker himself (or an authorized person, a licensee, or a permitted user) may constitute copyright infringement of such speech in India.

### Test of Originality for Transcription of Extempore Speeches

As per both ICA and UK CDPA, originality is prerequisite to copyrightability of a literary work. Even if the reporter had prior authorization from the speaker to transcribe his extempore speech, ICA will not allow subsistence of copyright in reporter's written record as distinct from the speech recorded unless it satisfies the test of originality of a literary work.<sup>22</sup> Similarly, UK CDPA envisages the possibility of subsistence of copyright in the written record as distinct from the speech recorded only if the record is original.<sup>23</sup> It, therefore, becomes pertinent to understand this test of originality in both UK and Indian context apropos transcription of an extempore speech.

#### Test of Originality in UK Copyright Law

*Walter v Lane* had held that the shorthand reporters who transcribed and published a verbatim compilation of previously unpublished, publicly delivered speeches of Lord Rosebery were entitled to copyright protection under UK Copyright Act 1842.<sup>24</sup> The speech was not held to be a 'book' but the written report was.<sup>25</sup> The majority stated that authorship in a 'book' did not require any literary merit, intellectual labour, skill, or originality of thought or expression.<sup>26</sup> Thence, reporters who merely reduced the speech in material form were held to be the authors of their written records.

With the express qualification of originality appended to a literary work vide Section 1(1) of the UK Copyright Act 1911,<sup>27</sup> *University of London Press Ltd v University Tutorial Press Ltd*<sup>28</sup> held that a literary work must be original, i.e., its expression<sup>16</sup> must originate from the author himself and not be copied slavishly from another work.<sup>8</sup> Privy Council in *Macmillan & Co Ltd v K&J Cooper*<sup>29</sup> endorsed *University of London's ratio*<sup>30</sup> even in context of derivative works,<sup>31</sup> but, propounded an additional test to be satisfied of 'knowledge, labour, judgment or literary skill or taste' sufficient to impart to such work quality or character differentiating it from the raw material upon which it is based (*Macmillan test*).<sup>32</sup> Interestingly, Court derived support for this test of originality from Lord Halsbury's obiter<sup>33</sup> in *Walter v Lane*.<sup>34</sup>

Post enactment of UK CDPA, the apparent conflict between still influential principle of *Walter v Lane* and the requirement of originality in Section 1(1)(a) of the UK CDPA was considered in *Express*

*Newspapers Plc v News (UK) Ltd*.<sup>35</sup> Interestingly, *Newspapers Plc* could be differentiated from *Walter v Lane* in two fundamental respects: firstly, *Walter v Lane* was concerned with publicly delivered speeches of Lord Rosebery while, *Newspapers Plc* was concerned with exclusive interviews taken in private;<sup>35</sup> Secondly, reporters in *Newspapers Plc* exhibited significant skills and judgment in framing reports unlike mere transcription of shorthand notes by *The Times* reporters in *Walter v Lane*.<sup>35</sup> Based on these two factual differences, observations in *Newspapers Plc* concerning *Walter v Lane* can be argued to be mere obiter.

Additionally, *Newspapers Plc* was arguably based on misinterpretation of *Walter v Lane* dictum. Lord Browne-Wilkinson in *Newspapers Plc* held that, "as a result of [*Walter v Lane*] it was established that the mere reporting of the words of another gives rise to a reporter's copyright so long as skill and judgment have been employed in the composition of that report".<sup>36</sup> On the contrary, the majority in *Walter v Lane* had emphatically held that the concept of authorship in copyright did not require expenditure of any skill, judgement or literary merit.<sup>37</sup> It was only incidentally that they had taken note of the language and shorthand skills, professional training, memory and judgement employed by a shorthand reporter to reduce the speech in verbatim.<sup>38</sup>

In fact, skill in stenography is arguably trivial and, accurately transcribing shorthand in longhand is a mere mechanical exercise of such skill.<sup>39</sup> However, even in absence of any doubt being cast on application of skill or judgement by a shorthand reporter; Privy Council in *Interlego A.G. v Tyco Industries*<sup>40</sup> had held that application of "skill, labour or judgment merely in the process of copying cannot confer originality".<sup>41</sup> Nevertheless, Browne-Wilkinson differentiated *Interlego* from *Walter v Lane* on the ground that former's ratio was inapplicable beyond artistic works;<sup>42</sup> and held *Walter v Lane* as still a good law.

In essence, despite the doubtfulness of *Walter v Lane* and *Newspapers Plc* in recognizing skill and judgement of a shorthand reporter; the impugned application of skill and judgement by the reporter in fixing the speech is sufficient under UK CDPA to confer originality upon his written record as distinct from the speech.

However, even after recognition of *Walter v Lane* in *Newspapers Plc*, a mere scribe or an amanuensis of

a speech may still not get copyright in his written record in UK insofar as no skill or judgement could conceivably have been expended by him in so recording it.<sup>43</sup> In this way, Newspapers Plc does, albeit controversially, resolve the apparent conflict between the still influential principle of *Walter v Lane* and, the legislators' intent to exclude a mere scribe or an amanuensis from copyright protection.<sup>44</sup>

#### Test of Originality in India's Copyright Law

In absence of any precedent similar to *Walter v Lane* or Newspapers Plc in India, the case of *EBC v DB Modak*<sup>45</sup> with regard to originality in derivative works is relevant. In the *EBC* case, Sup.Ct., while partly allowing copyright in law-reports of public-domain judgments, held that a compilation may be copyrightable if it is original in its 'selection, coordination or arrangement of preexisting data' such that 'a work somewhat different in character is produced'.<sup>46</sup> To claim originality, Court explained that, the work must exhibit 'minimum degree of creativity',<sup>47</sup> not in the sense of being 'novel or non-obvious',<sup>48</sup> but in producing a 'substantive variation and not merely a trivial variation',<sup>49</sup> from the preexisting work by author's application of non-mechanical,<sup>50</sup> non-trivial,<sup>51</sup> skill and judgement.<sup>52</sup> Therefore, an author of a derivative work must expend intellectual skill and judgement sufficient to lend minimal degree of creativity in substantively differentiating the literary expression of the derivative work from the preexisting work (*EBC* test).<sup>53</sup> Applying this test; Sup.Ct. observed that paragraph numbering, internal referencing and indicating opinions expressed by individual judges as dissenting, concurring, etc., required skilful consideration, capacity for discernment and exercise of judgement based on knowledge of legal argumentation that lend the requisite flavor of creativity to the law reports.<sup>54</sup> In such inputs of the appellants in their published law reports (plus, editorial notes and headnotes), Sup.Ct. granted copyright protection.

#### Doctrine of Idea- Expression Dichotomy

The requirement of originality in copyright is only with regard to the expression of the idea and not the underlying idea itself (doctrine of idea-expression dichotomy).<sup>55</sup> Themes, plots, historical or legendary facts, information, natural phenomena, or events that exist in public domain are non-copyrightable *ideas* (or concepts) that form the subject-matter or basis for all works.<sup>56</sup> The form and manner in which this basic

idea is to be expressed is the second level of idea (constructive in nature) which the author mentally conceptualizes and contemplates, drawing on his intellectual skill, judgement, knowledge, aptitude, and imagination.<sup>57</sup>

However, it is only the communicable expression (or concretization) of these ideas which is copyright-protected.<sup>58</sup> As per *EBC*, a work merely expressing facts/ ideas may also be original in its form, manner, selection, arrangement and expression of such facts and thus, copyrightable.<sup>59</sup> In being derived solely from preexisting subject matter (or facts), such a work qualifies as derivative;<sup>60</sup> and, has to consequently satisfy *EBC* test of originality.<sup>61</sup> Such a fact-based work may nevertheless be deprived of copyright-protection in two possible scenarios: (a) the idea and its expression are so commonplace that the author's own creativity does not find any substantial expression;<sup>62</sup> or, (b) the idea could be expressed in only one manner or in an extremely restricted manner such that the idea and its expression are either mutually inseparable or intrinsically connected to an extent that protecting the expression would result in monopolization of the idea itself.<sup>63</sup>

Taking an example, a timeline of a noteworthy recent event (say, Greek debt-crisis) compiled by a journalist that required careful selection of material incidents and full understanding of the topic would arguably satisfy the *EBC* test. Notably, the copyright-protection would extend to this factual compilation and not its constituent facts (idea). Similarly it is settled that news, being a mere factual narrative about a noteworthy event,<sup>64</sup> is an idea which is not copyright-protected.<sup>65</sup> However, a reporter's expression of such a news item, if original as per *EBC* test, may be copyright-protected. Even Article 2(8) of the Berne Convention excludes 'news of the day' and 'miscellaneous facts having the character of mere items of press information' from its protection. This may understandably seem unjust in allowing all the reporters to reproduce the news first collected by one reporter with considerable investment of time, labour and capital.<sup>66</sup> The reporter in question might have had obtained the impugned news about a particular event through investigative journalism, therein utilizing his skills and even undertaking risk. Nonetheless, insofar as news is a mere factual information and not the creation of the reporter who merely happened to discover or/and report it first, the reporter cannot claim copyright in it.<sup>67</sup>

*Walter v Lane* also considered Lord Rosebery's speeches like an idea. This is evident from Lord Davey's remark that 'it was of course open to any other reporter to compose his own report of Lord Rosebery's speech'.<sup>68</sup> Arguably therefore, reporter's shorthand record was a derivative work as per majority in *Walter v Lane*. However, insofar as the notion of originality as a basis for authorship was itself rejected apropos UK Copyright Act 1842, any such categorization of Lord Rosebery's speeches was conceivably irrelevant back then. Even after enactment of UK CDPA and the decision of Macmillan expounding the test of originality for a derivative literary work, Newspapers Plc did not consider reports based on the interviews as derivative work. After enactment of UK CDPA, Section 3 rendered reporter's verbatim record of a speech as a mere fixation, only upon which speech in itself became copyrightable as a literary work. Since, both the speech (as a literary work) and its fixation (in form of writing) came into existence simultaneously, it was impractical for Newspapers Plc to regard latter as derived from former. Thus, Macmillan's test for a derivative literary work was hardly significant in context of Newspapers Plc.

Contrarily, in the Indian context, a report of a public speech would arguably qualify as a derivative work, not because, such speech is a raw source of knowledge like a historical fact, but because it is a work derived from an existing work. As argued before, in India, the speech in itself is a copyrightable work, notwithstanding its fixation, that comes into existence as soon as it is publicly delivered. Any report of it could technically come into existence only subsequent to such speech having been uttered, lest by a fraction of time. Therefore, its written record would be a derivative work in the sense of being derived from a preexisting work (speech itself) and, the *EBC* test of originality would be applicable.

### **Copyright in Written Record of an Extempore Speech**

As per *EBC* test, the verbatim record of an extempore speech being a work derived from the latter, would fail to qualify as original for the lack of creativity or substantive variation in its literary expression of the speech. This is notwithstanding any extent or nature of skill or judgement possibly expended by reporter in shorthand transcription of the speech (if at all it is conceded that shorthand reporter

does exercise skill and judgment in writing the speech).<sup>69</sup> Therefore, the principle of *Walter v Lane* remains inapplicable in the construction of the word 'original' in Section 13(1)(a), ICA. However, fair reporting of a publicly delivered lecture<sup>70</sup> does not constitute copyright infringement even in ICA.<sup>71</sup> It would be a travesty to assume fair reporting to include verbatim reproduction of the lecture, as was the case in *Walter v Lane*. Instead, a report in its traditional English sense would conceivably refer to a record of the lecture by the reporter in his individualistic expression, possibly including excerpts of the lecture.<sup>72</sup> Such an expression, if literary, would have to satisfy the *EBC* test of originality in order to not infringe copyright in speech,<sup>19</sup> and to qualify for copyright-protection.

### **Copyright in Audio Record of an Extempore Speech**

It is true that as a substitute to a literary report, the reporter may choose to sound record<sup>73</sup> the speech. Absent any qualification of originality (unlike literary works), a sound record is readily copyrightable to its producer.<sup>74</sup> Insofar as such a sound recording is not a copy of a previous sound recording, it is independently copyrightable in UK,<sup>75</sup> and the reporter who made the necessary arrangements for such recording is its author.<sup>76</sup>

In India, however, Section 13(3)(b) of the ICA denies copyrightability of a sound recording made of a literary work if, in making it, copyright in such work was infringed. Copyright in a literary work is deemed to be infringed when the defendant makes a sound recording in respect of such a work without obtaining prior authorization from its copyright owner.<sup>77</sup> Ideally, it must not matter whether such a recording is of words spoken by the original speaker himself or by any other. This is unlike Section 3(3) of the UK CDPA, which renders it immaterial, for the purpose of copyright in the sound recording, whether the speech was recorded with the permission of its speaker.<sup>78</sup> Therefore, per ICA, copyright may not subsist in a sound recording made, without authorization of the speaker despite the reporter being its producer. Had copyright subsisted with reporter in his sound recording of a public speech, he would have gained exclusive right to communicate such sound recording to public<sup>79</sup> in conflict with speaker's exclusive right to make a sound recording of his speech and/or to communicate it to public. This

exclusive right of the speaker arguably finds its basis in both copyright (of the speech as a literary work) and performer's right. Publicly delivering a speech is a performance under ICA<sup>80</sup> and it is an exclusive right of its speaker as the performer to make a sound-recording of the speech.<sup>81</sup>

If however, such a sound recording is made only for the purpose of reporting of current events<sup>69</sup> or as incidental to the "technical process of electronic transmission or communication to the public" of the speech through say, internet, radio etc., it may not be considered as copyright-infringement.<sup>82</sup> Concerning the former exception, it is to be noted that, even though a reporter may obtain or electronically store the speech in sound recording for the purpose of reporting the lecture without having infringed any copyright of the speaker (explanation to Section 52(1)(a)(iii)), he will not be able to communicate the whole or substantial part of the sound recording without having infringed the speaker's performer's rights. This is because, statutory permissibility of reporting this speech as a current event vide Section 52(1)(a)(iii) ICA, is to be read with Section 39(b), ICA to allow such a report to include only the excerpts of the speech, if at all, and not whole or substantial part of it. Apropos latter exception; it is to be noted that it may apply only when prior authorization to electronically communicate the speech to the public had been obtained from the speaker such that, any ancillary or ephemeral recording was also impliedly authorized.<sup>83</sup>

### Conclusion

There exist wide differences between UK CDPA and ICA with regard to the recognition of reporters' copyright in their transcription and/ or audio-record of an extempore speech. UK CDPA is inclined to view such a transcription (in shorthand or otherwise) as a mere fixation of the speech in which the reporter may get copyright protection independent of, and distinct from, speaker's copyright in the speech. In UK, the test of originality for claiming copyrightability of such a written record of the speech is arguably that of primary works (i.e. mere expenditure of skill and judgment is sufficient). To that end, Newspapers Plc endorses *Walter v Lane* in recognizing, albeit controversially, reporters' copyright in their verbatim transcription of the speeches. Notably, whether the speech was fixed by, or with the permission of the author is immaterial under UK CDPA. Even if the

reporter was unauthorized to audio-record or transcribe the speech, he may still get copyright in his record independent of speaker's copyright in his speech. Having, so acquired copyright in his literary (or audio) record of the speech, the reporter will be entitled to exercise same set of rights as available to an author of any other literary work (or sound-recording), viz. distribution, reproduction, communication to public, etc., despite any objection raised by the speaker. Without delving into an assessment in equity of this English legal position, it is beyond doubt that English copyright law is much lenient in providing copyright protection even for a minimal effort on part of the reporter.

In stark contrast, ICA does not easily allow subsistence of copyright in a mere transcription of an extempore speech. This is because it regards a speech as copyrightable (with its speaker as its author), notwithstanding its fixation in writing or otherwise and allows subsistence of copyright in the written record as distinct from the speech recorded only if the test of originality of a derivative literary work is satisfied. Therefore, a reporter in India may get copyright in his written record only if he expends intellectual skill and judgement sufficient to lend minimal degree of creativity in substantively differentiating his written record from the speech. Since, mere verbatim transcription of an extempore speech is not substantively different from the speech itself, the reporter may not get copyright in such transcription. However, for copyright to independently subsist in sound-recording of the speech, it is sufficient to prove, as per ICA, that such sound-recording was made only after obtaining prior authorization from the speaker. While such prior authorization may be presumed when the speech is being delivered publically in presence of reporters, it largely depends on objective assessment of the facts and circumstances of each case. Conceivably however, obtaining such a prior authorization for sound-recording a speech is simpler as compared to satisfying originality standard for a derivative literary work (say, when transcribing the speech). With the advancement of technology and wide availability of sound-recording devices, it only makes sense for the reporters (in India) to sound-record the speeches instead of writing the same in shorthand. Such a sound-recording, obtained after prior authorization, may then be easily communicated to general public without having to worry about infringement of

speaker's copyright in his speech. However, reports of the speech in print media will nevertheless have to satisfy the *EBC* test of originality as demanded of a derivative literary work and thus, cannot be a mere verbatim transcription of the speech.

## References

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- 2 'Photojournalism' (Oxford Dictionaries) [www.oxforddictionaries.com/definition/english/photojournalism](http://www.oxforddictionaries.com/definition/english/photojournalism) (accessed on 11 August 2015).
- 3 'communication to public' defined in Indian Copyright Act 1957, Section 2(ff).
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- 6 *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 [per Peterson J]: "there remains the rough practical test that what is worth copying is *prima facie* worth protecting".
- 7 Encouragement of learning formed the basis for first copyright law in history, Statute of Anne 1710: Statute of Anne 8 Ann. c. 21 (1710) [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp) (accessed on 11 August 2015).
- 8 *V Govindan v EM Gopalakrishna Kone and Another* [1955] AIR Mad 391, which adopts a similar test of originality apropos to dictionaries without referring to *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.
- 9 [1900] AC 539.
- 10 Berne Convention for the Protection of Literary and Artistic Works, Article 2(1).
- 11 Indian Copyright Act 1957, Section 2(y).
- 12 Indian Copyright Act 1957, Section 2(d) defines 'author'.
- 13 Indian Copyright Act 1957, Section 17(1).
- 14 Indian Copyright Act 1957, Section 2(n) defines 'lecture' to include "address, speech and sermon". Indian Copyright Act 1957 gives copyrightability only to 'speech and address' through Section 17(cc). It follows therefore, that lectures like sermons are *per se* not copyrightable under Section 17(cc). However, lectures are usually defined as an educational speech (usually bidirectional) delivered to say, a group of students in a University: 'Lecture' (Oxford Dictionaries) <http://www.oxforddictionaries.com/definition/english/lecture>, 'Lecture' (Merriam-Webster) <http://www.merriam-webster.com/dictionary/lecture>, 'Lecture' (Black's Law Dictionary) <http://thelawdictionary.org/lecture/>. Since lecture is *in effect* a speech; Section 17(cc) must arguably be applicable also apropos sermons etc. which are lectures other than speeches in the conventional sense of the term.
- 15 WIPO, 'Treaties and Contracting Parties' (WIPO International) [http://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=969C](http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=969C) (accessed on 11 August 2015).
- 16 Doctrine of Idea-Expression Dichotomy.
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- 19 Indian Copyright Act, Section 14(a)(i).
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- 21 Indian Copyright Act, Section 51(a)(i).
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- 23 Copyright, Designs and Patents Act 1988, Section 3(3) r/w s 1(1)(a); Hansard, H L 29 March 1988, Vol 495, 610-611(Lord Beaverbrook); *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320, 1325-1326; Whitford Committee, *Report on Copyright and Designs Law* (Cm 6732, 1977) Para 589 upon which recommendation Section 3(3) was inserted in Copyright, Designs and Patents Act 1988.
- 24 *Walter v Lane* [1900] AC 539 (HL): Reporters employed by The Times Newspaper (plaintiffs) attended five public speeches given by Lord Rosebery. They took shorthand notes of the speeches, transcribed them and published reports reproducing those speeches verbatim. Subsequently, defendants published a book containing verbatim copies of the speeches published in The Times.
- 25 UK Copyright Act 1842, Section II, stated that, "book shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart, or plan separately published" and, "copyright shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of [books]"; Copyright Act 1842 thus protected the written word to the exclusion of purely oral compositions: Nigel P Gravells, Authorship and originality: The persistent influence of *Walter v Lane* [2007] IPQ 267, 269.
- 26 *Walter v Lane* [1900] AC 539 (HL), 548 [Lord Halsbury L.C.], 551-552 [Lord Davey]; Nigel P Gravells, Authorship and originality: the persistent influence of *Walter v Lane* [2007] IPQ 267, 272.
- 27 Copyright Act 1911, Section 1(1) stated that 'copyright shall subsist...in every *original* literary dramatic musical and artistic work'. Copyright Act 1911, Section 35(1) defined 'literary work' as including 'maps, charts, plans, tables, and compilations'. Chancery Division held that "the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high": *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 (Ch) 608 [J. Peterson].
- 28 [1916] 2 Ch 601 (Ch) 609-610: Examiners were appointed by the University of London to prepare question papers for elementary and advanced mathematics. These question papers were published by the University of London Press (plaintiffs). Subsequently, University Tutorial Press Ltd. published those question papers along with their answers and critiques to some questions. In suit for copyright infringement brought by plaintiffs against defendants, Court held that the examination papers were 'original literary works and proper subject for copyright'.
- 29 [1924] 40 T.L.R. 186: Appellants had published a book containing passages from a work of public domain. The passages were in some instances knit together by words or phrases. Subsequently defendants published a book allegedly reproducing plaintiff's work. Upon action brought by plaintiffs against defendants for copyright infringement,

- Court held that the work done by appellants didn't require any "great knowledge, sound judgment, literary skill or taste" as the selected passages were "reprinted in their original form, not condensed, expanded, modified or reshaped to any extent whatever", and denied plaintiffs any copyright protection.
- 30 *Macmillan & Co Ltd v K&J Cooper* [1924] 40 T.L.R. 186 (PC) 188 [Lord Atkinson] [34]-[35].
- 31 The books published by plaintiff and defendant primarily contained passages from another seminal book preexisting in public domain. Having been derived from an existing work, the impugned books of plaintiff/defendant were derivative works. Note that the case doesn't even mention the term 'derivative' though the principle it propounds is meant for derivative works as involved therein.
- 32 *Macmillan & Co Ltd v K&J Cooper*[1924] 40 T.L.R. 186 (PC) 188 [Lord Atkinson].
- 33 Lord Halsbury's observation that no one should be allowed to profit or appropriate to himself the labour, skill and capital of another, upon which basis Atkinson J, formulated the *Macmillan* test, was mere obiter insofar as Lord Halsbury had expressly stated that no skill or originality is required to claim authorship: *Walter v Lane* [1900] AC 539 (HL) 548-550.
- 34 *Macmillan & Co Ltd v K&J Cooper* [1924] 40 T.L.R. 186 (PC) 188 [Lord Atkinson].
- 35 [1990] 1 W.L.R. 1320 (Ch D): Plaintiffs published a news story quoting words actually used by the person interviewed. Subsequently, defendants published a news story in their words but reproducing in verbatim the quotes published in plaintiff's story. Issue was whether plaintiff could claim copyright-protection in the publication of verbatim quotes of the words of interviewee.
- 36 *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320 (Ch D) 1325.
- 37 *Walter v Lane* [1900] AC 539 (HL) 548 [Lord Halsbury L.C.], 551-552 [Lord Davey].
- 38 *Walter v Lane* [1900] AC 539 (HL) 552, 554 [Lord Davey], 555 [Lord James]. Lord James differentiated a shorthand reporter from a mere scribe.
- 39 : *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 (Supreme Court of Canada).
- 40 *Interlego A.G. v Tyco Industries*[1989] A.C. 217.
- 41 *Interlego A.G. v Tyco Industries* [1989] A.C. 217 (PC) 262, 263.
- 42 *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320 (Ch D) 1326; Nigel P Gravells, Authorship and originality: The persistent influence of *Walter v Lane* [2007] IPQ 267, 292 [n 103] where author hints that the principle of *Interlego* is of application wider than merely artistic works. Kevin G, Gillian D, and Gwilym H, Copinger & Skone J on Copyright (15th edn, Vol 1, *Sweet & Maxwell* 2008) 128.
- 43 Hansard H L, 29 March 1988, Vol 495, 610-611(Lord Beaverbrook).
- 44 Hansard H L, 29 March 1988, Vol 495, 610-611(Lord Beaverbrook); Nigel P Gravells, Authorship and originality: The persistent influence of *Walter v Lane* [2007] IPQ 267.
- 45 [2008] 1 SCC 1.
- 46 *Eastern Book Company v D B Modak* [2008] 1 SCC 112 [57]; This is quite similar to the test of originality apropos derivative works as devised in *Macmillan & Co Ltd v K&J Cooper* [1924] 40 T.L.R. 186.
- 47 *Eastern Book Company v D B Modak* [2008] 1 SCC 113-114 [60]-[61], possibly relying on *Feist Publications Inc. v Rural Telephone Service Co. Inc.* 499 US 340 (1991).
- 48 *Eastern Book Company v D B Modak* [2008] 1 SCC 113 [60], possibly relying on *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 (Ch) 609 [Peterson J].
- 49 *Eastern Book Company v D B Modak* [2008] 1 SCC 113 [60], possibly relying on *Macmillan & Co Ltd v K&J Cooper* [1924] 40 T.L.R. 186.
- 50 *Eastern Book Company v D B Modak* [2008] 1 SCC 108 [52], relying on *Key Publications v Chinatown Today Publishing Enterprises* 945 F 2d 509 (2d Cir 1991), endorsed rejection of the industrious collection doctrine or 'the sweat of the brow' that rewarded labour put in by compilers of facts with *de facto* copyright to those facts. Miriam B, Feist, facts and functions: Historical perspective, in Robert F B (ed), *Intellectual Property Protection of Fact-based Works: Copyright and its Alternatives* (Edward Elgar 2009).
- 51 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 (Supreme Court of Canada): "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".
- 52 *Eastern Book Company v D B Modak* [2008] 1 SCC 112-114 [57], [60]-[61], relying on *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 (Supreme Court of Canada): "By skill, I mean the use of one's knowledge, developed aptitude or practiced 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."
- 53 *Syndicate of the Press of the University of Cambridge on behalf of the Chancellor, Masters and School v B.D. Bhandari & Anr. and The Chancellor Masters And Scholars of the University of Oxford v Narendra Publishing House and Ors.* [2011] 185 DLT 346 [17], [20]
- 54 *Eastern Book Company v D B Modak* [2008] 1 SCC 114 [61]-[62].
- 55 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Article 9(2): "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 (Ch D) 608 [Peterson J]: "copyright acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work', with the expression of thought in print or writing"; Kevin G, Gillian D, Gwilym H, Copinger & Skone James on Copyright (15th edn, Vol 1, *Sweet & Maxwell* 2008) 28; Contra Michael Steven Green, Two fallacies about copyrighting factual compilations, in Robert F B (ed), *Intellectual Property Protection of Fact-based Works: Copyright and its Alternatives* (Edward Elgar 2009) 109.
- 56 *R G Anand v M/S. Delux Films & Ors*[1978] 4 SCC 140 [46] [Fazal Ali J.]; *Indian Express Newspapers v Jagmohan Mundhara And Anr.* [1985] AIR 229 (Bom); *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11 (HL) [24] [Lord Hoffman]; Kevin G, Gillian D, Gwilym H, Copinger & Skone James on Copyright (15th edn, Vol 1, *Sweet & Maxwell* 2008) 28.



- 57 *Barbara Taylor Bradford v Sahara Media Entertainment Ltd.* [2003] 47 SCL 445 (Cal) [142].
- 58 *RG Anand v M/S. Delux Films & Ors* [1978] 4 SCC 140, *Barbara Taylor Bradford v Sahara Media Entertainment Ltd.* [2003] 47 SCL 445 (Cal) [142], Kevin G, Gillian D, Gwilym H, Copinger & Skone James on Copyright (15th edn, Vol 1, *Sweet & Maxwell* 2008) 28.
- 59 *RG Anand v M/S. Delux Films & Ors* [1978] 4 SCC 140, Kevin G, Gillian D, Gwilym H, Copinger & Skone James on Copyright (15th edn, Vol 1, *Sweet & Maxwell* 2008) 63.
- 60 *Eastern Book Company v D B Modak* [2008] 1 SCC 93 [21]: “Broadly speaking, there would be two classes of literary works: (a) primary or prior works: these are the literary works not based on existing subject-matter and, therefore, would be called primary or prior works; and (b) secondary or derivative works: these are literary works based on existing subject-matter. Since such works are based on existing subject-matter, they are called derivative works or secondary works”; [28]: “In many cases, a work is derived from an existing work. Whether in such a derivative work...”
- 61 *Syndicate of the Press of the University of Cambridge on behalf of the Chancellor, Masters and School v B D Bhandari & Anr. and The Chancellor Masters And Scholars of the University of Oxford v Narendra Publishing House and Ors.* [2011] 185 DLT 346.
- 62 *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11 (HL), relying on *Kenrick and Co. v Lawrence and Co.* [1890] 25 QBD 99; cf. *Pepsi Co. Inc. And Anr. v Hindustan Coca Cola And Ors.* [2001] 21 PTC 699 (Del) laid down the test of *de minimis non curat lex* (law doesn't concern itself with trivial things) in context of copyright law.
- 63 *Syndicate of the Press of the University of Cambridge on behalf of the Chancellor, Masters and School v B D Bhandari & Anr. and The Chancellor Masters And Scholars of the University of Oxford v Narendra Publishing House and Ors.* [2011] 185 DLT 346 [18]; *CMM Cable Rep., Inc. v Ocean Coast Properties, Inc.* 97 F.3d 1504 (1st Cir. 1996).
- 64 ‘News’ (Oxford Dictionaries) [www.oxforddictionaries.com/definition/english/news](http://www.oxforddictionaries.com/definition/english/news) (accessed on 11 August 2015).
- 65 *Walter v Steinkopff* [1892] 3 Ch 489; *Wilson v Lukepy* [1875] 1 VLR 127; *International News Service v Associated Press* [1918] 248 US 215, 234 [Pitney J]; *Akuate Internet Services Pvt. Ltd. & Anr v Star India Pvt Ltd and Anr* [2013] 3 MIPR 1; See generally Robert F Brauneis, ‘The debate over copyright in news and its effect on originality doctrine’ in Robert F Brauneis (ed), *Intellectual Property Protection of Fact-based Works: Copyright and its Alternatives* (Edward Elgar 2009).
- 66 *National Telegraph News Co v Western Union Telegraph Co* [1901] 789 (7th Cir), Brief for Appellant, 2; *International News Service v Associated Press* 240 F. 996 (2d Cir 1917).
- 67 *International News Service v Associated Press* [1918] 248 US 215, 234 [Pitney J]; *Akuate Internet Services Pvt. Ltd. & Anr v Star India Pvt Ltd and Anr* [2013] 3 MIPR 1; *Contra* Michael Steven Green, Two fallacies about copyrighting factual compilations, in Robert F Brauneis (ed), *Intellectual Property Protection of Fact-based Works: Copyright and its Alternatives* (Edward Elgar 2009) 109.
- 68 *Walter v Lane* [1900] AC 539 (HL) 552 [Lord Davey].
- 69 *Hager v ECW Press Ltd. (T.D.)* [1999] 2 F.C. 287 accepts as valid the principle of *Walter v Lane* [1900] AC 539 (HL) in Canadian Copyright Law, the requirement of ‘skill and judgment’ borrowed from *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 (Supreme Court of Canada) in *Eastern Book Company v D.B. Modak* [2008] 1 SCC 112 may be arguably satisfied even in Indian context. However, *Hager* does not analyze *Walter v Lane* in context of derivative works and thus, casts doubt about its acceptability in Indian context.
- 70 Indian Copyright Act 1957, Section 2(n) defines ‘lecture’ as including ‘address, speech and sermon’.
- 71 Indian Copyright Act 1957, Section 52(1)(a)(iii).
- 72 *Cf Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320.
- 73 Indian Copyright Act 1957, Section 2(xx) defines ‘sound recording’.
- 74 Indian Copyright Act 1957, Section 2(uu) defines ‘producer’, who is the ‘author’ of sound recording vide Section 2(d)(v).
- 75 Copyright, Designs and Patents Act 1988, Section 5A(2); Hansard, HL 29 March 1988, Vol 495, 610-611(Lord Beaverbrook).
- 76 Copyright, Designs and Patents Act 1988, Section 9(2)(aa) and Section 178: the person by whom the arrangements necessary for the making of the sound recording are undertaken is the producer, who is the author of sound recording.
- 77 Indian Copyright Act, Section 51(a)(i), Section 14(a)(iv) and Section 52(1)(j).
- 78 Since sound recording is a fixation of speech in material form, Copyright, Designs and Patents Act 1988, Section 3(3) is applicable.
- 79 Indian Copyright Act 1957, Section 14(e)(iii).
- 80 Indian Copyright Act 1957, Section 2(q).
- 81 Indian Copyright Act 1957, Section 38A.
- 82 Indian Copyright Act 1957, Explanation to Section 52(1) 3(a); Section 52(b).
- 83 Indian Copyright Act 1957, Section 14(a)(iii).