

Copyright Protection for Computer Softwares and Databases: From Sweat of the Brow to Modicum of Creativity

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I. Introduction:

Life in this century has been transformed by technology, and perhaps nowhere has the change been more spectacular than in the field of communications. The growth oriented change in the economic policy necessitates availability of latest information to all in all fields. In order to achieve the growth oriented change, today everything is in the process of transformation from manual to electronic. The impact of these galloping technological developments (various types of computers like desktop computers, master computers to feed desk top computers and super computers to which the master computers are linked) has led to certain problems in the field of computer software too. Since a massive amount of time is required to create a computer programmes and the investment in terms of money is huge, reproduction of this software by pirating the original will be much easier and would not involve expenditure of so much time and money. Therefore, some kind of protection must be provided to creators of software against piracy otherwise, we may reach a stage where no one is willing to create software for the simple reason that returns are not even equal to the investment. Since the economic aspect would be in favour of piracy, it will obviously be immense. Therefore, there is a need to have a specially trained judiciary to decide cases relating only to copyright violations in general and violations of computer programmes in particular. Again since the modes of infringing would be different and complex, there is a need to create a special force to detect these violations. Most of the problems would be faced in the field of industrial software. The question usually asked is: What is software and why protection to software? The complex technologies have often relied on changing legal interpretations to suit themselves into the copyright law framework. Therefore, another question arises: What is the legal position in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)¹

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1 TRIPS Agreement was adopted on 15 April 1993 and came into force with effect from 1 January 1995. See, *ILM* (1994) at p. 1197. For various issues on TRIPS Agreement, see, J. K. Das, "TRIPS Agreement and Intellectual Property Rights: An Indian Perspective" 6 *International Trade Law & Regulation*, Thomson Reuters (Legal) Limited, London, (2010) pp.165-173; J.K. Das, *Intellectual Property Rights*, Kamal Law House, Kolkata (2008); *Tea Board, India v. ITC Limited*, MIPR 2011 (2) 160.

for protection of computer software and databases? Whether Copyright Act 1957 protects new technologies like computer software and databases? Again Copyright Act protects “original” works, tacitly galvanizing the distinction between “idea” and “expression”. Can compilation work be protected under Copyright Act? The Doctrine of “Sweat of the Brow” has been used as tool of judicial interpretation of copyright cases in India. Whether the doctrine is still relevant? Can “Modicum of Creativity” theory be applied in case of protection of computer software and databases? Whether punitive damages can be awarded in case of piracy of computer software and databases? The Article demonstrates the aforesaid issues?

II. What is Software and why Software Protection?

A computer software is nothing but a set of commands, on the basis of which the computer may be directed to perform the desired function. A software is completely unlike a book or a painting. The question as to whether software is tangible or intangible property has been considered by the American Courts. In America there is a difference of opinion amongst the various Courts. However, the majority of the Courts have held that a software is an intangible property². The reasoning for arriving at this conclusion is basically that the information contained in the software programs can be introduced into the user’s computer by several different methods, namely, (a) it could be programmed manually by the originator of the program at the location of the user’s computer, working from his own instructions or (b) it could be programmed by a remote programming terminal located miles away from the user’s computer, with the input information being transmitted by telephone; or (c) more commonly the computer could be programmed by use of punch cards, magnetic tapes or discs, containing the program developed by the vendor. Computer software has also been explained by the Delhi High Court in *Amway India Enterprises v. Deputy Commissioner of Income-tax*,³ to include computer programme recorded on any disk, tape, perforated media or other information storage device. Therefore, computer software is goods and a tangible asset by itself. The Apex Court in *Tata Consultancy Services v. State of Andhra Pradesh*⁴, observed:

“Software is an essentially classic form of intellectual property. The

2 *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405; *State of Alabama v. Central Computer Services*. INC 349 So. 2d 1156; *The First National Bank of Fort Worth v. Bob Bullock*, 584 S.W.2d 548; *First National Bank of Springfield v. Department of Revenue*, 421 NE2d 175; *Compuserve, INC. v. Lindley*, 535 N.E. 2d 360; *Northeast Datacom, Inc., et al v. City of Wallingford*, 563 A2d 688.

3 [2008] 301 ITR 1 (Delhi): (2008) 114 TTJ (Delhi) 476. *Commissioner of Income-tax v. Arawali Constructions Co. (P.) Ltd.*, (2002) 177 CTR (Raj) 79: [2003] 259 ITR 30 (Raj).

4 2001 (2) SCALE 417: (2001) 4 SCC 629.

value of the tapes on which it is sold is much lesser than the value of the software programme itself; that the software programme is always transferred onto the hardware and then the tapes are useless; that, therefore, the licensee/payer is paying for the programme and not for the tapes or discs; these discs are different from music cassettes and video tapes, music reels, etc. because the programme on the discs is separable and is always transferred to the hardware, whereas in the case of music cassettes, etc. though they may be separable and can be transferred to another cassette or tape this is not generally done and the music or movie always remains on the tangible property on which it was stored when sold; that there are other methods by which a software programme can be installed, like, the programme directly keying in the programme can be installed, like, the programme directly keying in the programme through the console keyboard; that what is transferred is the right to use the programme (which is a set of instructions) and not the tape on which it is stored; that though software has a physical component, these physical components are merely tangential incidents of a computer programme, they do not change the programme's clearly intangible character."

Again Bombay High Court in *Abdulgafar A. Nadiadwala v. Assistant Commissioner of Income Tax and Ors.*,⁵ held that Sections 10A and 10B of the Income Tax Act deal with export incentives and exempt income from export of articles and things and computer software. These sections define "computer software" to mean any computer programme recorded on any disc, tape, perforated media or another information storage device. Thus, according to the assessee, there is overwhelming authority for the view that even intangible rights, etc., once recorded on a tape or disc, can be considered as goods and merchandise. In *Ambience Space Sellers Ltd. v. Asia Industrial Technology (P) Ltd.*,⁶ the Bombay High Court has held that broadcasting of signals through satellite for the purpose of transmission on television are movable properties within the meaning of the Sale of Goods Act. The Apex Court in *Associated Cement Companies Ltd. v. Commissioner of Customs*,⁷ examined the issue whether drawings and designs could be considered as goods. While answering this question, the Court ruled that technical device or information technology may be an intangible asset but the moment the information of device is put on media, whether on paper or cassettes or diskettes or any other thing, then it becomes chattel. The Apex Court further in *Commissioner of Customs Excise, New Delhi v. Living Media*

5 (2004) 188 CTR (Bom) 232; [2004] 267 ITR 488 (Bom).

6 1998 PTC 19.

7 AIR 2001 SC 862; (2001) 4 SCC 593.

(India) Ltd.⁸, observed:

“Therefore, the intellectual input in such items greatly enhances the value of the paper and ink in the aforesaid examples. This means that the charge of a duty is on the final product, whether it be the encyclopedia or the engineering or architectural drawings or any manual... Similar would be the position in the case of a programme of any kind loaded on a disc or a floppy. For example in the case of music the value of a popular music cassette is several times more than the value of a blank cassette. However, if a pre-recorded music cassette or a popular film or a musical score is imported into India duty will necessarily have to be charged on the value of the final product.”

Thus, “computer software” including computer programme, drawings, designs, broadcasting of signals are goods and tangible assets by themselves. The cost of developing a programme is far greater than the one involved in duplicating it, this works as an incentive to pirates to go in for unauthorized duplication at the cost of original creator of a programme. Therefore, the programme will be disseminated only if the creator can recover all his costs plus some kind of profit and he can spread his cost over sale of number of copies of his work with some kind of protection from unauthorized duplication since these works are the product of great intellectual effort and their utility cannot be questioned. Computer software may also be explained to constitute the following three elements:

1. “Computer programme”: which means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result⁹.
2. “Programme Description”: which is a comprehensive procedural presentation in verbal, schematic or other form, in sufficient detail to determine a set of instructions constituting a corresponding computer programme.
3. “Supporting Material”: it is a material other than a computer programme or a programme description, created for aiding the understanding or application of a computer programme, i.e. problem descriptions and

8 JT 2011 (9) SC 324: 2011 (9) SCALE 153. See also, *Tata Consultancy Services v. State of Andhra Pradesh*, AIR 2005 SC 371: (2005) 1 SCC 308.

9 *Tata Consultancy Services v. State of Andhra Pradesh*, AIR 2005 SC 371: (2005) 1 SCC 308; *O.R.G. Systems, Baroda v. Collector of Central Excise*, AIR 1998 SC 2662: (1998) 6 SCC 56.

user instructions¹⁰.

The computer cannot open without the operating system. The laptop without an operating system is like an empty building. It may be clarified that the operating system can also be imported as a packaged software which is like an accessory. A laptop is a small portable Personal Computer (in short 'PC'). It runs either on battery or electricity. Laptop has a screen and a small key board. Most of the laptops run on the same software as their desk top counterparts. The Supreme Court in *Commissioner of Customs, Chennai v. Hewlett Packard India Sales (P) Ltd.*¹¹, observed:

“Software is a computer programme. It consists of instructions that make hardware work. There are two types of software’s, namely, system software which controls the working of the computer and application software such as word processing programmes, databases etc., which perform the tasks for which we use computers. In addition, we now have network software which enables groups of computers to communicate, and language software which provides programmers with the tools with which they write programmes. We also have what is called as packaged software’s which are sold through retail outlets.”

The definition of software covers not only the actual software but also switching operations of hardware components according to a particular programme and the action which translates other programmes expressed in a programming language into their final form. It also covers many other kinds of programmes complementing the hardware in a computer so as to make easy the carrying out of the new programmes. In view of this comprehensive definition, it is important to protect rights of the individuals and the firms developing software either under the existing law or if it is inadequate to amend the law and if necessary by framing a new law.

III. TRIPS Agreement:

TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) made significant progress over pre-existing international copyright law in clarifying that computer programmes should be protected as literary works. The *Berne Convention*, in Article 1, defines the objective of the Berne Union as the protection of the rights of authors in their literary and artistic works. Article 2 of this convention then goes on to define this term. These are broadly defined as every production in the literary, scientific or artistic domain, whatever may be

¹⁰ WIPO, Model Provisions on Protection of Computer Software, (1978), see, P.M. Dhar, “Intellectual Property in Computer Programs : Weakness of the Indian Copyright Act, 1957,” 28 *Journal of the Indian Law Institute* (1986) pp. 487-496.

¹¹ 2007 (10) SCALE 535: (2007) 8 SCC 404.

the mode or form of its expression. Although this article merely gives illustrations of what could constitute literary or artistic works, the non-inclusion of specific works had led to a debate on whether computer programmes were included or not. Article 10 of TRIPS Agreement now clarifies that computer programmes are eligible for protection under copyright law. Article 10 runs as follows:

“Article 10: Computer Programs and Compilations of Data.

1. Computer programs, whether in source or object code, shall be produced as literary works under the *Berne Convention* 1971.
2. Compilation of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.”

Article 10.1 of TRIPS Agreement provides for the protection of computer programmes, whether in source or object code, as literary works. By specifying that computer programmes are to be protected as literary works, the shorter term of protection of 25 years applicable to works of applied art under the *Berne Convention* [Article 7(4)] was explicitly excluded. Article 2(5) of the *Berne Convention* recognises the protection of collections of literary or artistic works which, by reason of their selection and arrangement of their contents, constitute intellectual creations without prejudice to the copyright in each of the works forming part of such collections. According to the WIPO Guide to the *Berne Convention*, the creator of such a collection is required to bring to bear an element of creativity to such a work. In other words, a telephone directory that simply lists names and addresses with no creative selection or arrangement cannot be protected under this provision. Article 10.2 of TRIPS Agreement elaborates this provision of *Berne Convention* to include: (i) a database or other compilation of data or other material, (ii) material in both machine-readable or other form, (iii) compilations of non-copyrighable material¹².

IV. Copyright Act 1957:

IV (i) Legislative Scheme of Protection: Computer Programmes and Databases

Subject to the provisions of Section 13 and the other provisions of the *Indian Copyright Act 1957*, there shall be a copyright throughout India in “original literary work”, dramatic, musical and artistic works, cinematograph films and sound recording, subject to the exceptions provided in Sub-sections (2) and (3)

¹² See, Jayshree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, Oxford University Press, New York (2001).

of Section 13. For copyright protection, all literary works have to be original as per Section 13 of the Act. However, there are two classes of literary works: (a) primary or prior works, and (b) secondary or derivative works. Primary or prior works are the literary works not based on existing subject-matter, therefore, would be called primary or prior works. Secondary or derivative works are literary works based on existing subject-matter; since such works are based on existing subject-matter, they are called derivative work or secondary work. For the purposes of the Act, Section 14(1) enumerates what shall be a copyright which is an exclusive right, subject to the provisions of the Act, to do or authorize the doing of the acts provided in Clauses (i) to (vii) in respect of a work or any substantial part thereof in the case of a literary, dramatic or musical work, not being a computer programme.

The Indian *Copyright Act 1957* has been amended several times. The Copyright (Amendment) Act, 1994 has included “computer programmes” and also added “databases” within the definition of literary works. Section 2(o) defines “literary work” to include (among others) computer programmes, tables and compilations including computer databases. Section 2(y) defines “work” as meaning any of the following works namely: (i) a literary, dramatic, musical or artistic work, (ii) a cinematographic film, (iii) sound recording. Under Section 14, literary work is one of the items wherein exclusive rights can be claimed so as to amount to copyright. Under Section 17(c) if a work is made in the course of other’s employment under a contract of service or apprenticeship it is the employer who is the first owner of the copyright therein in the absence of any agreement to the contrary¹³. As per Section 2(ffc) a computer programme means a set of instructions expressed in works, codes, and schemes or in any other form, including a machine-readable medium, capable of causing a computer to perform a particular result. Thus copyright subsists in a computer programme including databases provided sufficient effort or skill has been expended to give it a new or original character. But it must be written down, recorded or otherwise reduced to a material form. However, it has been argued that computer programmes and databases are not “original literary works” rather compilation of various works; therefore, these works are not protectable under copyright law. Now question arises: What criteria are to be adopted for determining the scope of copyright protection in case of compilation work¹⁴. Whether compilation work of “computer programmes” and “databases” are entitled for copyright protection? If so what is the scope and ambit?

13 *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber and Another*, 1996 PTR 40: (1995) 15 PTC 274.

14 *Gurleen Kaur and Ors. v. State of Punjab and Ors.*, (2010) ILR 1 P and H 52; *Eastern Book Company and Ors. v. D.B. Modak and Anr.*, AIR 2008 SC 809; (2008) 1 SCC 1.

IV (ii) Development Prior to 1994 Amendment: Protection of Compilation Work

Prior to Copyright (Amendment) Act, 1994 the scope and ambit of copyright protection in case of a compilation work was settled by Courts in various cases. The question whether a plaintiff is entitled to copyright in his coupon depends on whether it is an original literary work. The words “literary work” includes a compilation¹⁵. They are used to describe work which is expressed in print or writing irrespective of whether it has any excellence of quality or style of writing. The word “original” does not demand original or inventive thought, but only that the work should not be copied but should originate from the author¹⁶. Now question arises: whether a work in the nature of a compilation is original? It is wrong to start by considering individual parts of it apart from the whole, as the appellants in their argument sought to do. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original. In such cases the courts have looked to see whether the compilation of the non-original material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. So the protection given by such copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours¹⁷.

Thus, directories, catalogues, and the like have been held to be original and to acquire copyright if the work that goes to their making has been sufficient¹⁸. In *G. A. Cramp. and Sons Ltd. v. Frank Smythson Ltd.*¹⁹, it was held to have no copyright where the work of compilation was not “substantial” but “negligible”. The arrangement of the material is one of the factors to be considered. The Court said:

“There was no evidence that any of these tables was composed specially for the respondents’ diary. There was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler. It was not suggested that there was any element of originality or skill in the order in which the tables were arranged.”

So in each case it is a question of degree whether the labour or skill or ingenuity or expense involved in the compilation is sufficient to warrant a claim

15 *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1964 WL 19516 (HL): [1964] 1 All E.R. 465.

16 *University of London Press Ltd. v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601, 608.

17 *Kelly v. Morris.*, (1886) L.R. 1 Eq. 697, 701.

18 *H. Black lock and Co. Ltd. v. C. Arthur Pearson Ltd.*, [1915] 2 Ch. 376: 31 T.L.R. 526.

19 [1944] A.C. 329.

to originality in a compilation. In *Macmillan and Co. v. K. and J. Cooper*²⁰, an abridgement of an author's work which in fact was not an abridgement but was a collection of detached passages from the author's work joined together was held not to be an abridgement of the original work of the author but merely a selection of scripts taken from the author's work printed in the form of a narrative. The Judicial Committee observed:

“... it is the produce of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.”

In *G. A. Gramp and Sons Ltd. v. Frank Smythson Ltd.*,²¹ both the parties were publishers of pocket diaries. The question for consideration was whether the appellants in inserting certain tables in their diary of 1942 had infringed any copyright that the respondents had in a collection of tables included in their pocket diary known as “Litublue”. Seven of the tables in the appellants' diary had been copied from the respondents' diary. The question was whether having regard to its nature and subjects the compilation to be found in the respondents' diary which had thus been copied and made use by the appellants could be regarded as the subject matter of copyright. It was held that the impugned compilation fell short of “displaying the qualities requisite to attract copyright.” The court further observed:

“Under Section 1 (1) of the Copyright Act of 1911 copyright subsists in ‘every original literary work’ and this expression includes compilation. The existence of sufficient originality is a question of fact and degree.”

Similarly, in *S. K. Dutt v. Law Book Co.*,²² the plaintiff had alleged that that the copyright in his work “Indian Partnership Act, by Mukerji and Dutt” had been infringed by the second defendant in his publication entitled “Law Book Company's Commentaries of law and Practice of Partnership and Private Companies in India”. It was observed that in order to construe infringement of a man's copyright there must be sufficient infringement of the work. Fair Dealing by any one has been kept out of the mischief of the Copyright Act”. It was further observed:

20 AIR 1924 PC 75.

21 (1944 A. C. 329).

22 AIR 1954 All 570.

“Several persons may originate similar works in the same general form without anyone infringing the law in regard to copyright. The infringement comes in only when it can be shown that someone has, instead of utilising the available sources to originate his works, appropriated the labours of another by resorting to a slavish copy of mere colourable imitation thereof. The ‘animus furandi’, that is, an intention to take from another for purposes of saving labour, is one of the important ingredients to be found against a defendant before he can, in a suit under the Copyright Act, be demnified.”

Further, in *Mohini Mohan Singh v. Sitanath Basak*,²³ the plaintiff was the author of a book entitled “Adarshalipi-o-Saral-Barna- Parichaya which was first published in 1902 and had run into several editions. In 1919, the defendant published two books in which, according to the allegations of the plaintiff, his copyright in the afore said book had been infringed by the defendant. It was observed that the question whether a colourable imitation had been made of the work of another must necessarily be a question of fact. A mere similarity was not enough as it may be due to chance, both works having been taken from a common source. It was observed: “Though similarity is to a large extent inevitable and each one of the points of similarity may not be worth anything, a conglomeration of so many points of similarity which, in the opinion of the defendant’s own expert, constitutes a strange coincidence, points to the defendants having copied from the plaintiff’s book.” *Govindan v. Gopalakrishna*,²⁴ was a case of compilation. It was held that though in the case of “compilation” the amount of originality will be very small but even that small amount is protected by law and no man is entitled to steal or appropriate for himself the result of another’s brain, skill or labour even in such works. On the defense plea of common source it was held : “A person relying on it must show that he went to the common source from which he borrowed, employing his skill, labour and brains and that he did not merely do the work of the copyist, by copying away from another work.” In *Shyam Lal Paharia v. Gaya Prasad Gupta*,²⁵ Allahabad High Court examined the various cases on the issue of compilation work and developed various principles enunciated in the cases may be briefly summarized as follows:

1. A compilation which may be derived from a common source falls within the ambit of literary work.
2. A work of compilation of a nature similar to that of another will not by itself constitute an infringement of the copyright of another person’s work written on the same pattern.

²³ AIR 1931 Cal 233.

²⁴ AIR 1955 Mad 391.

²⁵ AIR 1971 All 192.

3. The question whether an impugned work is a colourable imitation of another persons' work is always a question of fact and has to be determined from the circumstances in each case.
4. The determining factor in finding whether another person's copyright has been infringed is to see whether the impugned work is a slavish imitation and copy of another person's work or it bears the impress of the author's own labours and exertions.

From the various statements of the authorities²⁶ and the trend of judicial opinion it is clear that a compilation of previous work developed by any one by devoting time, money, labour and skill though the sources may be commonly situated amounts to a "literary work" of the author has a copyright. Thus, a compilation derived from a common source falls within ambit of literary work. A work of compilation of a nature similar to that of another will not by itself constitute an infringement of the copyright of another person's work written on the same pattern. The question whether a work is colourable imitation of another person's work is always a question of fact. The determining factor is to see whether the impugned work is a slavish imitation and a copy of another person's work or it bears the impress of the author's own labours and exertions.

IV (iii) Post 1994 Amendment Development on Computer Software and Databases: Doctrinal Tension.

(a) Doctrine of Sweat of the Brow: Its Contemporary Relevance

During post Copyright (Amendment) Act, 1994 a large number of cases have been decided by Indian Courts. Indian law has recognized that computer programmes, tables and compilations including computer databases are entitled to copyright protection²⁷. However, that would not end the debate. The law mandates that the work claiming protection ought to be original. Copyright law does not also grant the author of a literary work protection on ideas and facts²⁸.

²⁶ *Waterlow Directors Ltd. v. Reed Information Service Ltd*, 1992 F S R 409; *William Hill (Football) Ltd. v. Ladbroke (Football)*, 1980 RPC 539; *Khemraj Shrikrishandas v. Garg and Co.*, AIR 1975 Delhi 130; ILR 1975 Delhi 251; *Sham Lal Paharia v. Gaya Prasad*, AIR 1971 All 182; *Govindan v. Gopalakrishna*, AIR 1955 Mad 391.

²⁷ Section 2(o) of the Copyright Act 1957 defines "literary work" to include (among others) computer programmes, tables and compilations including computer databases. Section 2(y) defines "work" as meaning any of the following works namely: (i) a literary, dramatic, musical or artistic work, (ii) a cinematographic film, (iii) sound recording. Under Section 14, literary work is one of the items wherein exclusive rights can be claimed so as to amount to copyright. See *O.R.G. Systems v. Collector of Central Excise*, AIR 1998 SC 2662; (1998) 6 SCC 56; *Barbara Taylor Bradford v. Sahara Media Entertainment Ltd.*, 2004 (28) PTC 474 (Cal); (2003) 47 SCL 445 (Cal).

²⁸ *Baker v. Seldon*, [1879] 101 US 99; *Nichols v. Universal Pictures Corporation*, 45 F.2d (2d Cir. 1930); *R. G. Anand v. Delux Films*, AIR 1978 SC 1613; (1978) 4 SCC 118.

It is the creative expression of an idea or fact which gets rewarded by law, through copyright monopoly for a specified period. The law does not, however protect every expression, but grants such recognition and protection to expressions that are “original”. This standard is incorporated by Section 13, in respect of every class of work. A literary work, in order to qualify as work in which copyright can subsist, must therefore be original. The standard for judging “originality” has undergone a radical change from the time a work was deemed original if it was the product of the “Sweat of the Brow” as it was enunciated in *University of London Press*²⁹. The underlying notion of the “Sweat of the Brow” doctrine was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine was as follows:

“The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author”

One of the interesting questions that came up for consideration before the Delhi High Court in *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*³⁰ was regarding the protection of computer databases. In this case the plaintiff was doing the business of mail order service. One of the major investments for the success of the business is the compilation of the list of the customers. The plaintiff has developed a list of customers’ database over a period of three years prior to the institution of the suit by investing considerable amount of money and

29 The Chancery Court in *University of London Press Limited v. University Tutorial Press Limited*, [1916] 2 Ch 60 observed thus: “Asswning that they are” literary work, “the question then is whether they are original. The word” original “does not in this connection mean that tbe work must be the expression of original or inventive thought. 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. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author. [n the present case it was not suggested that any of the papers were copied. Professor Lodge and Mr. Jackson proved that they had thought out the questions which they set, and that they made notes or memoranda for future questions and drew on those notes for the purposes of the questions which they set. The papers which they prepared originated from themselves, and were, within the meaning of the Act, original.”

30 1996 PTR 40: (1995) 15 PTC 274.

time and kept it as a trade secret. The defendant, a previous employee of the plaintiff, but not connected with the work of the compilation of the customers' database, recently started mail order service business. According to the plaintiff, the defendant managed to get a copy of the plaintiff's customers database and was using it for establishing relationship with the plaintiff's customers. It was contended by the plaintiff that this amounted to infringement of copyright in the database and violation of the trade secret. He, therefore, prayed for a permanent injunction restraining the defendant from infringing the copyright and confidentiality. The defendant denied the allegations and argued that the plaintiff had no copyright on the database on the ground that the address of customers included in the database were collection of facts from common source. According to the defendant he developed his own database and the utilization of it did not amount to any infringement of the copyright of the plaintiff.

The court examined the question whether a compilation of addresses in computer database from the common source is a literary work for the purpose of copyright protection. After quoting from various provisions³¹ of the Indian *Copyright Act*, foreign authorities³² and case laws from India³³ and abroad,³⁴ *R.C. Lahoti J* concluded thus:

“From the above statement of the authorities and the trend of judicial opinion it is clear that a compilation of addresses developed by any one by devoting time, money, labour and skill though the sources may be commonly situated amounts to a ‘literary work’ wherein the author has a copyright”³⁵.

It is clear from Section 2(0)³⁶ of the Act that computer database is specifically included as a compilation to treat it as a literary work. But it is only “original” literary work that is protected under Section 13³⁷ of the Act. In case of compilations the originality is not on the materials but on the manner of organization of the material since in some cases the materials as such can enjoy separate

31 The court referred to Sections 2(o), 2(y), 14 and 17(c) of the Copyright Act 1957.

32 The court quoted from Laddie, Prescott and Vitoria, *The Modern Law of Copyright, 1980*; Copinger and Skone James on *Copyright, 1991*; David Bainbridge, *Software Copyright Law*: (1996).

33 *Govindan v. Gopalakrishnan*, AIR 1955 Mad 391; *Sham Lal Paharia v. Gaya Prasad*, AIR 1971 All 182.

34 *Waterlow Directors Lt. v. Reed Information Service Ltd.*, 1992 FSR 409 and *William Hill (Football) Ltd. v. Labroke (Football) Ltd.* 1980 RPC 539.

35 *Burlington v. Rajnish*, 1996 PTR 40 at 46.

36 Section 2(0) reads: “literary work includes computer programmes, tables and compilations including computer databases”.

37 Section 13(1) reads “Subject to the provisions of this section and the other provision of this Act, copyright shall subsist throughout India in the following classes of works, that is to say, - (a) original, literary, dramatic, musical and artistic works”.

copyright protection. It is the well established law of copyright that facts are not copyrightable and are to be left open in the public domain as common source for free use by the public for creation of new works since they are considered to be the basic building blocks. Thus, in cases of compilation of facts the question is whether there is any originality in the manner of organization of the facts for copyright protection. So the important question in this case was not whether the database was a compilation but whether the one created by the plaintiff would qualify the test of 'originality' for the purpose of copyright protection. Instead of examining this question, it appears that the court has followed the "Sweat of the Brow" doctrine for the purpose of extending copyright protection for compilations of facts. The court, thus, relied on the time, money and labour of the plaintiff in collecting the information, which by itself is uncopyrightable, for the purpose of extending copyright protection. Even though the court used the work 'skill', it appears it has not inquired about the amount of skill used by the plaintiff in the manner of organization of the compilation. Thus, the court focused on the slavish imitation by the defendant to make out a clear case of infringement³⁸. The court in this process has not dealt with the basic question of the requirement of originality for the purpose of extending copyright protection to compilation as a literary work. This seems to be the trend followed by the Indian courts even in earlier cases.

The "Sweat of the Brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement, the compiler's original contributions, to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently work out the matter for himself, so as to arrive at the same result from the same common sources of information." The Supreme Court in *Eastern Book Co. v. D. B. Modak*,³⁹ relied on the US⁴⁰ and Canadian⁴¹ judgments and observed thus:

"The sweat of the brow approach to originality is too low a standard which shifts the balance of copyright protection too far in favour of the owner's right, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creative standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard

38 1996 PTR 40 at 46.

39 AIR 2008 SC 809; 2008 (1) SCC 1.

for copyright protection that is consistent with the policy of the objectives of the Copyright Act.”

(b) Modicum of Creativity Theory and Abolition of Doctrinal Tension

A higher criterion of “Modicum of Creativity” theory was deemed necessary after the decision of the American Supreme Court in *Feist Publication Inc. v. Rural Telephone Service*⁴². In this case the court had examined whether the white pages of a telephone directory could claim copyright protection as compilation. The court while rejecting the “Sweat of the Brow” doctrine followed in earlier cases emphasized the need the demonstrate originality for the protection of copyright in compilation. It was categorically stated that facts as such were not copyrightable. The observation of the court is quite pertinent, as follows :

“This, then, resolves the doctrinal tension : Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts. In no event may copyright extend to the facts themselves”.

Since there was no originality in the organization of the name and address of the customers in the telephone directory the court held that the white pages were not entitled to copyright protection⁴³. It is true that the court has not laid

40 *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, 18 USPQ 2d. 1275; *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 674 (2nd Cir. 1998); *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d.509.

41 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 (1) SCR 339 (Canada).

42 (1991) 199 US 340. The US Supreme Court in *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, 499US 340 (1991) observed thus: “The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper & Row* at 547-49. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. M. Nimmer & D. Nimmer, *Copyright* at 2.01[A], [B] (1990) (hereinafter Nimmer). *To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.* The vast majority of works make the grade quite easily, as they possess some creative spark,” no matter how crude, humble or obvious “it might be. *Id.* at 1.08[C][I]. *Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.* To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable”

43 The court observed: “The selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural’s white pages ae entirely typical. Pesons desining telephone sevice in Rural’s service area fill out an application and Rural issues them

down the standard of originality or creativity required to be satisfied in compilation for the purposes of determining copyright. It appears that it has been left to the lower courts to find out the originality or creativity based on the facts of each case. The application of the Feist's ratio by the US lower courts for extending protection to maps⁴⁴ and numbers⁴⁵ is indicative of this. Had the Indian Courts examined these decisions, the court could have set the law in the proper direction. It is also interesting to examine whether the act of making a single copy or storing it in electronic means and using the information in it for business purpose amounts to infringement of copyright or can be treated as a fair dealing for private purpose. According to Section 14 of the Indian Copyright Act 1957, the act of reproduction including the storing in electronic means, distribution, communication to public, translation etc., are the rights of the copyright owner. It is the exercise of these rights without the authorization of the owner that constitutes infringement of copyright. Strictly speaking, even making a single copy or storing it in personal computer may amount to infringement of the reproduction right of the owner. But keeping in mind the public interest, the Copyright Act permitted limited use of copyrighted materials without permission of the owner of copyright. One such use is the fair dealing of literary work for private use⁴⁶ under Section 52 of the Copyright Act. It is true that the Act has not defined fair dealing and the courts find it difficult to lay down precise standards. On an examination of the case law from various jurisdictions it is clear that the most important test is to find out whether the use is likely to harm the potential market or the value of the copyrighted work⁴⁷.

It is generally understood that making a single copy for private use is within the ambit of fair use. The US Supreme Court has examined the issue of copying the entire work for private use in *Sony Corp. v. Universal City Studios Inc.*,⁴⁸ and concluded that it falls within the scope of fair use. It is clear from the facts of the present case that the copy possessed by the defendant was copied from the plaintiff. It was not the allegation of the plaintiff that the defendant was reproducing the work and distributing it so as to affect his potential market in

a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists in alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity". 499 US 340 (199) at p. 362.

44 See *Mason v. Montgomery Data, Inc.*, 967 F. 2d 135 (5th Cir. 1992).

45 See, *CCC Information Service v. Maclean Hunte Reports*, 44 F.3d 61 (2d Cir. 1994).

46 Section 52(1)(a) reads: "a fair dealing with a literary, dramatic, musical or artistic work, not being a computer program, for the purpose of (1) private use ..."

47 See for example *Civic Chandran v. Ammini Amma*, 1996 PTR 142; *Hubbard v. Vosper* (1972) 2 WLR 389; *Sony Corporation v. Universal City Studios, Inc.*, 464 US 417 (1984).

48 464 US 417. In this case the court examined whether home video taping for time shifting constitutes infringement of copyright.

exercising the reproduction right. It was the use of the information in the work by the defendant to compete in the business of mail order service of the plaintiff that forced him to file this suit. It is needless to emphasize that the object of copyright is not to protect information and recognize exclusive use of it. On the contrary, the purpose of copyright protection is to facilitate the dissemination of information. In this context, it appears difficult to appreciate the conclusion of the court that the act of the defendant amounts to infringement of copyright. In this regard the observation of the US Supreme Court in *Sony Corp.* case is worth noting.

“Even unauthorised uses of a copyrighted work are not necessarily infringing. An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute”⁴⁹.

It is the trade secret law that safeguards the confidential business information and copyright law cannot be pressed into use for this purpose. Even though the Delhi High Court referred to some literature on the trade secret law, it has not applied it to the facts of the case. It appears from the facts of the case that reliance on the principles of trade secret protection would be of little help to the court in giving relief to the plaintiff. This seems to be the reason for giving relief under copyright. Unfortunately, the court has not examined these issues. It is hoped that it will examine these issues when the case comes up for final disposal.

The Supreme Court of India has also recognized the above shift to “Modicum of Creativity” theory from the “Sweat of the Brow” and in *Eastern Book Company v. D. B. Modak*,⁵⁰ following the approach adopted by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*⁵¹. The Indian Supreme Court also rejected the “Sweat of the Brow”

49 *Sony Corp. v. Universal City Studios Inc.*, 464 US 417.

50 AIR 2008 SC 809; 2008 (1) SCC 1.

51 (2004) SCC 13; 2004 (1) SCR 339 (Canada). The Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 (1) SCR 339 observed thus: “I conclude that the correct position falls between these extremes. For a work to be” original “within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or 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. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment

doctrine, (which conferred copyright on works merely because time, energy, skill and labour was expended, that is, originality of skill and labour), and held that the work must be original “in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author”. Recently, the Supreme Court of India noticed that the two positions: (i) the “Sweat of the Brow” on the one hand, and (ii) “Modicum of Creativity” were extreme positions. The Apex Court preferred a higher threshold than the doctrine of “Sweat of the Brow” but not as high as “Modicum of Creativity”. Thus, Indian law mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a minimum degree of creativity. Even before the Indian Copyright (Amendment) Act 1984, in the UK⁵² and in the USA⁵³, computer databases and computer programmes were afforded copyright protection. Thus, copyright is capable of subsisting in a scientific record consisting of a series of letters or other characters symbolizing the sequential structure of DNA, proteins and similar constructs found in molecular biology, provided the recorded sequence is of sufficient length. This view may seem somewhat surprising at first blush, but it is submitted that it is rather difficult to see how any other can be sustained, consistent with the language of the Copyright Act and well-established principles of copyright law. Any sense of surprise would appear to arise not from the legal principles but from the dramatically novel set of scientific facts to which they are applied. It will often be the case that such sequences will be held in the form of computer databases.

In *Emergent Genetics India Pvt. Ltd. v. Shailendra Shivam and Ors.*⁵⁴, plaintiff sought for permanent injunction restraining defendants from selling “tomato seeds” under trademark “ANUPAMA”. However, Court allowed application of plaintiff’s for ad-interim temporary injunction and granted such relief, ex-parte. Hence, this case for vacation of for ad-interim temporary injunction. The issue was whether, in absence of copyright protection, could plaintiff claim injunction on ground that its trade secret, and confidential information had been unauthorized misappropriated by defendants? The Delhi High Court observed:

“Quality of confidence highlights that trade secrets were legal concept with sufficient effort or through illegal acts rivals might access trade secrets. However, if trade secret or information owner

that might be involved in simply changing the font of a work produce” another “work would be too trivial to merit copyright protection as an” original “work”.

52 *Sega Enterprises Ltd. v. Richards and Anr.*, 1983 FSR 73.

53 *Apple Computer, Inc. v. Franklin Computer Corporation*, 714 F.2d 1240: 1253 (3d Cir.1983).

54 2011 (125)DRJ 173.

proved that reasonable efforts were made to keep information confidential, information remains trade secret and was legally protected. If, trade secret owners could not establish reasonable efforts to protect confidential information, they risk losing quality of confidentiality of information even if its information was obtained by rivals without permission. It was noticed by Court that suit and documents were bereft in materials about nature and quality of information which was confidential and precise developments, which plaintiffs' seeds offer to public. This aspect was crucial, because if information and techniques were neither unique, nor novel, but were merely documentation, or compilation of existing material, or existing techniques, freely available, or widely practised, there was no question of confidentiality. However, plaintiff did not claim exclusivity in respect of any particular technique or process. Thus, seeds in question were in respect of commercial crop would not in any manner detract from circumstance that nature of protection sought, that confidentiality, affects all classes of seeds. Therefore, plaintiff was unable to establish, prima facie, its claim for copyright protection in databases, claimed by it. It was also found that it had not shown that information, which it claims to be exclusive was capable of protection, qualifying as "confidential information". So, ex-parte injunction granted at an earlier stage of proceeding, had to be vacated."

The Delhi High Court justified in its above decision by explaining Sections 2(o), 2(y) and 14 of the Copyright Act 1957. The Court stated: "Indian law has recognized that compilation of databases is entitled to copyright protection. However, the law mandates that the work claiming protection ought to be original. Copyright law does not also grant (the author of a literary work) protection on ideas and facts⁵⁵. It is the creative expression of an idea or fact which gets rewarded by law, through copyright monopoly for a specified period. The law does not, however protect every expression, but grants such recognition and protection to expressions that are "original". This standard is incorporated by Section 13, in respect of every class of work. A literary work, in order to qualify as work in which copyright can subsist, must therefore be original. However, mere labour (sweat of the brow) or investment of manpower and resources, is not a substitute for originality. Sequences obtained from nature (e.g., the sequence for a gene) cannot per se, be original. The microbiologist or scientist involved in gene sequencing "discovers" facts. There is no independent creation of a "work", essential for matching the originality requirement. Such a scientist merely copies from nature-genetic sequence that contains codes for proteins. Therefore there

⁵⁵ *Baker v. Seldon*, [1879] 101 US 99; *Nichols v. Universal Pictures Corporation*, 45 F.2d (2d Cir. 1930); *R. G. Anand v. Delux Films*, AIR 1978 SC 1613: (1978) 4 SCC 118.

is no minimum creativity. So long as a researcher constructs a DNA sequence based on a sequence discovered in nature, there is no independent creation, no minimum creativity and thus no originality⁵⁶.

In *Dr. Reckweg and Co. Gmbh. and Anr. v. Adven Biotech Pvt. Ltd.*⁵⁷, the Court held that a work, in order to be called original must contain at least a “Modicum of Creativity”. In that sense there must be intellectual originality and creativity. The level of such creativity, of course, would vary from case to case to render the work copyrightable. It noted that the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent’. Such works are incapable of sustaining a valid copyright. Dealing with the question of copyright in compilations, the Court held that there could be no copyright on facts, which form the compilation, but only on the arrangement of those facts, if a minimal level of creativity could be established. Similarly, copyright could subsist on the manner of expression of facts only if such “Modicum of Creativity” were established. In this regard, the Court observed:

“To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea-expression or fact-expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”

Law mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of “Modicum of Creativity”⁵⁸. In *Sap Aktiengesellschaft v. Mr. Sadiq Pasha*

56 *Mattel, Inc. and Ors. v. Mr. Jayant Agarwalla and Ors.*, MIPR 2008 (3) 298: 2008 (38) PTC 416 (Del); *Dr. Reckweg and Co. Gmbh. and Anr. v. Adven Biotech Pvt. Ltd.*, 2008 (38) PTC 308 (Del); *Servewell Products Pvt. Ltd. v. Dolphin*, 2010 (43) PTC 507 (Del).

57 2008 (38) PTC 308 (Del).

58 *Chancellor Masters and Scholars of The University of Oxford v. Narendera Publishing House and Ors.*, MIPR 2008 (3) 402: 2008 (38) PTC 385 (Del).

Proprietor,⁵⁹ defendant illegally obtained/ installed licence and was using pirated/ infringing software products belonging to plaintiffs, as plaintiff had not granted any valid licence. The issue was whether, there was infringement of copyright of software programme of plaintiff and therefore whether, plaintiff was entitled for injunction against defendants? The software programmes developed and marketed by plaintiff are “computer programmes” within the meaning of Section 2(ffc) of the Indian Copyright Act, 1957 and are also included in the definition of a “literary work” as per Section 2(o) of the Copyright Act. It is also alleged that both India and Germany are signatories of the Berne Convention, Universal Copyright Convention and WTO’s TRIPS Agreement and, therefore, rights of the plaintiff companies are protected in India under Copyright Act. In this case the Delhi High Court held that as per Section 51 of the Copyright Act, copyright work could be infringed when any person without licence granted by owner of copyright or registrar in contravention of conditions of licence does anything, of which exclusive right to do was conferred upon owner of copyright. However, as per evidence on record it was proved that no license was issued by plaintiffs to use software as it was not found in database maintained by plaintiff company. Therefore, defendant could not claim that software found loaded on his hardware was licensed software and was not pirated version. Using pirated versions of softwares, copyright of which vested in plaintiff companies, defendant infringed their copyright in those softwares. Moreover, defendant was using software for purpose of imparting training in SAP R/3 or any other programme and defendant had not have any education license agreement with plaintiffs therefore he had no right to impart training in programme to any person. Hence, defendant had infringed copyright of plaintiffs by using pirated software R/3 and by imparting training using aforesaid software. Thus, defendant could be restrained from using any pirated/unlicensed software of plaintiff company including R/3. The Delhi High Court observed:

“Section 51 of the Copyright Act, to the extent it is relevant, provides that copyright in a work shall be deemed to be infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyrights under the Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under the Act does anything, the exclusive right to do which is by the Act is conferred upon the owner of the copyright. Section 14 of the Copyright Act, to the extent it is relevant, provides that copyright means the exclusive rights subject to the provisions of the Act, to do or authorize the doing of specified acts in respect of a work or any substantial part thereof, which in the case of a computer programme would include to reproduce the work in any material form including the storing of it in any medium by

59 179 (2011) DLT 709; 2011 (46) PTC 335 (Del).

electronic means. It has come in evidence that no license has been issued by the plaintiffs to use the above referred software. Had any such license been issued and had the same been valid, it would have been found in the database maintained by the plaintiff company. In any case, the defendant has not come forward to claim that the software found loaded on his hardware was licensed software and was not by pirated version. Therefore, by using pirated versions of the software, copyright of which vest in the plaintiff companies, the defendant infringed their copyrights in those software.”

V. Remedies for Infringement of Copyright in Computer Software and Databases— Punitive Damages:

Now question arises: What are the remedies for infringement of copyright in computer software and databases? For infringement of copyright in any type of work recognized in the Copyright Act 1972 damages, accounts of profit⁶⁰, ‘*anton piller order*’⁶¹ as well as criminal remedies are available. Again question arises: When punitive damages can be awarded in case of infringement of copyright in computer software and databases? The fact that a lot of energy and resources are spent in litigating against those who infringe the copyright of others and try to encash upon the goodwill and reputation of other brands by passing of their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, in the case of a trademark use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity or in the case of a software use the pirated software thereby depriving the copyright owner of the revenue to which he is entitled by sale of license to use that software and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark/pirated software, which, if he is using the infringing mark/pirated software for business purposes, can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court. The Calcutta High Court in *C. M. Agarwalla v. Halar Salt and Chemical Works*,⁶² observed:

⁶⁰ *Green Valley Biscuit Pvt. Ltd. v. Madhabi Biscuit Pvt. Ltd.*, 2005 (1) GLT 556: 2005 (31) PTC 438(Gau).

⁶¹ *Mohit Bhargava v. Bharat Bhushan Bhargava and Ors.*, AIR 2007 SC 1717: (2007) 4 SCC 795; *Bucyrus Europe Limited v. Vulcan Industries Engineering Company Private Limited*, 2005 (1) CHN 106: 2005 (30) PTC 279 (Cal).

⁶² AIR 1977 Cal 356.

“Damages are denned as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether the act is a breach of contract or a tort or put more shortly damages are the recompense given by process of law to a person for the wrong that another has done to him. Punitive damages are intended to be in solatium to the plaintiff and in terrorem to the public.”

Regarding punitive damages in *Time Incorporated v. Lokesh Srivastava and Anr.*,⁶³ the Delhi High Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the *lis* but suffer on account of the breach. In *Hero Honda Motors Ltd. v. Shree Assuramji Scooters*,⁶⁴ the Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books. In *Microsoft Corporation v. Ms. K. Mayuri and Ors.*,⁶⁵ the Delhi High Court emphasized the need to award punitive damages in case of blatant infringement of copyright. In an *ex parte* final order preventing the defendants from the unauthorized loading of the MS Windows and MS Office the court reasoned thus:

“This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade name, copyright, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.”

The court in this case awarded rupees five lakh as compensatory damages against a claim of Rs. 26.72 lakh by the plaintiff-and another rupees five lakh as punitive damages. Though the reasoning is a welcome move one would wonder whether the amount of rupees five lakh would “spell financial disaster” to the

⁶³ 116 (2005) DLT 599: 2005 (30) PTC 3 (Del).

⁶⁴ 125 (2005) DLT 504: 2006 (32) PTC 117 (Del).

⁶⁵ 2007 (35) PTC 415 (Del). See also *Microsoft Corporation v. Kiron and Anr.*, 2007 (35) PTC 748 (Del).

defendant who has made a profit of Rs. 26.72 lakh. In *Microsoft Corporation v. Deepak Raval*,⁶⁶ the Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities. In *Larsen and Toubro Limited v. Chagan Bhai Patel*,⁶⁷ the Court observed that it would be encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

VI. Conclusion:

The Copyright Act 1975 is the law governing copyright protection in India. It extends protection to computer program under the category of literary works provided they constitute “original literary works”. The words “computer” and “computer programme” have been graciously defines in the Act [Sections 2(ffb), 2(ffc)]. The fact that computer programmes are utilitarian works is well imbibed in the definition by using the words “a set of instructions” and “capable of causing a computer to perform a particular task or achieve a particular result”. The word “expressed” asserts that even while utilitarian works are given protection, such protection only extends to its expression. Thus the concept of idea-expression dichotomy is advanced. The use of words, “form” and “medium” makes fixation a requirement. The terms “words, codes, schemes, or in any other form” and “including a machine readable from” cover protection for both source code and the object code. The content of what is meant by “originality” has undergone a paradigm shift from the days of “sweat of the brow” doctrine to the “modicum of creativity” standard. Thus, law mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of creativity. An aspect peculiar to copyright law, is the “doctrine of merger”. This doctrine posits that where the idea and expression are intrinsically connected, and that the expression is indistinguishable from the idea, copyright protection cannot be granted. Applying this doctrine courts have refused to protect the expression of an idea that can be expressed only one manner, or in a very restricted manner, because doing so would confer monopoly on the idea itself. Computer software and databases satisfy the “modicum of creativity” standard. Therefore, protection of computer software and databases through copyright law is justified.

⁶⁶ MIPR 2007 (1) 72.

⁶⁷ MIPR 2009 (1) 194; 2009 (39) PTC 538 (Del).