Chapter 2
Copyright, Access and Information Society

2.1 Copyright Protection and Public/Private Interest

Information is an invaluable social resource. Before information is given a strenuous legal protection, it must be made sure that protection is warranted and carefully delineated. The mechanism to stimulate dissemination and use of new knowledge is an important incentive for generating knowledge. Access to information is an issue which concerns various categories of users. Information which is in public domain, information where database constitutes the only source of that information, information relating the academic and scientific research and other information of public interest are always sensitive to monopolization and consequent restriction in use. There are databases like databases on remote sensing activities, which are by their nature unique and cannot be reproduced independently by third parties and in these cases possibility of monopoly becomes greater.[1] By introducing intellectual property rights in non-original databases, private rights will be created in the information contained in the databases which would seriously damage the content of public domain in the domain of scientific, educational and legal information.[2]

[1]The Association of Research Libraries have noted that prices of such journals rose by 115 % between 1986–1994 which was the result of a market which was monopolistic and controlled by a small group of publishers. Maurer M (1999) Raw Knowledge: Protecting Technical Databases for Science and Industry. Workshop on Promoting Access to Scientific and Technical Data for the Public Interest: An Assessment of Policy Options, National Academy of Sciences, January 1999.
[2]Maurer SM, Scotchmer S (1999) Intellectual Property Rights: Database Protection: Is It Broken and Should We Fix It? Sci 284:789.

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National Research Council, National Academy of Sciences, National Academy of Medicine, National Academy of Engineering, National Sciences Foundation and National Institute of Health objected to any legislation in the United States that might restrict data or information as they feared that IPR in databases would put an obstacle to free circulation of information through price rise and private appropriation.[3] It is observed that social benefit increases when knowledge is more disseminated. All information related to law are in public domain but today a lawyer or researcher who has to purchase law books and CD-ROMs, subscribes to online databases. So when access to databases is restricted, for example by pay per use system, it becomes an obstacle to advancement of sciences as the researchers tend to compromise with the quality of research because of the additional cost for having access to databases. Heller observed it as tragedy of anti-commons.[4]

Any increase in the cost of accessing databases will have a chain reaction in the society as the research is likely to compensate the higher cost with another source of revenue based on the result of the research either through patenting or other means of exclusion of research output. This has been indicated by the increase of private involvement in collection and generation of data. This can also lead to a strategy of scientific collaboration in the model of 'open science'.[5] There is an increasing demand for consumer's access to information like weather data, maps, and statutory registers.

Copyright protection for a compilation is confined to selection and arrangement of information and reproducing selection and arrangement will infringe either copyright in compilation or database. Information recorded in a work qualifying for copyright protection may be used and re-expressed till reuse does not amount to reproduction of substantial part of it and to this extent underlying information in a copyrighted work remains in public domain.[6]

Digital technology has created considerable tension for traditional concepts of copyright law. Digital Millennium Copyright Act in the United States and

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[3]When commercialization of images from Landsat satellite in the USA was privatized, price raised from $400 to $4400 per images. Reichman, Samuelson (2001) Intellectual Property Rights in Data? http://www.eon.law.harvard.edu/h2o/property/alternatives/reichman.html. In: Colston C (2001) Sui Generis Database Right: Ripe for Review JILT3. http:// www.elj.warwick.ac.uk/jilt/01-3/colston.html. Accessed 17 Nov 2006.

[4]When many individuals have right to exclude in a scare resources, acting separately they can cause collective squandering by under utilizing it. Heller M (1998) The Tragedy of Anti Commons. Harv L Rev 111(3):621–688.

[5]Baron P (2001) Back to Future: Learning from the Past in the Database Debate. Ohio State L J 62:880.

[6]In Elanco Product Ltd v. Mandops Ltd 1980 RPC 213. Patent on herbicide expired. The defendant marketed it with an accompanying leaflet with detailed instruction as to use the herbicide. Much of the information was in public domain. The plaintiff—the original inventor alleged that the leaflet infringed their copyright in the leaflet they provided with the tin. The court granted injunction and held that defendant could not use plaintiff's skill and judgment to save themselves the trouble and cost of assembling literature.

Information Society Directive in the European Union have affected freedom of expression as it does not recognize the right of private copying.[7] The apprehension is that information published in copy protected form, without having any other source shall be effectively monopolized. ALLEA (All European Academics) expressed concern that scientific research would be affected because of the Directive as the Directive limits the access to data for research and scientific purposes.[8]

Christophe Geiger feels that the over protection offered to the copyright owner is detrimental to public interest. Due to this overprotection, the balance existing within copyright law has disappeared. According to him copyright's internal limits cannot restore this balance and it requires external solution, that is, to him human rights.[9] Copyright addresses a conflict between different interests and different fundamental freedoms. These conflicts are between interest of the copyright owner and that of the public. The conflict is about the owner's copyright and public's right to information. Christophe Geiger observes that existing copyright regime is so tilted towards publishers (originality level is brought down, term of protection has been extended, exceptions have been narrowed down) that traditional justifications are not enough to maintain the balance.[10] According to him, considering that human right is a part of the national and international constitutional law can provide better justification.

Christophe Geiger thinks that *sui generis* protection for database has the potential for monopolization of information and creating multiple intellectual property rights over same subject matter, affecting access to information.[11] This possibility arises only in cases where database is the only source of particular information. Compulsory licensing and broad exceptions will be better balancing factors. The lengthy process of litigation in case of competition law does not make a certain remedy for denial of access.[12] The possibility of perpetual protection for database right can also jeopardize the human rights in general and public's right to information in particular.

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[7]Arrest of Russian programmer on criminal charges for developing software to circumvent Adobe's copy-protection technology for digital book. http://www.epccentral.org/dmca.html. Colston, supra note 72.

[8]First Evaluation of Directive 96/9/EC on Legal Protection of Databases, Commission of The European Communities, Brussels, 12 Dec 2005, p 21.

[9]Book Review of Christophe Geiger, (2006) E.I.P.R. 357.

[10]Id.

[11]Id.

[12]Apart from high degree of litigiousness due to a legislation on competition, it only solves the problem of undue appropriation by competitors and not by users, recourse to unfair competition is available only ex post, it does not solve the problem of information Samaritan who for non-economic reason extracts data and then make it available to public for free, the legislation does not give any exclusive or transferable right and the concept of unfair competition varies from country to country. Supra note 7, at 15.

2.2 Copyright and Access to Information

Does copyright prevent free access to information? The Library of Alexandria felt that money or a lack of infrastructure was not the main problem of information in society; rather the greatest problem was copyright.[13] OECD also emphasized on reconciliation between effective IPR protection and the need for access to information.[14] The increasing perception among the academic community is that copyright hinders access to knowledge.[15] Considering the negative impacts of copyright, it is important to ensure free access to information.[16] This issue becomes more pertinent in case of developing countries. Intellectual property is justified to preserve for the authors the fruits of their work as well as to disseminate ideas. Authors are encouraged to create new works and there by contribute in disseminating new ideas. Copyright law should be drafted in such a way so as to maintain balance between protection of the author and interest of the society.[17]

'The Framers of the U.S. Constitution intend copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'[18] Principles of natural law, constitutional principles and norms of international law have influenced principles of copyright law to emerge.[19] Two conflicting but important issues are to be carefully balanced through copyright legislation—on author's side, property right and right of personality and on the user's side, freedom of expression and freedom of information.[20]

The exclusive right created by copyright works under different limitations to ensure free access to information. These are like, ideas themselves are not protected, but expressions which have originality are protected. Protection is for a limited period, protected expressions can be used if it is required in public interest, protected expressions can also be used for private purpose, teaching and research.

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[13]Geiger C (2006) Copyright and Free Access to Information: For a Fair Balance of Interest in a Globalize World. E.I.P.R. 366.

[14]OECD Report on the Scientific Publishing Industry, Digital Broadband Content: Scientific Publishing, Sept 2005.

[15]Geiger, supra note 82, at 366.

[16]Hugenholtz P (1996) Adapting Copyright to the Information Superhighway: The Future of Copyright in a Digital Era. Kluwer. In: Geiger, supra note 82, at 366.

[17]'The Congress shall have the power securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries'. Article 1, Section 8, American Constitution.

[18]Griffiths J, Suthersanan U (2005) Copyright and Free Speech. Oxford University Press. In: Geiger, supra note 82, at 367.

[19]Fundamental Rights, Universal Declaration of Human Rights, European Convention on Human Rights.

[20]Geiger, supra note 82, at 368.

These principles are recognized by international instruments like Berne Convention, TRIPS and WCT.[21]

In information society, knowledge has become a contributing factor in economy and thus attempts have been made to reserve the use of information through intellectual property right and as a result the difference between idea and expression is becoming blurred. This situation is reflected in cases of sole source database and business method patent.[22] The technical development in copying and distributing attained a new height through digital technology and it affected investors negatively as it allowed users to copy and share documents quite easily. To challenge these threats investors took resort to technical device that prevents copying and circumventing measures were considered as illegal.[23] These technical devices would not be in a position to appreciate the legitimacy of purpose and decide accordingly. Thus investors would like to regulate access through technology instead of through law.

Technology will always have effects—positive and negative. Internet being a huge source of information can play a pivotal role in education and research and at the same time Internet poses threat for fundamentals of copyright. Public domain should be defined in clear terms to include matters like essential public information, official documents and texts. States are given discretion to decide the ambit of public domain; so states should make full use of it like patentable subject matter.[24] While defining, public domain should have space to accommodate technical and social changes. The definition can also include works of social, cultural and economic importance to keep them outside the purview of exclusive right.[25] These can be sports, cultural and other events as well.

Anything corollary to the exception can also be enforced against the right holder and thus if a technical measure hinders the user from enjoying the use permitted by law, then the user can enforce that hindrance.[26] But this right is made available to only limited situations and it does not cover rights like digital private copy or quotation right. The Directive[27] provides that appropriate measure can be taken to

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[21]Articles 7 and 10 of Berne Convention, Article 9 of TRIPS, Article 2 of WCT.

[22]Geiger, supra note 82, at 368.

[23]WCT 1996.

[24]Article 27, TRIPS.

[25]Following Article 3(a)(1) European Directive 97/36 (on television)—'Member States may take measures … to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by the Member States as being of major importance for society in such a way as to deprive a substantial proportion of public … of possibility of following such event via live coverage or deferred coverage on free television'

Article 9, Convention of Council of Europe on Transfrontier Television, 1989, '…to examine and where necessary, take legal measure …… to avoid right of public to information being undermined due to exercise of exclusive right'.

[26]Section 95b(2) German Copyright Act, user is entitled to demand from the right holder support required for exercise of certain legitimate uses. In: Geiger, supra note 82, at 370.

[27]Article 6.4.

enforce functioning of limitations but no explanation has been given to describe what constitutes appropriate measure. If Articles 8[28] and 9[29] are considered to ensure access to information, it may be found that they do not constitute sufficient means to reach the objective as it all depends on the interpretation of the term 'lawful user'.[30] A careful observation indicates that the exception to *sui generis* right in Article 9 for private purpose and teaching and research allows only extraction and not re-utilization.

Reichman and Samuelson has described this as fool's gold. The condition attached to 'lawful user' is not to perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.[31] This results in affecting access to information.[32] Information which is already in public domain can be expressed in a different language as it does not put the database into public domain. Reproduction for the purpose of analyzing the design or evaluating the embodied concept, processor system has not been included in case of databases with the objective of limiting commercial uses than non commercial uses. Law can be made to prohibit technical measure which prevents any privilege authorized by law as the solution of problem in copyright lies in the copyright itself.[33]

Principles of copyright must ensure that rights of the users are balanced with rights of authors. In digital environment, private copying has not been recognized but exception has been made to allow copy for scientific purpose to ensure access to information.[34] This should be coupled with enforceable right to overcome technical barrier. Every author is a researcher and user at the first place. The author takes note of the existing literature at the time of creating work. Thus denying private copy would negatively affect the creative process of the author. Here the purpose of copy becomes important. Copy for consuming music may not be allowed but copy for producing a literary work may be allowed, knowing very well the practical difficulty of cross checking it one might require to copy a piece of music in order to get information about it and it may not be necessary that one plays the music every time to enjoy it. User's right management is more desirable than digital right

[28]The maker of a database which is made available to the public in whatever manner my not prevent a lawful user of the database from extracting and/or reutilizing insubstantial part of the contents evaluated qualitatively or quantitatively for any purpose whatsoever.

[29]Lawful user of a database which is made available to public in whatever manner may without authorization of the maker of the database, extract or reutilize a substantial part of its content in case of extraction for private purpose of the content of a non-electronic database, in case of extraction for teaching and scientific research for non commercial purpose, in case of extraction for administrative or judicial purpose.

[30]Thakur (2001) Database Protection in the European Union and the United States. IPQ 100.

[31]Article 8, Database Directive.

[32]Reichman, Samuelson, supra note 72.

[33]Geiger, supra note 82, at 371.

[34]Section 53(2)(1) German Copyright Act.

management.[35] To balance both sides private copying should be continued along with equitable remuneration which will satisfy both the author and user.

Statutory licenses can create a situation where users will not be prohibited and right holder will also get financial compensation. So every time the use of an existing work makes it possible to create a new work, a remuneration right will take birth and it will work as replacement of exclusive right.[36] It is doubted whether this arrangement will satisfy the three-step test provided by international instruments.[37] A fair user can always re-gather data and re-compile database without infringing or seeking license. This does not affect competition. The competition is not from the regular fair user but from the efficient second comer who has access to information in public domain and can offer a price competition to the first maker. This creates an incentive for the first maker to provide license at a reasonable rate. This competition will bring more efficiency to data collection and remove the fear of monopolistic behaviour from the database maker. This logic has been criticized as it does not consider the fact that recreation of database will be inefficient and uneconomic and thus there will be de facto monopoly of the database maker.[38] Moreover most of the data originate from only one source and most of the data are out of public domain which leads to a situation where there will be more restriction than access to free information.

Copyright should not hinder access to information but rather promote it and it has to be achieved by balancing different interests. Instead of increasing sanction, law should be made acceptable which is possible in case of copyright only when it does not deviate from its objective. As books are build on preceding books, creation of new information rely on preceding collections. Database protection should treat this development as priority, particularly within the context of scientific and educational research.

International Council of Science prepared principles for addressing restrictions in using scientific databases.[39] Technological changes can always influence collection of information. Sometime technology can make competition very easy by creating a state of inadequate protection and sometime it can create over protection,

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[35]Geiger, supra note 82, at 371.

[36]Geiger, supra note 82, at 371.

[37]Article 9 Berne Convention, Article 13 TRIPS, Article 10 WCT, the limitation to exclusive right—1. must qualify as special case, 2. should not conflict with normal exploitation and 3. should not unreasonably prejudice the interest of the right holder.

[38]Thakur, supranote 99, at 100.

[39]Celera Genomics database of the Human Genome published in Science magazine at the HUGO Satellite Meeting 'Intellectual Property and Related Socio-legal Aspects of the Human Genome Project', University of Edinburgh, 23 Apr 2001. Licenses must be secured for the extraction of sufficient data to perform any of the named and necessary computations, evaluations or enhancements of the data that would be considered the norm in computational genome biology. Though this relates to contractual protection for a database, in an environment where free access to full information was expected for the benefit of all, the effect of such guarding of a database may be seen to illustrate the fears of researchers and scientists. http://www.codata.org/codata/data_access/principles.htm. In: Colston, supra note 72.

especially in case of sole source data provider. It cannot only raise the prices but also can prevent access to information completely. The State can intervene in these cases to offer access to these databases which have become building blocks of knowledge.[40]

The future of access to information is threatened as de facto monopoly over data becomes increasingly realistic. It has been observed that result of cases like Feist[41] and Tele-Direct,[42] which can prevent others from appropriating information in a compilation of facts would limit the ability of later authors to build upon earlier works. This would affect the progress in both arts and sciences.[43] As IPRs can consolidate monopoly and can affect efficiency and welfare, intellectual property regime must have adequate space for public policy arrangements like protection of competition, which can limit the abuse of monopoly and promote dissemination of knowledge. It has been apprehended that sooner or later all commercially valuable information will end up being protected as part of databases.[44]

Any attempt to incorporate a regime in the line of the Database Directive should be carefully studied so that its influence on access to information which is a key component for social and economic development in the new global scenario is not affected. It has to be remembered that public sector supplies information for free of charge or with little consideration and sometime this information may be related to metrology, agriculture, hydrography, demography, health, cartography, geology, environment etc. Sometime local users consumes localized databases and local users consume information in foreign databases.

Creation of new IPR in databases can create a danger in disturbing the balance between protection and dissemination and it will lean towards protection. Over-protected database regime would not create new ideas or goods but rather it would protect investment in collation and arrangement which is against the traditional objectives of IPRs, indirectly suggesting that IPRs are to encourage economic activity. Prof. Hugenholtz observed that in most of the European countries, database right had been categorized as a neighbouring right but from an economic perspective it was an understatement as he believed that potential anti competitive effect of the database right on the information market was much more than that of copyright or neighbouring right.

The monopoly created by copyright leaves unlimited alternative forms of expression to unlimited number of authors but the database right creates monopoly that is difficult or even impossible to invent around and thus confers significant market power. Cases where databases are the only source of information, it might

[40]Reichman, Samuelson, supra note 72.

[41]499 US 340 (1999).

[42](1997) 154 DLR 4th 328.

[43]Denicola R C (1981) Copyright in Collection of Facts: A Theory for the Protection of Non Fiction Literary Work. Colum L Rev 81:516.

[44]Maurer, Scotchmer, supra note 71, at 789.

result in a near—absolute downstream information monopoly.[45] On the other hand creating private property rights in intangible assets will not inevitably create commercial and social problem. Private property coupled with monitoring and supervision can create a balance between commercial market and public domain.

If it is socially desirable to encourage database protection, it is also socially desirable that information and ideas remain in the public domain. If facts and ideas remain accessible to consumers and competitors then more informational goods will be produced and eventually that will increase knowledge. It is an established principle in copyright law that protection of private interest should not block access to information.

Copyright protects expression and not idea, so ideas will not be monopolized. The *sui generis* law for protection of databases concentrates more on competition policy rather than promotion of culture. Thus it does not give more emphasis on public access. Digital technology influences databases in two ways—1. technology makes piracy of databases relatively easier and justifies a stronger protection, 2. technology helps the database maker to control access of user, track unauthorized access and charge for every sort of use of database and thus makes access to databases more difficult.

Kreiss observed that accessibility required two important features—users of work must be able to obtain a physical copy of the work and ideas and expressions must be available in human understandable terms.[46] Copyright protects original work of authorship and idea becomes work when it is reduced into writing in any medium through any material form. Ideas are so incorporeal that it does not take the shape of property but expressions are very well stand as property.[47] Idea-expression concept offers consumers a number of expressions of one ideas and that increases access to knowledge. Digital dilemma has created a combination of promise and peril as it improved access to information through technology but the same technology has created a hurdle to get access to information and thus the gap between information rich and information poor has further increased.[48]

2.3 Copyright and Free Speech

Copyright does not restrict free speech as it offers the author the exclusive right to specific expression and it does not protect the idea and also it permits fair use of the expression.[49] The Copyright Term Extension Act 1998 extended duration of

[45]Hugenholtz B (2004) Abuse of Database Right—Sole Source Information Bank under the EU Database Directive, Conference on Antitrust, Patent and Copyright, Paris, 2004.

[46]Kreiss R A (1995) Accessibility and Commercialization in Copyright Theory UCLA L Rev 43:1.

[47]Yen A C (1990) Restoring the Natural Law: Copyright as Labour and Possession. Ohio State LJ 51:517.

[48]Cohen J E (1998) Copyright and Jurisprudence of Self Help. Berk. Tech LJ 13:1089.

[49]Eldred v. Ashcroft 537 US 186.

copyrighted works by 20 years period. The United States Supreme Court held that the Copyright Term Extension Act 1998 was not unconstitutional as it did not restrict free speech.[50] The copyright patent clause of the US constitution provides,' Congress shall have power to promote Progress of Science and Useful Arts by securing to Authors for limited times the exclusive right to their writing'.[51]

US Supreme Court in Eldred v. Ashcroft[52] did not find anything in the text and history of the constitution which prevents limited term of copyright being extended by another limited term. The word 'limited time' in copyright clause does not mean inalterable but rather it means confined within certain limits. So extension of copyright term by 20 years which was confined within certain limits did not violate constitutional mandate. The benefit of the extension of copyright term was given to existing and future work, so that all of them could be governed even-handedly.

In 1993 European Union extended copyright term to life plus 70 years and made a provision not to allow this extended protection to the works of non-EU countries who did not offer similar extended term. So for the interest of reciprocity, the copyright term extension was justified. The extended term of protection would encourage more investment in creating more copyrightable works. Copyright Term Extension Act 1998 did not change the contours of copyright. The First Amendment secures freedom to make or decline to make one's speech. Thus the First Amendment of Copyright Term Extension Act 1998 is unwarranted.

Justice Breyer in his dissenting judgment in Eldred v. Ashcroft[53] quoted from Walterscheid[54] 'the economic effect of this 20 year extension—the longest blanket extension since the Nation's founding—is to make the copyright term not limited but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates or corporate successors. And most importantly, its practical effect is not to promote but to inhibit, the progress of 'Science'—by which word the Framers meant learning or knowledge'.

Even the personality approach can justify extension of copyright protection by inclusion of adaptation works but it may suffer difficulty in including work of information as personality in low authorial information works is less than apparent and thus does not qualify for copyright protection. The personality approach also expanded the scope of copyright protection by liberating it from any particular form and thereby allowing work irrespective of form to come under copyright protection.

But the question still remains whether copyright at all should protect functional, commercial works as the Court denied copyright protection to price catalogue of bathroom fixtures in J.L. Mott Iron Works v. Clow[55] and observed 'We discover

[50]Id.

[51]Article 1, Section 8 cl 8, US Constitution.

[52]Supra note 118.

[53]537 US 186.

[54]Walterscheid E (2000) The Nature of the Intellectual Property Clause: A Study in Historical Perspective. William S Hein & Co., p 125.

[55]82 F. 316 (7th Cir. 1897).

nothing original in the treatment of the subject, it is merely the picture of the bath tub in ordinary use…The question, therefore which confront us is, were such things intended to be protected by the constitutional provision in question? The object of that provision was to promote the dissemination of learning, by inducing intellectual labour in works which would promote the general knowledge in science and the useful arts. It is not designed as a protection to traders in the particular manner in which they might shot their wares. It sought to stimulate original investigation, whether in literature, science, or arts, for the betterment of the people, that they might be instructed and improved with respect to those subjects'.

2.4 Copyright and Incentive for Investment

The value of information in the commercial world is well understood and the informational works well fit into the principles of copyright law as it protects works like directories, calendars and statistical reports. If these works are valuable enough to be the target of piracy, they should be important enough to be protected. Commercial value of low authorial works can support justification for copyright protection. In Bleistein v. Donaldson Lithographing Co,[56] Justice Holmes observed 'if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value and the taste of any public is not to be treated with contempt'.

According to Justice Holmes, copyright can be awarded to both works with creative value and with commercial value. There can be two complimentary rationales for copyright protection—copyright protects against appropriation of both authorial personality present in a work and the labour and resource invested in it. When right in derivative work borrows justification from personality theory, the same cannot support low authorial work and the labour theory can support the hard work of second comer who adds his own labour to existing information to claim copyright. 'The doctrine of new and different use which permit copying of information in illustration of new and original proposition or for any other purpose not substantially the same as the plaintiff's use. There is no recognized principle which will prevent a subsequent compiler from copying common material from an existing compilation and combining them in a new form or using them for a different purpose'.[57]

In high authorship work, right to control adapted versions flow from personality right of self determination, that is to control manifestation of himself in various forms. Statutory expansion does not any more support a similar claim of hard work by a second comer in case of dramatization or translation works. The continuing

[56]188 U.S 239 (1903).

[57]Drone E S (1879) A Treatise on The Law of Property in Intellectual Productions in Great Britain and The United States. Little Brown & Co., Boston, p 424.

emphasis on protection of author's labour and investment in the making of informational works reflect the influence of expanded scope of high authorship copyright and along with that diminishing effect of new toil defense by the second comer in case of low authorial work is also reflected. This is closely linked with the existing standard of technology as when mere copying is costly and time consuming, addition of independent material to existing material can justify as significant contribution but the same may not be true if technology makes copying more simple and an easy job. As reproduction and dissemination of information became cheaper and faster, ability of the second comer to compete with the initial compiler increased.

The new technology helped the second comer to save time and money by copying the previously compiled information and thus pressure increased to protect information. With this faster and better means of copying, the quantum of copying leading towards infringement has been reduced. The new copying and distributing technology may force the Court to stretch copyright protection for low authorial work even to non-competing appropriation.

The modern view regarding copyright principle supports more the personality concept of original authorship rather than labour theory. The Courts may like to extend copyright protection to low authorial works depending on uniqueness of selection and arrangement. The reluctance of the court in this regard is mainly due to threat of monopolizing the facts and thus copyright protection often emphasizes on the need for keeping data free. Two other factors which influence the decision in these cases are economic harm of the first compiler and opportunity to reprimand the free rider. The new technology helps copying and developing derivative works in such a way that scope of copyright protection for low authorial works becomes very limited and can offer very little protection in a meaningful manner.

The United States Copyright Act 1909 mentioned directories, gazetteers and other compilations as categories of works register-able for copyright.[58] But 1976 Act removed specific mention of directories and gazetteers and added 'copyright protection subsists in original work of authorship'. Compilation was defined as works formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.[59]

It turned out to be original work of authorship included compilations if compilations as a whole constituted an original work of authorship. The emphasis was on original authorship which was not defined by statute but discussed through judicial decisions which created more controversy than clarifying it. As a result original authorship could cover a wide range of low authorial works—those whose investment of labour justified protection and those whose selection and arrangement justified protection.

[58] 17 U.S.C. Section 5(a).

[59] 17 U.S.C. Section 101.

The Second Circuit Court denied copyright protection to index card reporting daily bond information where the gathering of information for the card was a simple clerical work and required no exercise of judgment.[60] The Court rejected the grant of copyright on the basis of sweat of the brow doctrine as it felt that it would threaten public's access to information as it would guard a large amount of factual research materials. The logic of the Court's argument here (threatening public's access to information) indicated the effect of copyright or scope of copyright protection whereas the issue involved was copyright-ability of index card. Here if the index card was protected from verbatim copying, that would not prevent others from acquiring the same information elsewhere or using this information in different works.

The Court indicated that had they copied the volume in which daily bond cards were bound and infringement might have been found. Thus it appeared that without wholesome appropriation, sweat would not merit copyright protection. In other words it became that copyright ability of sweat would depend on extensiveness of copying. But copyright-ability and infringement should be dealt with separately as a work should be either copyrightable or not but it should not depend on the wholesale copying.

Professor Goreman observed 'Court should resolve the problem of full copyright protection under the rubric of infringement and fair use rather than of copyright-ability. This in turn will offer greater flexibility, enabling the court to label as infringement those works which interfere with the monopoly of the copyright holder without bringing a commensurate benefit to the public…'.[61]

Sweat is a strong argument for original authorship but should the personality concept be considered exclusively for the purpose of authorship? It is possible that considering the technological development sweat for informational work has in fact become a very little endeavour and hence loses the justification for copyright protection. This argument does not in any way affect labour intensive work of authorship. This technological superior position has not only challenged copyright-ability of low authorial work but also raised doubts about the maker of compilation. Who should be the author of computer assisted database—maker of the software who assists the database or the person who takes initiative to make the database?[62]

The problem of substantial labour pre-requisite for copyrightability is the assessment of quantum of labour that justifies copyright protection. How much of labour is required? And whether all labour is to be treated alike or there are some efforts which generate more sweat than others. A work by work analysis will require the court to differentiate between works which genuinely generates more

[60]Financial Information Inc. v. Moody's Investors Serv. Inc. 808 F 2d. 204 (2nd Cir. 1986).

[61]Gorman (1963) Copyright Protection for the Collection and Representation of Facts. Harv L Rev 76:1569.

[62]Samuelson (1986) Allocating Ownership Right in Computer-Generated Works. Univ Pitt L Rev 47:1185.

sweat and socially useful work like map created from original survey, for which copyright incentive is presumed to be essential and works which are collected rather easily such as maps created from data collected from variety of published sources, for which copyright would arguably be superfluous.

The social benefit theory justifies copyright protection by noting that social benefits will not follow in the absence of copyright. Address list, law reports, maps remains to be as useful as it was in the last century and as they are socially beneficial even today, copyright in these works should continue as it was in the last century. Even if court could indicate criteria to decide on social value, the standard cannot be predictable. No doubt the question will still remain whether copyright is the most appropriate means to ensure production of these works.

In case of compilations, there shall be many subjective choices regarding selection and arrangement. Like selection of stocks which will be representative of market trends, is completely a subjective choice. This selection and arrangement is a reflection of personality. The arrangement of materials can point out the selector's idea about a theme and his treatment of the theme. Like several law schools have their case books on different subjects, these case book may contain similar cases but the detailed table of contents of case books will be different and will represent the characteristics of the respective compiler. The structuring of chapters will reflect the perception of the editor of the case book. In case of database there is one more problem which is the nature and utility of database.

For a database, comprehensiveness is more important than selection and arrangement and thus the attention of the database maker is on making the database exhaustive and not goes for any unique style of selection. Moreover each researcher wants to exploit the data of a database in different fashion depending on their research focus, which makes it more logical to make the database more exhaustive rather than based on any particular selection criteria. With so much of subjective element in the preparation of informational work, the authorship of it becomes very evident and can call for personality concept in support of justification along with labour and social benefit theory.

Copyright protects against copying. There may be three types of copying so far as low authorial informational works are concerned—1. Close copying of all or substantial portions of the work in preparation of a competing work, 2. Use of work as a starting point to save a competitor time, money and effort, 3. Reproduction of substantial element of information in the creating of a different but not directly competing work.[63]

The 1976 Act precludes certain work of authorship from copyright protection like idea, procedure, process, and system, method of operation, concept, principle, and discovery, regardless of their form of expression.[64] Considering this exclusion, the first type of copying (full or substantial work) will cause infringement but the

[63]Ginsburg (1990) Creation and Commercial Value: Copyright Protection of Works of Information. Colum L Rev 90:1903.

[64]Section 102(b).

second type of copying (using as starting point) will be considered as consultation of the work and will not be considered as infringement and the third type of infringement (reproducing information only) will be considered as re-manipulation of data and will not be considered as infringement.

The issue of infringement is decided after considering the originality of copied portion in such a way that more original the copied material, the more protection it will deserve. But in case of facts, as it falls within the excluded group, so it will never be protected however original it may be. In low authorial work, form of original is so minimal that there shall not be infringement unless the whole work is virtually copied. The labour approach to originality may change the perception. If the second comer uses the work only as starting point and second work is not a copy of the first one, even then it can be a case of infringement on the ground that the first work is a product of labour of the first author.

The situation of the third type of copying is placed in a better position as it adds a lot of its own material along with material taken from the first comer and it does not create a competing work. This also gets support from social benefit theory as the society gets new combinations of information and thus it contributes to the promotion of knowledge indirectly. In determining infringement thus, both high labour work of the first author and low or negligible labour work of second author become important criteria.

The Court will keep it in mind that although the defendant has invested his labour but the fact that he copied portions of plaintiff's work, the defendant has spared him from putting the labour to that extent. 'Directory Services Co. tells us that it did not infringe because its agent too was industrious. This is irrelevant. The infringement comes from the fact that Directory Services copied Rockford Map's output, not from the fact that it ended with a different plot map.

The second map at issue contained all the same information as the plaintiff including planted errors and did not add any new information'.[65] Re-manipulation of data is discouraged to secure the investment of the first compiler, though it may go away from the conceptual framework of the copyright law. 'If the compiler's protection is limited solely to the form of expression, the economic incentives underlying the copyright laws are largely swept away….Moreover given the manner in which information is stored in automated electronic compilations, an emphasis upon arrangement and form in compilation protection becomes even more meaningless than in the past'.[66] The danger of this argument is that it does not consider copyright protection in forms and arrangement and recognizes commercial value of gathered facts and thereby it rejects the personality based approach of authorship.

In case of high authorship works like biographies and news reports Court observes goal of copyright law in a different manner. 'The protection accorded to the copyright holder has never extended to history, to be documented facts or

[65]Rockford Map Publishers Inc. v. Directory Services Co. 768 F2d. 145 (7th Cir. 1985).

[66]National Business Lists Inc. v. Dun & Bradstreet Inc. 552 F.Supp. 89.

explanatory hypothesis….The scope of copyright in historical account is narrowed indeed, embracing no more than the author's original expression of particular fact and theories already in public domain…There can be no copyright in the order of presentation of the facts, nor indeed in their selection'.[67] The strength of protection grows in inverse proportion to the amount of personal authorship.[68] Thus more the history books exposition of fact looks like telephone book, the more protection the information receives. In case of high authorship information work like historical document, it has literary value independent of the information contained in it but in case of low authorial information work like telephone book, the basic value is a source of information.

Copyright should not only be concerned about authorial personality but also investment protection in case of information of commercial value. The principles need to be re-examined on the basis of existing technology. If computer can copy and reorganize information, failure to protect information will deprive meaningful incentive to the compiler.

Incentive model presumes that copyright is needed to prompt authors to take up creative labour.[69] Personal authorship becomes irrelevant in an inquiry into incentives.[70] If copyright's role to create incentive then copyright should be given only when incentive is required and the burden of proof is on the author to demonstrate that he needs incentive and thus should be given copyright and protection may be created. 'Glory is the reward of science and those who deserve it scorn all meaner views, I speak not of the scribblers for bread, who teases the press with their wretched productions. …It was not for gain that Bacon, Newton, Milton, Locke instructed and delighted the world, it would be unworthy of such men to traffic with dirty book sellers for so much as a sheet of letter press. When the book seller offered Milton five pound for his Paradise Lost, he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as a reward for his labour, he knew that real price for his work was immortality and that posterity would pay it'.[71]

Landes and Judge Posner felt that some protection was appropriate but inquired how much protection would wield the greatest production of works from the first and second author.[72] This maximizing author's return is not necessarily creating a monopoly over the work. 'The economic philosophy behind the clause (Constitution's copyright clause) empowering Congress to grant patent and

[67]Hoehling v. Universal City Studios Inc. 618 F.2d 972 (2nd Cir. 1980).

[68]Gorman (1982) Fact or Fancy? The Implication for Copyright. J Copy Soc 560.

[69]Gordon (1989) An Inquiry into the Merit of Copyright: The Challenges of Consistency, Consent and Encouragement Theory. Stan L Rev 41:1343.

[70]Yen, supra note 116, at 517.

[71]Lord Camden (1774). In: Ginsburg, supra note 132, at 1908.

[72]Landes, Posner (1989) An Economic Analysis of Copyright Law. J Legal Stud 18:325.

copyright is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare'.[73]

Landes and Posner while addressing the author's economic interest in control over derivative works observed that scope of copyright monopoly extends beyond mere reproduction to comprehend the various ways in which a work may be recast or transformed.[74] Hardcover sales of a book may not generate enough revenue to recoup its advance but subsidiary right may prove to be real source of income. This economic analysis of derivative work is not only applicable for high authorship work but it can also be for low authorship work of informational product. Investment for creating directory may be discouraged if the scope of protection does not cover the full value of work. The value of directory can be extended to rearranging or creating sub directories. As re-manipulated compilation may be a copyrightable work, so if control over copyright is awarded to the author of the derivative work rather than to the first author, the exploitation of the derivative work can interfere with exploitation of the first work.

A directory arranged by address may not affect the sale of a directory arranged by address if they operate in two different works. But if they operate in same market each can pose potential to undermine other's market as a third party can reverse engineer directory arranged by address to create another competing directory arranged by name. This cannot be termed as infringement, although copying a name directory to produce another name directory may affect reproduction right. Copying a derivative work (address directory) to create another name directory is like acquiring information from public domain and which cannot be objected. Copyright in re-manipulation does not make sense if a third party can revise a name directory and create address directory to compete with the original address directory.

This economic argument can be made to protect low authorship informational work against re-manipulation but the possible impact is that it can affect the other copyright principle of not protecting data itself.[75] 'By limiting potential rewards in the copyright market….by refusing to extend copyright to new uses…the entrepreneurial calculus which precedes risk taking in authorship and publishing is shifted in the direction of not taking a chance, i.e., not writing or publishing a risky work whether ideologically or economically risky'.[76]

It will be interesting to find out whether fact-expression dichotomy has the same role in the copyright law as idea-expression. Protection of idea depletes the universe of themes and subjects about which people are expected to write, compose and design. If idea-expression dichotomy is applied strictly, it restricts the scope of protection of computer program as it denies effective coverage and thus calls for a

[73]Mazer v. Stein, 347 US 201 (1954).

[74]Landes, Posner, supra note 141, at 353.

[75]Hurt, Schuman (1966) The Economic Rationale of the Copyright. AMEco Rev 56:435.

[76]Ladd (1983) The Harm of the Concept of Harm in Copyright. J Copy Soc 30:421.

sui generis protection for computer program where some amount of idea can be protected.[77]

Copyright's goal of encouraging and enabling both first and second author to create and disseminate useful works depends on how the first author presents the fact and how the second author uses them. Facts contained in works of high authorship can be treated as part of public domain as they become inseparable from the second author's worldview and becomes necessary building blocks for second comer's subsequent creations. 'It would be unlikely for an author to make inadvertent use of directory listing because we do not normally learn the contents of directories…Protection of the facts in plaintiff's directories…did not prohibit defendants from consulting the same pre-existing sources that plaintiff had consulted. As a result plaintiff's copyright did not remove facts from the public domain, it simply prohibited a single albeit more efficient route to unearthing them'.[78]

It is difficult to substitute idea-expression concept with economic value criteria. Thus it becomes extremely important what is characterized as expression, so that the remaining portion can be termed as 'idea'. Fact-expression concept makes sense in case of a work like narrative history. Here limiting extent of copyright to the first author's subjective contribution allows the second author to account for all sources and also offers the first author extensive protectable material through selection, arrangement, description and evaluation of facts. In case of low authorial work, if the first and second work operates in the same market, the second comer's free reuse of the first compilation, does not advance public access but discourages the production of these works. If the second comer competes with the first one, the public will not make any gain of knowledge but the incentive of first compiler will be compromised. Even if the second comer exploits different markets, if there is a possibility that the first compiler may exploit that market by repackaging the product, then also the interest of the first compiler is weakened.

Reliance to incentive alone may turn out to be counterproductive. Maximum incentive can be offered only by creating exclusive control over any recombination made out of information contained in a compilation. The effect of this is to cut-off public access to new informational works if there is no mechanism to force the first author to grant licenses. The term of copyright is such a long period that if an informational work is blocked for such a long time, that itself can cause serious injury to the content of public domain. Balancing between commercial value of low authorial compilation and promoting creation of and access to wide variety of informational works is a challenge to the copyright law.

The scope of copyright protection has grown from mere reproduction to public performance and derivative right as copyright accommodated not only print media but also photograph, motion pictures, sound recording and computer program.

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[77]Menell (1989) An Analysis of the Scope of Copyright Protection for Application Programs. Stan L Rev 41:1045.

[78]Litman J (1990) The Public Domain. Emory L Rev 39:965.

Copyright protection in factual compilation can be extended to include re-manipulation of information by extending derivative work to low authorial information work and by creating a different kind of copyright for low authorial informational work which will necessarily combine authorial presence, labour and investment as justification. Along with this if the scope of infringement is limited to selection and arrangement in a factual compilation, considering the high level of technology; it will compromise the interest of the compiler.

In the absence of copyright protection, copying can be prevented to some extent by protective contract. In case of online services, keeping track of copying is possible but otherwise it is a difficult proposition. It is more difficult for the information provider to make out whether the copy of information is for private use or for resale or repackaging of information. It is possible for service provider to charge a high price to cover uncompensated resale of information. If the information is provided through free standing mode like CD ROM, then securing payment for copying becomes all the more difficult. Copying from print media is virtually impossible to keep track of as no professional photocopying establishment, office, libraries keep track of what is being copied and hardly people take permission from publishers to photocopy informational works.[79] So it can be observed that individual supervision of the fact of copying on behalf of proprietors is difficult.

In this situation, collective administration (like Copyright Clearance Center) of right can offer some benefit to the proprietor. But generally the right licensed is the right to reproduce and not the derivative work right. The information provider may try to secure control even after the delivery by obtaining acquirer's consent not to reuse the information without the permission of the provider or without paying royalty. Even without copyright, the information can reach to the hands of the third party through unauthorized access or hacking. To address a solution, anti-copying device is not an alternative as private users need to copy databases. If resale of information is considered to be a problem then in some cases due to nature of information, such as stock exchange information, old information which do not have much market. Thus for such information, resale is not a problem. It has been observed that privatizing information through contract, encryption and similar devices may carry greater individual and social costs than would a copyright system.[80] If the author expends more in protecting information than in gathering information, it will compromise with the quality of collection. The greater protection cost will deter the author from entering the market.

Landes and Posner have argued with respect to copyright law that beyond some level copyright protection may actually be counterproductive by raising the cost of expression and thereby cutting off the production of new and different works. Full copyright protection for compilation of data which allows the author to prevent any kind of copying, may turn to be counterproductive, as subsequent compilers under

[79]Liebowitz (1985) Copying and Indirect Appropriability: Photocopying of Journals. J Pol Econ 93:945.

[80]Kitch (1980) The Law and Economics of Rights in Valuable Information. J Legal Stud 9:683.

this protection can start from the scratch by going to the source and then get full copyright over their compilation. If the second comer is not willing to start from scratch, he is free to negotiate with the first compiler for a license to copy and re arrange. This may give an opportunity to the first compiler to charge a prohibitively high price for recombining data. Even the first compiler may refuse to grant license as he has no obligation to grant license. Sometimes the first compiler refuses to grant license as he wants to come out with a derivative work in future. The first compiler may refuse the license if the second comer wants an exclusive licensee.

Collective licensing may prove to be effective in such situations as it assists both copyright owners and users and it has been proved to be effective in case of performing rights and to some extent in cases of photocopying. Collective licensing tries to balance between transaction cost and greed of licensors and it offers equal access to data. Collective licensing tries to reduce the transaction cost and thereby facilitates access to data by deciding the fee on the basis of the capacity of the user and not on the nature and quantity of material copied. It is true that the justification for compulsory licensing is transaction cost but it does not mean that if this transaction cost does not exist, owner of copyright will be willing to license his work to all who like to use his work as copyright is based on the right to exclude others from exploiting the work protected by copyright.

The more important purpose of compulsory licensing is to nullify the effect of monopoly created by owner of copyright, by compelling the owner to make the work accessible to interested people. It is also true that through fair use defences, work may be accessible to people but the difficulty is that it does not allow anyone to determine ex ante what can be copied and to what extent, as fair use is a very fact specific defence.[81] If in a given legal regime, no protection is available for informational works; compulsory license will help to make the information available for exploitation. Thus compulsory licensing will be effective both for under protection of informational work (where the work is held to be not original or protection is available only for selection and arrangement) overprotection of informational work (where re-manipulation of information is inducted). Compulsory license can be effective tool in balancing between protection and dissemination.

If a compulsory license regime is proposed for informational work, it can even absorb the effect of reintroducing the sweat or investment concept, i.e., protection for gathering information and the effect of introducing that copyright extend to protection of information also. This proposed change should come with the criteria that protection should be available only if informational work has been publicly disseminated, considering the objective of copyright law is to disseminate works among public. It is equally true that incentive to produce is not necessarily incentive to disseminate as copyright law not only protects published work but also unpublished work.[82]

[81]Fisher W (1988) Reconstructing the Fair Use Doctrine. Harv L Rev 101: 1661.

[82]Swanson (1988) The Role of Disclosure in Modern Copyright Law. J Pat & Tra Off Soc 70:217.

The compulsory license can replace contractual protection in cases where other means of protection are too costly and the owner is willing to disseminate the work among the public. The compulsory license is effective for promoting public dissemination of new compilation based on prior information and thus it is not only offering compensation but also removing control over derivative work. It has to be remembered that in case of confidential information, compulsory license does not work as it goes against the purpose of confidential information.

Compilations which are not yet disseminated into public or which are still in gestation period, compulsory license is not effective as it undermines the goal of encouraging creation of new informational work by discouraging the compiler to take advantage of releasing the work first into the market. The compulsory licensing can be effective in creating opportunity for third parties for coming out with competing compilations. It has to be remembered that the compulsory licensing can operate for right to create derivative work but not for right of reproduction. But in this process the producer is deprived of the right to prevent copying and reshuffling of data in creation of different databases.

The compulsory licensing does not offer right to sell, lease, and transfer or reproduce the original copy. Here it can be mentioned 'slipping' is different from reproducing as 'slipping' refers to copying by reference where the second comer contacts all whose name is found in the first compilation and takes permission to include them in the second compilation.[83] Although in essence, it creates a competing compilation but the process involves something more than copying. It can be observed that 'slipping' stands in between derivative work and reproduced work. Often the social benefit arising out of open production of identical work gets overshadowed by disincentive which follows from that. If it is found that policing of right of reproduction is so expensive that lower return from compulsory license is more than the negotiated price minus enforcement cost, then compulsory license can stand as superior incentive.[84]

In Blestein v. Donaldson,[85] Justice Holmes paired personality and commercial value concept together and declared that 'individuals are not free to copy the copy of an original work' and as argument he placed 'even a copy is the personal reaction of an individual upon nature'. Although the earlier view condemned copying the copy as it compromised first author's laboriously earned property but Justice Holmes argued 'copying also misappropriated some aspect of author's personality'. According to Justice Holmes, under copyright, a work can be protected because it embodies the author's personality and also it represents a commercial value.

Copyright respects both—original personal imprint of the author on the work and investment of labour and resources. The high and low authorship work does not much differentiate on the issue of copyright status but on the scope of protection. The copyright owner of high authorship work is entitled for compensation for

[83]Ginsburg, supra note 132, at 1931.

[84]Ginsburg, supra note 132, at 1932.

[85]188 US 239 (1903).

derivative work and at the same time can have control over the work as it reflects the personality of the work. But in case of low authorship work which does not reflect personality of the author, there is no justification to have control over the derivative work.

The availability of compensation through licensing can prove to be more attractive to the producer of the compilation than insecurity of litigation but license can offer only compensation but no control of the derivative work. The compulsory license creates an opportunity to get reward for the initial producer's investment of labour and capital and also allows subsequent compiler to exploit information without incurring the cost of independent generation of the same data.

2.5 Requirement of Originality in Copyright Law

Intellectual property rights are seen as system of incentives intended to promote the creation of new objects, knowledge and ideas, so as to grant monopoly to its creators to allow them to secure income from commercial exploitation of their creations as Jeremy Bentham observed the usefulness of the limited monopolies to encourage production of things. Thomas Jefferson emphasized on the social benefits of free dissemination of ideas—'If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself, but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses whole of it……That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them like fire, expansible over all space, without lessening their density in any point and like the air in which we breathe….incapable of confinement or exclusive appropriation'.[86]

The main points on this issue remains—1. Knowledgeis 'non-rival' goods, means consumption of which by a person does not limit access or use by other consumers, 2. Once knowledge has been disseminated, it becomes difficult or impossible to prevent in absence of a legal barrier, others from using it who does not wish to pay, 3. Free dissemination of knowledge is beneficial to society as it contributes in creation of new knowledge, 4. Intellectual property rights are temporary monopolies that are granted in exchange for creation of new things.

Copyright or so called right to print and publish was developed in mediaeval England. With the advent of printing press, the art of publishing became very

[86]Devid P A (2002) Does the New Economy Need all the Old IPR Institutions? Digital Information Goods and Access to Knowledge for Economic Development, WIDER Conference for the New Economy in Development, Helsinki, 2002. In: supra note 7, at 7.

popular. The King asserted control over publishing to control formation of dissent and influencing public opinion. By royal charters and letters patent, authors or printers were granted the privilege to publish and import. This was followed by establishment of Stationers' Company and book seller's monopoly was continued with it. Statute of Anne was enacted in 1709 to secure the rights of authors as its preamble suggested 'An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchaser of such Copies, during the Times therein mentioned'. The preamble also echoed the objective of preventing printers and book sellers from publishing 'Books and other Writings without Consent of the Authors and Proprietors …. to their very great Detriment and too often to the Ruin of them and their Families and for encouragement of learned Men to compose and write useful Books'.

The creation of a statutory copyright raised the issue whether copyright under common law still existed after the enactment of the statute. In Donaldson v. Beckett[87] it was held that with the passing of Statute of Anne, common law right and remedies of the author no longer existed and were governed solely by the statute. The nature of copyright is such that there must be as embodiment of the work. It is not sufficient that the work be in the mind of the creator. Some early statute of copyright described the subject of copyright as new and original.[88] The Copyright Act 1911 confirmed that work in respect of which copyright is claimed must be original.

The question that remains is that in what sense must the work be original? Work will lack originality if it is copied from another. This does not mean that the subject matter should be new as required in patents. It is essential that the work is created by the author. Is it necessary that the author must expend some intellectual effort to get protection? Is it sufficient for copyright that the author exerts labour and incur expenses? Whether industrious gathering and listing of data qualify a work to be original or it requires some additional elements like selection or arrangement. It is an elementary principle of copyright law that there can be no copyright in fact as the author may record a fact but does not create the fact.

From the beginning, the purpose of copyright is public welfare. It recognizes need of Enlightenment—'the encouragement of learning'.[89] Hugh Laddie observed, 'The whole human development is derivative. We stand on the shoulders of the scientists, artists and craftsmen who preceded us. We borrow and develop what they have done, not necessarily as parasites but simply as the next generation. It is at the heart of what simply we know as progress. When we are asked to remember the Eighth Commandment, 'thou shalt not steal', bear in mind that borrowing and developing have always been acceptable'.[90]

[87](1774) 1 ER 837.

[88]Telstra Corporation Ltd. v. Desktop Marketing Systems Pvt. Ltd 2001 FCA 612.

[89]Patterson L R (1968) Copyright In Historical Perspective, p 147.

[90]Laddie H (1996) Copyright: Over-strength, Over-regulated, Over-rated? EIPR 5:253.

The US constitution mandate is based on this principle.[91] TRIPS[92] and WCT[93] also recognize this principle. The concept of copyright is based on the premise that to protect public interest, private enjoyment of work should be considered as privilege and to be continued with, considering it as social obligation of copyright.[94] Copyright is designed to protect originality or in other way skill, labour and judgment involved in a work. Access to copyrighted work is recognized as permitted work and idea-expression dichotomy is treated as integral part of the issue.[95]

In Bleistein v. Donaldson Lithographing Co[96] Court rejected the argument that copyrightable work must rise to some level of aesthetic merit and observed 'The work is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in the hand writing and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the word of the act.' Locke observed that every man has a property in his own person. So anything created by labour of his body or work of his hands, belong to him as one owns the fruit of one's effort.[97] The right to one's personality both transcends property and perhaps somewhat contradictorily is embraced within the right of property in its widest sense.[98]

> The principle which protects personal writings all other personal productions not against theft and physical appropriation but against publication in any form is not the principle of private property but that of an inviolate personality. The right of property in its widest sense, including all possession, including all rights and privileges and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.[99]

Let us find out if there is difference in scope of protection between personality based concept and labour based concept of copyright law. Both the approaches would not consider laboriously prepared variation of existing work as infringement.

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[91]U.S. Constitution, Article 1, Section 8, cl. 8.

[92]Article 7—'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations'.

[93]Preamble—'Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information as reflected in the Berne Convention'.

[94]Zimmerman D L (1994) Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water. Ann Surv Am L 403.

[95]Section 29, Copyright, Designs and Patents Act 1988, Article 10, TRIPS.

[96]188 US 239 (1903).

[97]Locke J (1955) Second Treatise of Civil Government, Gateway, Chap. V, Section 27. In: Hughes (1989) The Philosophy of Intellectual Property. Geo L J 77:287.

[98]Warren, Brandeis, supra note 15, at 193.

[99]Warren, Brandeis, supra note 15, at 193.

The variations need not be extensive to capture the personality of the second comer and in that case the personality approach will recognize more works with little variations from earlier works. Justice Kaplan observed 'the changing status of authors in the nineteenth century, from imitative craftsman to professionals conscious of their unique individuality, led in the nineteenth century both to increasing intolerance of copying and to disapproval composition of heavily dependent on predecessor's work'.[100]

The expansion of scope of author's right, from reproduction right to adaptation right, has been influenced both by labour approach and personality approach. Labour approach may not satisfactorily answer why the fruits through translation and dramatization should be reaped by the original author when they are the product of labour from translator and dramatist. The personality approach can offer the missing link to the question. In Holmes v. Hurst,[101] the United States Supreme Court determined that it was not infringement to reprint portions of a magazine in which chapters of Holmes' book The Autocrat of the Breakfast Table had been published serially when the magazine in which the material first appeared had not been copyrighted.

The Court rejected Holmes's argument that the copyright attached only to the form in which his work ultimately appeared. Had the Court held that the serial publication of the work in magazine form was not a copyrightable book then magazine publication would have had to bearing on the copyright status of the book. Because the Court held the serial publication to constitute publication of the book, the magazine's non-compliance with copyright formalities cast Holmes' literary work into public domain. Subsequent publication in the book form could not revive the copyright. The Court observed 'It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes and the word book is not to be understood in its technical sense of a bound volume but any species of publication which the author selects to embody his literary product'.

This concept of copyright in authorial creation which is nothing but an intellectual production will allow copyright to subsist on any work irrespective of its form and this will allow copyright to enlarge its scope and embrace many more new types of works in modern times which are yet to form its distinct character. The literary products thus can be well interpreted to go beyond the realm of literature and can cover works like film and software.

The greatest benefit of the digital economy is the universal access which allows any information to be made available to anyone, anywhere and at any time but this advantage challenges the basic premise of intellectual property law and makes it difficult to protect the rights of the owner. Exclusivity means the ability of the owner to control access to the product as the seller will have absolute control over the product so far as access and distribution is concerned and here free riding

[100]Kaplan B (2005) An Unhurried View Of Copyright. Lexis Nexis, p 17.
[101]174 US 82 (1899).

becomes impossible. The concept of rivalry denotes that consumption of a product by one will affect the supply from others as it happens in case of retail goods where one product cannot be enjoyed by two persons at one time.

Most forms of intellectual properties are by nature non exclusive and non rival as ideas; concepts are readily accessible to many at one time without any control of the seller. Naturally the sufficient incentive to take risk to develop and market new products is missing. In such a situation government tries to create artificial exclusivity so that the required incentive can be created through legislation.[102] The guiding principle of copyright law is to allow exclusivity as much necessary to provide incentives to creativity but otherwise to protect public domain. The exclusivity created by the Govt. is artificial and arbitrary and it requires to be constantly watched so that discouragement of free riding should not discourage the social process of incremental development.[103]

This exclusivity problem has affected digital property as well as digital goods, which can be consumed by consumers and competitors without compromising its quality or quantity. This always prompts for free riding without compensation. Digital property can be accessed, copied, modified and transferred so easily that intellectual property law is finding it very difficult to create the artificial exclusivity. When the digital property is a database then it becomes further difficult proposition for law to create the same exclusivity.[104] Computers can archive, compare and manipulate in such a way that collection and arrangement of data has become a very easy job and it has created more problems for maintaining the exclusivity as a balance has to be made between incentives to promote creation of useful compilation and free access to information.

[102]Landes, Posner, supra note 141, at 328.

[103]Breyer S (1970) The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs. Harv LRev 84:281.

[104]Plotkin M (1999) The times they are changin'. Vend J Int'l L Prac 1:46.

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