THE ROLE OF CREATIVITY IN LAW: CAN JUDICIAL JUDGEMENTS BE COPYRIGHTED?

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Abstract

The question of whether judicial judgments can be protected under copyright law presents a unique intersection between intellectual property rights and public interest. This comment explores the legal and philosophical underpinnings of copyright in judicial opinions, with particular reference to Indian jurisprudence and comparative perspectives from other jurisdictions such as the United States and the United Kingdom. While judgments are original literary works authored by judges, their primary function as public documents serving justice raises significant concerns about ownership, access, and reproduction rights. The analysis critically examines the Indian Supreme Court's stance, especially in Eastern Book Company v. D.B. Modak, where the court recognized limited copyright in the value-added components of judgments. This comment argues that while the core content of judicial pronouncements must remain in the public domain to uphold transparency and accountability, the editorial efforts that enhance their usability- such as headnotes, paragraphing, and formatting may warrant conditional protection. The comment concludes by emphasizing the need for a balanced approach that respects both the creative inputs of legal publishers and the democratic imperative of open access to the law.

Keywords: *Copyright, Judgement, Literary Work, Indian jurisprudence*

INTRODUCTION

The guiding proposition of the copyright law is that an equilibrium should be maintained between the interests of the one who authored a particular work and the general public which seeks access to that work. In its truest sense, the copyright protection serves as an extension to fair-play principle, which states that the one who produces the work by investing his labour

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and skill into it, shall enjoy the ownership of the work and no one else should be allowed to benefit from the work unjustly. Therefore, the copyright is in place to ensure that the others are prevented from taking advantage of the work in absence of the author's consent, who owns the copyright over that work. This concept might seem very simplistic in theory but there are larger issues surrounding the concept, and multiple considerations which need to be paid a heed to, while granting a copyright. Although, copyright enables the protection of the author's rights, the goal is also to incentivize innovation and further creation of new work, which would further be incentivized by granting such protection. To address this issue, granting of copyright is not done for a thought or an idea as it would monopolise the entire idea.[1] The copyright is granted only over the particular expression in which the thought has been presented. Furthermore, when there are limited ways of expressing an idea, copyright is not to be granted as otherwise, the concerned expression would ultimately and indirectly result in the entire idea being monopolised.

A copyright is granted in two types of works, primary and derivative. As is clear from the name, primary work is entirely new or novel creation, which is not affected by any matter that already exists in public domain. Whereas, derivate work may have actually been influenced by or inspired from the matter that already does or does not remain available to the public. Thus, it is not a requirement for a work to be entirely innovative to not contain any influence derived from any other work that already exists, but only has to be a production which is original in itself, in order for it to be granted a copyright. The author shall, in course of this project, attempt to analyse the issue of copyrightability of courts judgements comprehensively. The main research question which the author attempts to provide an answer to is whether the copyright subsists in court judgements in India? And if the judgements are published by the esteemed databases that are regularly used in conducting legal research like Manupatra and SCC, would the copyright protect extend to those as well? To address these questions, the author shall form a complete understanding of the derivative works and concerned copyrightability. Additionally, the focus shall be on the issue of copyright protection in judgements in the context of India, while considering the legal framework adopted in India and copyright related jurisprudence that has taken shape over the course of time. To sum it all up, the author shall compare the Indian position of copyright law with popular foreign jurisdictions.

THE CONCEPT OF DERIVATIVE WORK IN COPYRIGHT LAW

[1] *Barbara Taylor Bradford v. Sahara Media Entertainment Ltd.*, 2004 (1) CHN 448.

As abovementioned, any work that has taken influence from any other work that exists already in the public domain, falls in the category of derivative works. The copyright law of the USA defines a derivative work as any work that consists of any editorial review or revisions, annotations, any elaborations made, or other such modifications, that represents an original work when looked at as a whole.[2] The law of copyright takes into account the fact that some sources could be common for all those who might attempt to work on a particular topic. The common source doctrine acknowledges this and provides that since, the source is common, there could be cases where different individuals develop the same idea in different manners, and could still face some similarities with the original work.[3] Hence, the copyright is granted over derivative works also as there could still exist possibilities for novel expressions of such thoughts. However, one must keep in mind that this would not breach one of the core principles of copyright which says that there should not be any unjust enrichment of anyone from the labour and skills that someone else has put into his work. Thus, to be granted copyright, some originality thresholds must be adhered to by the derivative works, in order to make sure that it is distinguishes itself from other existing works on the subject matter.[4] There could be different standards employed to test originality as depending on the nature of the derivative work, but some objective principals always exist in order to consider any work as an original one, for it to be conferred copyright protection. To maintain brevity, major discussion on derivative work in the project shall only limit itself to the court judgements with its concerned copyright ability.

THE INDIAN LEGAL FRAMEWORK

The Indian Copyright Act of 1957 (hereinafter referred to as "the Act") governs the subject matter of copyright in India. Section 2 of this Act provides that dramatic, literary, artistic or musical work, a sound recording or a cinematograph film shall be included within the ambit of 'work'.[5] Moreover, 'government work' is defined under Section 2 as any work that would be made/published by or under the Government's directions, or any of its wings such as legislative department, or courts of law, including tribunals and other judicial authorities.[6] On the face of it, any judgement delivered by a court of law has to fall under the purview of Government work. Instances where a copyright maybe granted would include original dramatic, literary or musical or artistic work as specified under Section 13.[7] Moreover, the exclusivity in rights

[2] United States Code, Section 101, Title 17.
[3] *V Govindan v. EM Gopalakrishna Kone*, AIR 1955 Mad 391.
[4] *Ladbroke v. William Hill*, [1964] All ER 465.
[5] The Copyright Act, 1957, S 2(y).
[6] The Copyright Act, 1957, S.2 (k).
[7] The Copyright Act, 1957, S 13.

conferred upon an owner of copyright is laid down under Section 14 and majorly includes rights to grant authority to other people to make use of the work.[8] Additionally, the directions for first owners to the copyright for a government work are laid down under Section 17 and says that unless otherwise stated, government would be deemed as the copyright's first owner.[9] This clears out the situation that, where court judgements are concerned, the copyright would be vested in the government. Though, Section 52 specifies certain types of works where some specified actions would not lead to infringement of copyright. One of these categories include the publication and/or reproduction of a court judgement, unless the same has been prohibited expressly.[10] This implies that it is allowed for anyone to make such a publication or reproduction without having to worry about infringing the copyright.

This gives rise to online databases being allowed to compile the court judgements, which makes accessing these judgements very easily. One of the early skills learnt in a law school is exactly this, and includes carefully examining such databases and coming up with relevant cases that helps in the legal research. Furthermore, it is also an aim of these databases to make this job of finding case laws easier. This is achieved by inclusion of headnotes referring to the subject matter which the case deals with, segregating the paragraphs in order to simplify reading and cross referencing of the cases that one relies on. As abovementioned, original judgements can be published or reproduced in their raw form. However, the modifications or alterations that these databases make to the raw judgement, the end product includes additional aspects along with the original text of the judgement.

This section analyses the role played by the case of Eastern Book Company v. DB Modak[11], a leading judgement which paves the way for a definitive ruling on the issue of whether the judgements given by the courts are copyrightable or not. In the concerned case, Appellant Eastern Book Company ('EBC'), was engaged in the printing and publication of law reports containing Supreme Court cases and their associated judgments, collectively referred to as "Supreme Court Cases." The appellants however, would publish the judgements after thorough modification with several changes being undertaken in order to make the judgements more reader-friendly. They also added headnotes and footnotes in addition to adding other inputs like paragraphs and attractive fonts. The respondent DB Modak was in the business of developing software packages incorporating court judgements. However, the judgements in the

[8] The Copyright Act, 1957, S.14.
[9] The Copyright Act, 1957, S. 17.
[10] The Copyright Act, 1957, S. 52.
[11] *Eastern Book Company & Ors. v. D.B. Modak & Ors*., (2008) 1 SCC 1.

software packages appeared to have been plagiarized, i.e., lifted verbatim from the reports prepared by SCC. Hence, an action was initiated against the respondent by the appellant EBC and the matter went to the court.

Initially, Delhi High Court ruled that copyright only bestowed with the EBC for their headnotes, however it rejected EBC's contention that by making certain modifications to the judgements, inserting paragraph numbers, or organising the judgments in a particular order during printing, the copy-edited judgments became their original literary work and consequently entitled to copyright protection. The Hon'ble High Court reasoned that if a person's right to report court judgements is pushed to that point, then once a judgement is reported by a particular publication, others will be banned from doing the same, defeating the fundamental purpose of making these judgments public. Additionally, the Court held that the appellants are not the authors of the Supreme Court judgements and that by simply correcting specific errors or adding paragraph numbers, the character of a judgement does not get alter to make it fundamentally different from the original judgement.

Aggrieved by the decision, EBC appealed in the Supreme Court through a special leave. In the Supreme Court, EBC contended that the copyright protection exists throughout the legal report Supreme Court Cases. It went on to elaborate that how the judgments are presented in the reports, which includes footnoting, adding editorial notes, cross-referencing, selection, sequencing, and arrangement of the judgments, contribute to the report becoming an original work of art in itself and consequently is in stark contrast to the raw data collected from the Supreme Court's register. Moreover, the work necessitates significant labour, expertise, capital, and infrastructure on the side of the appellant, qualifying it for copyright protection under Section 13 of the Copyright Act and subsequent publication on e-platforms under Section 14 of the Copyright Act, 1957. Hence, EBC sought copyright protection on the entire copy-edited version of the Supreme Court Judgements as presented on their platform.

The respondents rebutted the appellant's contentions by pleading that the extensions made by the appellants lacked even the bare minimum of creativity or intellectual labour required to obtain copyright under the Copyright Act 1957. Furthermore, SCC Report was claimed to be merely derivative work of the appellants without any originality and as originality is a statutory requirement in India for any work to be accorded with copyright protection, there should be no reason for SCC report to be accorded with copyright protection. The respondents based this argument on the premise that the additions made by the appellant were trivial in nature and as per De minimis principle, copyright should not be given for trivial additions as they do not

satisfy the pre-requisite for originality.[12] The respondents further elaborated that as copy-editing modifications which includes footnotes or paragraph numbers can be expressed only in limited ways, copyright would not subsist in them.

The Supreme Court opined that if a court does not explicitly state that there exists copyright in the court's verdict, then that reproduction of the verdict will not infringe any copyright. The apex court also considered that mere capital investment, judgment, and skill in the copy-edited version of the ruling would also fail to meet copyright requirements. The court considered originality or innovativeness as the crucial aspect necessary to consider a work copyrightable. The copy-edited version must contain a character or quality which is exclusive of the original text of that judgement. Copy-edited versions are derivative work and must display distinctive features than the original raw text in the public domain. Such specific features must not be trivial. However, the apex court disagreed with the Rajasthan High Court's judgement as it did not accept the idea of only extending copyright protection to parts of the SCC Online judgement. The court was of the view that inputs on lines of paragraph segregation based on the matter, whether judges' opinions are dissenting, concurring, separate or partly concurring, creation of footnotes, editorial notes and headnotes. All these inputs meet the requirement of minimal creativity since all the above changes require legal skill, legal knowledge, and sound judgment. Hence, it was held that the modification and alterations or inputs so put in the copy-edited version of SCC Online judgement should be protected under copyright, even though the copy-edited version of the decision in its entirety fails to satisfy copyright requirements.

Hence, the judgements of Indian courts, in general, are not copyright protected in India. Copy-edited versions of verdicts released by legal research databases and law reports are Derivative works since these publishers put in labour and skill and modicum of creativity and should be protected by copyright for their inputs, alterations, and modifications.[13] Likewise, the standard of originality in the above case is widely acceptable in assessing originality in derivative works where the contention is based on copyright protection.[14]

STANDARD OF ORIGINALITY IN OTHER JURISDICTIONS

This tranche of the paper compares the treatment of derivative work in other jurisdictions with a particular focus on reproducing the verdict of the court. Primarily, it is the standard of originality determining the subsistence of copyright in the derivative work, which differs in

[12] *Ibid.*
[13] *Ibid.*
[14] *Mattel Inc. & Ors. v. Jayanta Agarwalla & Ors.*, IA No. 2532/2008 in CS (OS) 344/2008.

other jurisdictions that will be discussed in this tranche. The law of Canada, UK and USA are discussed herein.

UK

In the UK, earlier, there was no standard of originality for the extension of copyright. However, the standard was put into law, which the courts accepted due to issues involving a multiplicity of copyrights.[15] However, the expression does not need to have literary or creative merits. The guiding principle in the UK is based on the consideration that a man, by copying the work, should not avail the capital, labour and skill invested by another man. He could enjoy the exclusive right to coy for his work by investing his own capital, labour and skill.[16] The primary necessity to meet the standard of originality is not a novelty but one of labour and skill. Hence, for a work to have copyright protection, it must be something original of the author as a product of his labour and skill.[17] This standard of originality has been popularly defined as the sweat of the brow doctrine.

USA

In the USA, the determining factors of copyright vary slightly from that of those in the UK. Here, the primary focus is not on the labour or skill of the author but the promotion of the progress of useful arts and science.[18] Primarily, the originality of the work, which is a work originating from the author and is not copied from a work that already exists, is the primary focus. For derivative work, especially legal judgements and case compilation, the courts have considered that copyright subsists only when such work displays originality (author's original work) and a certain amount of creativity when it is analysed as a whole.[19] This standard is popularly defined as the modicum of creativity doctrine.[20]

CANADA

The country whose copyright standard pertaining to derivative works resembles that of India is Canada. The Indian apex court, while deciding the EBC v. Modak case, borrowed heavily from the jurisprudence of Canada. Here, the primary standard balances, or we can say harmonises the above two doctrines, i.e., the sweat of the brow and modicum of creativity. This approach was adopted because the standard of originality in the former doctrine is too lax and that in the latter is too strict. So, to harmonise these two doctrines, the apex court of Canada

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[15] *Walter & Anr. v. Lane*, [1900] AC 539.
[16] *Designers Guild Limited v. Russel Williams (Textiles) Limited,* [2001] 1 WLR 2416.
[17] *University of London Press v. University Tutorial Press,* [1916] 2 Ch 601.
[18] Constitution of the United States, Clause 8, Section 8, Article 1.
[19] *Matthew Bender & Co. v. West Publishing Co.,* (1997) U.S. SDNY 95 Civ. 0589.
[20] *Feist Publications Inc. v. Rural Telephone Service Co*., 499 U.S. 340 (1991).

opined that for copyright, the author must produce an original work (originating from him and not necessarily novel) which should be a product of his labour, judgement and skill, which should be something beyond mechanical labour and skill. This work should also have a semblance of creativity.[21]

CONCLUSION

The law confers this copyright on the Government and the publication and reproduction of the same shall not result in infringement of copyright. Although the compilation of these judgements is not granted a copyright upon, its original expression however, is conferred such protection. This principle ensures access to justice, transparency and the free dissemination of legal information. The rationale is that legal judgments are expressions of the law, which is public property and must remain accessible to all for the proper functioning of a democratic society and legal system. With regards to this, alterations made to the court judgements by expenditure of labour and skill, like segregating paragraphs and categorising opinions, including headnotes, summaries, etc, would be granted a copyright upon, and trying to copy the same will lead to infringement of copyright. Indian legal take on copyrightability element of the derivative works contains resemblance to the Canadian take on the same, where the work has to be an end result of one's own labour and skills and shows some amount of creativity in order to indicate the work being original. This position of law also seeks to serve as an equilibrium between the USA and UK standards, that are often criticized to be the two-extremes of this spectrum.

[21] *CCH Canadian Ltd v. Law Society of Upper Canada*, [2004] 1 SCR 339.