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Unlocking the Data Dilemma Intellectual Property and the Challenge of Database Regulation

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ABSTRACT

Databases are protected under copyright law as a part of literary works, but the criteria for protection are more stringent due to their nature as collections of "dressed facts" rather than original creative expressions. This distinction creates challenges because copyright requires originality, and databases mostly comprise factual information organized systematically. In the current information age, databases have gained significant economic and practical importance, as they facilitate efficient access to large volumes of data. This growing relevance has sparked debates about whether the existing copyright framework adequately protects databases or if alternative legal models are needed. This paper explores the development of database protection law, focusing on the limitations posed by the originality requirement in traditional copyright law. It analyses the extent and nature of protection granted under other regimes, emphasizing the balance between protecting creators' rights and ensuring public access to information. A significant part of the paper examines the European Union's sui generis database protection regime, which offers a dual system which is copyright protection for creative database structures and a separate right safeguarding the substantial investment in database contents. The paper engages in critique of the effectiveness of this model, which includes concerns about monopoly creation and investment standards. Further, it evaluates the applicability and suitability of adopting a similar sui generis regime in India, given its unique legal, economic, and technological context. Finally, the paper argues for a balanced and context-specific approach to database protection in India, considering international frameworks and domestic policy priorities, rather than adopting a foreign model in its entirety.

Keywords: *Originality, EU Database Directive, Sui Generis Database protection, Reward v Access, Neighbouring right model.*

I. INTRODUCTION

Informational goods, more commonly known as intellectual works, exhibit public good

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characteristics of non-rivalriness and non-excludability owing to their property of non-exhaustion by consumption. A stylised characterisation of an informational work is one with a fixed cost of creation, and zero or non- increasing marginal cost of reproduction.[2] This is what hampers the ability of the creators to recover costs with the phenomenon of driving down the costs by competitors, who now have to undertake only the marginal cost of replicating such work. It, in turn, takes away the incentive to create, causing welfare loss as access to new intellectual creation suffers. In order to remedy such a situation, these creations are equated to property of the traditional sense. The argument for ownership in such property is incentive as Blackstone states "who would be at the pains of tilling if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour?"

Various justifications be it of natural law or of economics necessitate thus the protection of such property rights. One kind of such protection is concerned with the creative works of arts (Literary, Dramatic, Musical, Artistic mainly) known as copyright. The requirement for granting protection is two-fold : Originality and Fixation. Every work which fulfills the conditions and falls in the requisite subject matter category is qualifies automatically for protection which is essence is the grant of certain exclusive rights, the infringement of which is remedied for. In the presence of such a system, the copyright law tries to balance the dimensions of public interest/ access with the rights of the owner/author of such work. To ensure a fair balance it becomes necessary to lay down what is protectable and to what extent under the provisions of copyright law.

II. ARGUMENT FOR THE EXTENT OF DATABASE PROTECTION

The economic utility of informational goods along with the marriage of Intellectual protection with the aspects of trade on the international level via the medium of TRIPs has led to space for informational goods where two kinds of law, which apparently work for a similar goal, govern it. The focus of both the laws though being in the interest of consumers, one works for granting of exclusive rights and the other preventing any creation of monopolies. This divide thus makes possible a number of models for protection of a complex subject matter which is inherently useful but essentially non original in content like the databases or compilations.

The economic argument for an efficient system of protection would be based on protecting the significant levels of abstraction as the consumer derives utility from the consumption of these elements in a good. These are generally lower level of abstraction which contains unique and

[2] Kenneth J. Arrow, Economic Welfare and the Allocation of Resources for Invention, in The Rate and Direction of Inventive Activity: Economic and Social Factors 609 (R.R. Nelson ed., Princeton Univ. Press 1962).

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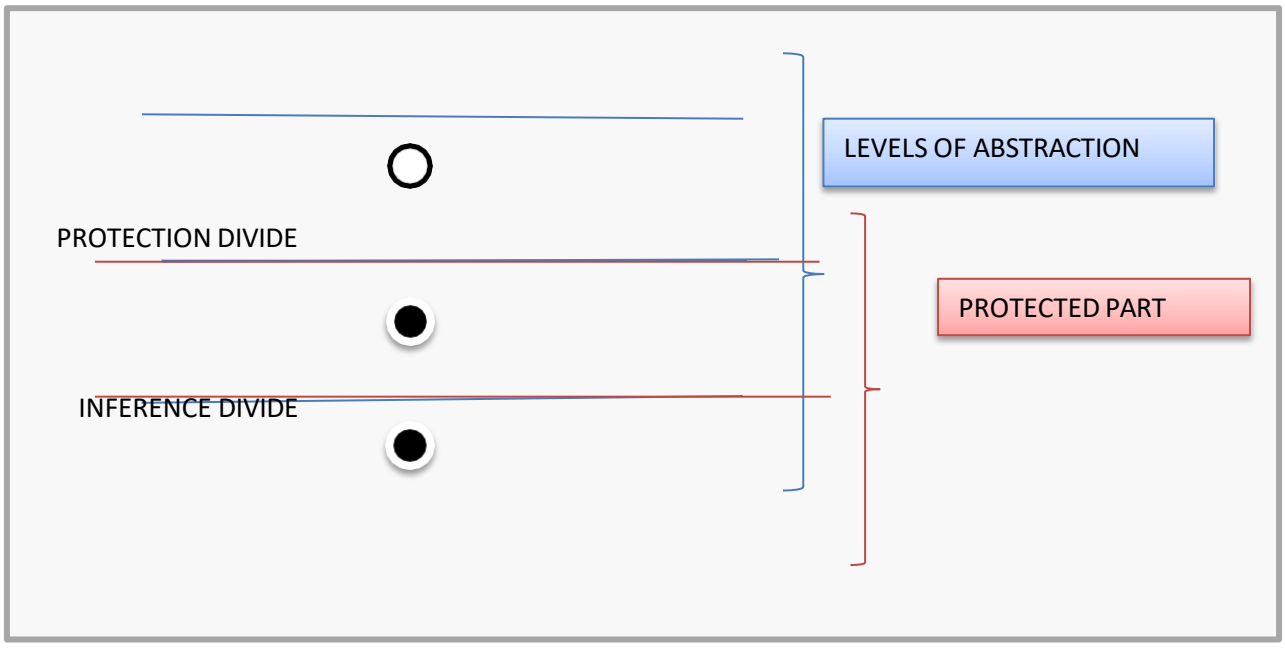
detailed elements. The significant level may or may not be protected by copyright law but the argument is that the best case scenario is avoiding the market failures as a result of copyright protection at a level that is too much or too little termed as Copyright failures.[3]

The graph below illustrates the presence of imperfectly competitive market where significant level of abstraction is protected and the non-significant level is above the protection divide. Thus, it ensures the presence of. On the other hand the complete non protection of content would lead to lack of incentive to invest in the collection and compilation of useful data.



III. ABSTRACTION LEVELS AND PROTECTION

DATABASE PROTECTION UNDER THE CURRENT COPYRIGHT SYSTEM

The copyright law protects original subject matter which falls in the expression side of the idea- expression divide. This criteria has brought in to debate the protection of databases as is in the system. Some argue for higher protection, other for higher threshold for databases to qualify for protection. A database generally refers to an aggregate of information systematically arranged and fixed, whether on paper or in any other form such as electronic media, i.e. stored in computer system.[4] Simply stated, Database is a collection of facts, data or information. The value of such goods is basically in the content which fails the requirement of originality based on the evolution of jurisprudence in this regard:

Database/ Compilations are protected as literary works - Literary work includes computer

[3] Dennis W.K. Khong, Copyright Failure and the Protection of Tables and Compilation,3 SCRIPTed 2 (2006).
[4] Graham J.H. Smith, *Internet Law and Regulation* 24 (3d ed. Sweet & Maxwell 2002).

programmes, tables, compilations including computer databases[5] but exhibit a higher requirement of protection than the sweat of brow doctrine which earlier was an appropriate doctrine of deciding originality even in cases of compilations. Given in University of London v University Tutorial press[6] case where Peterson J. defined original as

"Original does not mean that the work must be an expression of an original or invented thought. Copyright laws are not concerned with original ideas but their original expression. Original is thus what originates from the author in which the author puts his own labour."

The Indian understanding was similar to the above even in cases of databases as illustrated by the case of Burlington Sopping House V Rajnish Chibber[7], the court, relying on the University of London Press case held that since skill and labour had been invested in the preparation of the database, it would amount to an original work. The Court held that the "sweat of the brow" should be the threshold for determining the originality of a work.

The inefficiency of this doctrine for compilations occurs mainly due to the fact that the protection is being sought for a subject matter which falls on the Idea spectrum of the Idea-Expression dichotomy, being factual information which is thus not protectable and does not constitute relevant labour even if it qualifies the test of sweat of brow i.e., the work originating from the skill and labour of the author.

The US Supreme Court in the case of Feist Publications Inc v Rural Telephone services[8] laid down the test for originality in compilations which is the touchstone of the understanding to this day. The court defined original as used in copyright law to mean that the author created the work independently and it possesses at least a minimum degree of creativity. Denying the copyrightability of facts, the court stated that the person who first person to find and report a particular fact has merely discovered its existence and therefore does not trigger copyright. The ideas though are not protectable, the original expression used in the presentation of ideas or facts is copyrightable. The protection of database is thus in form of the protection that a dressed fact (Malla Pollack describes dressed facts as an idea or a fact that is presented in an original expression.)[9] receives. The level of protection for a dressed fact is dependent upon the quantity and quality of their expressive facade.[10]

[5] The Copyright Act, No. 14 of 1957, § 2(o) (India).
[6] Univ. of London Press Ltd. v. Univ. Tutorial Press Ltd., [1916] 2 Ch. 601 (Eng.).
[7] Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber, 1995 IVAD Delhi 732 (India).
[8] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
[9] Malla Pollack, The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (A.K.A. Copyright and Patent Clause) (2004), https://ssrn.com/abstract=533523.
[10] Robert A. Gorman, Fact or Fancy? The Implications for Copyright, 29 J. COPYRIGHT SOC'Y U.S.A. 560, 563 (1982).

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This hurdle of originality set by Feist case is at minimum modicum of creativity which has been interpreted to be at different heights since the court did not explain the level of creativity required. The position was clarified in the case of

C.C.H. Canadian v Law Society of Upper Canada[11] where it was held that

"To claim copyright in a compilation, the author must produce a material with exercise of his skill and judgment, which may not be creativity in the sense that is not novel or non-obvious but at the same time it is not the product merely of labour or capital."

Soon after, in the EBC & ors v D. B. Modak & ors[12]., the supreme court held that:

"Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. … To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital."

Thus, the Indian position corresponds that of the American courts. The protection therefore is provided only to the originality of arrangement and selection but not to the content itself.

ISSUES WITH THE CURENT MODEL

The information age signified by the abundance of information, values the organization of such information which saves time and efforts. Simply stated, Database performs this exact function of information organization which makes the protection of such effort a requirement. The Feist decision gave rise to problematic aspects of database protection of copyright. The copyright system being inefficient mechanism to protecting databases as the content being facts, etc are non-original by the standards of copyright. The copyright system does not value the growing importance of databases in the modern age and thus such work is unlikely to attract thick copyright protection. The demand of creators of protection on raw information which requires major skill and labour is not allowed for database as a literary work. This prevalent protection model is considered to be insufficient by many, and it is in a sense protection not for the database at all, it only protects the arrangement which is in itself not the part requiring substantial effort more so with the ubiquity of the electronic medium to aid the above. Also, the primary value of databases is not in their original expression, selection, or arrangement of materials, it is instead in the easier accessibility to large amounts of data.

[11] CCH Canadian Ltd. v. Law Soc'y of Upper Canada, [2004] 1 S.C.R. 339 (Can.).
[12] E. Bd. Co. v. D.B. Modak, (2008) 1 S.C.C. 1 (India).

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ALTERNATE MODEL

To deal with the issues there are various ways to approach it one being the EU Sui generis system which creates a neighbouring right-like model for database or leave this to be governed by the laws of competition and tort misappropriation.

EU MODEL

The economic notions of protection highly support such claim exemplified by the database resembling sui generis protection model developed in the sense as neighbouring rights.

Database protection model for EU as regards the reasons for protection: The EU Database Directive provides for a dual (or two-tier) system for database protection, comprising:

- Copyright protection for the structure of the database (covering creative databases) and
- Sui generis protection for the contents of the database (covering non-creative databases).

These two systems stand independently of each other. The former being in the realm of copyright being dealt with the issues of originality and fixation, the latter is in the domain of competition law, thereby making a suggestion towards a comprehensive database protection regime. The sui generis protection of content over time through judicial pronouncements has acquired an approach which can be exemplified as follows:[13]

Risk to investment vs Social Gains	Low Gain	High Gain
Low Risk	No Infringement	No infringement
High Risk	Infringement	Infringement

IV. RATIONALE FOR PROTECTION IN SUI GENERIS MODEL

The reason behind the protection of a certain subject matter greatly affects the manner of provision of protection as the highly industrialized EU nations with their approach for protection focusing on balancing the interest of the database users and competitors as against

[13] Estelle Derclaye & Martin Husovec, Sui Generis Database Protection 2.0: Judicial and Legislative Reforms (Nov. 16, 2021) (forthcoming in Eur. Intell. Prop. Rev.), https://ssrn.com/abstract=3964943 or http://dx.doi.org/10.2139/ssrn.3964943.

the “legitimate interes” of the makers to realize their substantial investment. Such an understanding of protection strengthens the link between substantial investment and risk to such investment.

ISSUES

1. Possibility of Monopoly Creation under the Sui Generis Database Regime

One of the most critical concerns associated with the European Union’s sui generis database protection regime is the potential for the creation of monopolies over data. The Directive provides protection not only for the original structure or arrangement of data (covered by copyright) but also extends a separate layer of protection to the content of the database if a "substantial investment" has been made in its collection, verification, or presentation. This dual protection lasts for 15 years and may be renewed each time a substantial investment is made to update or modify the database, effectively allowing for "evergreening" of protection. Unlike patents or certain forms of copyright where the public domain is assured after a fixed period, databases under this regime may remain inaccessible indefinitely if continuously updated and reinvested in.

Moreover, the absence of any compulsory licensing mechanism or fair-use style provisions within the Directive exacerbates this monopolistic tendency. Since even facts—otherwise unprotectable in traditional copyright—are effectively ring-fenced under sui generis rights when organized in a database, the lack of easily available substitutes becomes problematic. This can hinder downstream innovation and competition, particularly in data-intensive fields like AI, healthcare analytics, and public research.

2. Problems with Standards of Investment and Inconsistent Protection

Another critique of the sui generis system is its reliance on the ambiguous and variable standard of “substantial investment.” Protection is granted not based on the intrinsic value or originality of the content but on the economic input involved in assembling the database. This introduces a problematic disparity: two datasets with identical content may be treated differently under the law purely based on who produced them and how. For instance, a dataset of flight connections generated by an airline through routine operations may not qualify for protection, whereas a third party that purchases and compiles the same information, incurring costs in aggregation and formatting, could receive protection. This creates legal uncertainty and undermines fairness, as it elevates financial expenditure over innovation or utility, potentially privileging entities with greater economic power rather than technical or creative merit.

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V. CONCLUSION

It seems to be of little use to provide a copyright like protection to content as in the case of EU sui generis system for India. It would be in India‟s interest to have a balanced legislation. The fact that India is a new information economy appears to necessitate database regulation. Our participation in an international framework for such protection cannot be limited to simply consuming models in use in other jurisdictions. India must consider the risks associated with enacting similar proposals. The WIPO study recommends that India adopt a regime similar to the European Union's sui generis regime [14] but having adjudged the issues with the model in question, it hardly seems to be an appropriate approach. The suitability of such a system to India is questionable at best. The content protection issue thus seems to be effectively remedied by the unfair competition laws in the country though the clarity as regards the residuary remedy to non-creative databases as per such law is required.

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[14] World Intellectual Property Organization [WIPO], A Study on the Impact of Protection of Unoriginal Databases on Developing Countries: Indian Experience, SCCR/7/5 (Aug. 30, 2002), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_7/sccr_7_5.pdf.

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