

THE IDEA - EXPRESSION DICHOTOMY: INDIANIZING AN INTERNATIONAL DEBATE*

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Abstract. The idea-expression dichotomy was originally formulated to ensure that the manifestation of an idea is protected rather than the idea itself. Created with the intention of stimulating creativity while at the same time ensuring that such creativity is protected, this concept has come a long way since it was first formulated. However, in developing countries like India, this concept has not yet attained the levels of abstraction that is desirable and there has been little application of this concept in the Indian context. However this position can be expected to change and it is high time the Indian position on this concept is firmly established.

1. Introduction

The principle 'the law must keep up with human development and progress' is quite a clichéd one. But it can hardly be described thus, if one were to consider the growing relevance of software and technology in modern times. However on a practical scale, this evolution of the law is often fraught with difficulties given its reliance on principles and practices that have since time immemorial become its essence. So the question that we must consider here is how one needs to go about reconciling these governing standards of the law with the growing need for its evolution so that it is possible for one to encompass computer software protection into the law. It is in this context that this dichotomy between idea and expression has arisen. Thus, if one seeks to understand the problems that we are facing with current copyright law and its application to computer software protection, one must first understand the nature of the afore-mentioned dichotomy between ideas and expression. The essential difference between the two has been classified as the foundation upon which copyright law rests.

Courts have traditionally declined to put forth a straitjacket definition for the term idea. An idea has been described as a thought, as a mental image, as a conception of a theory. In layman terms, an idea can thus be described as a formulation of thought on a particular subject while expression would constitute implementing the said idea. Needless to state, the same idea can have numerous expressions and this is where the issue of copyright arises. If the same idea can be expressed in a number of different ways, a number of different copyrights may co-exist and no infringement will result. However, one is faced with a problem when it becomes difficult to delineate between the idea and its expression. Herein lies the idea of merger where an idea and the expression cannot be separated and they are said to have merged. When merger has occurred, the expression may not be copyrighted, because to do so would in effect be copyrighting the idea. However an oft quoted policy concern of this doctrine is that, when the idea and its expression are thus inseparable, protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner. At the same time, an idea can also have certain expressions, without which the idea cannot exist. In other words, there can exist an idea where changing the expression of the same in a particular form would, in effect change the very idea itself. Most courts consider these essential ideas not copyrightable, as to copyright them would also, in effect, copyright the idea. This type of merger is sometimes called *scenes a faire*. Another example of merger is when there are only a very few ways to express a given idea. This is called the 'Idea-expression identity' exception when specific instructions, even though previously copyrighted, are the only and essential means of accomplishing a given task, their later use by another will not amount to an infringement.¹ Although the idea/expression dichotomy is such a time-honoured doctrine, it has long been subject to fierce criticisms for its failure to provide practical guidelines underneath its metaphysical surface. The intricacy lies in the fact that very few, if any, works contain exclusively either ideas or

* This paper was first published in Kierkegaard, S.(2007) Cyberlaw, Security and Privacy , pp. 93 - 110

expressions. Indeed, almost any work can be abstracted into a spectrum of various levels of generality, at one extreme of which is the principal goal or theme of the work and the other extreme is the literary expression.

2. The Law in the United States of America

2.1 Origins

American copyright literature has usually traced the origin of this dichotomy between idea and expression back to the seminal case of *Baker v. Selden*.² In this case, the plaintiff owned copyright in a series of books that explained a bookkeeping system annexed with certain forms consisting of ruled lines and headings, illustrating this system. The defendant was accused of copyright infringement, because it made and used account books arranged on substantially the same system, employing forms with slightly different columns and headings. In ruling in favour of the defendant, the Supreme Court held that there is a clear distinction between the books, as such, and the art, which they intended to illustrate. The description of the art in a book (the expression in the instant case), though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art (the idea) itself.³

2.2 Principles of the idea/expression dichotomy in Computer Software under U.S Law: -

The afore-mentioned principle that governs the idea-expression dichotomy in the United States has since been incorporated into the software field as well. Copyright grants the author of a computer program the exclusive right to reproduce copies, prepare derivative works, distribute copies, and perform and display the copyrighted work for the period of his life plus fifty years.⁴ These exclusive rights are limited in several important ways however. The purchaser of a copy of a copyrighted computer program may make an archival copy of the program or adapt the program to his own specific needs, if he does so solely for his own use. In addition, the computer program may be used for teaching, research, or scholarship without constituting infringement under the fair use doctrine. As a final limitation, the statutory scheme embodies the common-law limitation that ideas as such are not protected. The Act gives a statutory definition of the idea/expression dichotomy:

*“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”*⁵

In spite of such a provision this dichotomy has remained unsolved. Through an analysis of case law it becomes apparent that the purpose of this statutory definition is merely to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged. Thus, the resolution of the most crucial and most elusive question concerning the scope of copyright protection afforded to all works of authorship is solely a matter of judicial discretion.

In the 1980s the National Commission on New Technological Uses of Copyrighted Works (CONTU), created by the Congress to study the application of intellectual property law to computer software, came out with a final report that set forth four goals for copyright in computer programs, which reflect the traditional attempt to balance protection and competition:

1. Copyright should proscribe the unauthorized copying of these works.
2. Copyright should in no way inhibit the rightful use of these works.
3. Copyright should not block the development and dissemination of these works.
4. Copyright should not grant anyone more economic power than is necessary to achieve the incentive to create.⁶

Although accosted with severe criticism, this explicit recognition of computer programs as literary works under the Act settled the initial question of protection ability, but left the courts to resolve the scope of protection under the Act. In their attempts to be practical, however, courts have erected a framework that protects the time, effort, and money involved in the production of copyrighted material to the exclusion of all else. Thus it is helpful to examine how the courts have filled in the present outline of copyright protection of computer programs. Decisional and statutory laws make it abundantly clear that computer programs expressed in source code can be protected as literary works.⁷ Courts further have held that computer programs expressed in a higher-level language meet the statutory requirements of originality and fixation. The afore-mentioned defence that limited copyright to works designed to be read by lay individuals rather than by machines or experts,⁸ was rejected by Courts in a line of cases, the most notable being *Apple Computer, Inc. v. Franklin Computer Corp.* which stated that copyright protection could also be extended to the object code version of a computer program embedded in a ROM. The afore-mentioned decisions are representative of the Court's efforts to protect the object code of the software within

the definition of a 'literary work' under the Copyrights Act, 1976. This is because the mechanical process of coding from source code to object code has been held to be a product of sufficient mental labour to merit protection, the imprinting of which constitutes 'fixation'.

Similarly the 3rd Circuit Court rejected a claim by the infringers that sought to differentiate 'operating systems' from other computer programs, holding that such a distinction could not be made within the statutory definition of a 'computer program' as operating systems were also responsible for facilitating a computer's interaction with an application apart from managing its internal functions. Thus the instructions that constituted the operating program were held to be subject to copyright.

In so far as the application of copyright laws to software, more specifically, computer programs, is concerned, American courts have traditionally distinguished between idea and expression with reference to the end sought to be achieved by the program in question. In this regard, American courts have generally construed that the manner in which a program operates, controls and regulates the computer in receiving, assembling, calculating, retaining, correlating, and producing useful information either on a screen, print-out or by audio communication would constitute the expression of the idea. The idea on the other hand would be constituted by the purpose for which the program was created. Consider for instance a program that was constructed by one company and sold to another for the purpose of effectively managing a laboratory by simplifying data management of chemicals in medium sized business computers. The second company however through their own efforts makes the program compatible with personal computers as well. Going by the decision of the U.S courts, the idea behind the program would be the *efficient management of the laboratory* and thus, only by applying the principle, this idea could be used by software developers from the second company. Thus in this instance, modifying the program to make it compatible with personal computers would amount to tampering with the expression of the idea by the first company and would amount to a violation of copyright.

2.3 Case Laws Concerning the Idea-Expression Dichotomy:

This principle followed in the United States has elicited a mixed response from courts and academics. As the courts have attempted to diversify the concept of an idea under copyright law, several authors have criticized the underlying assumption that a computer program has only one underlying idea, which is equated to the end goal or motive sought to be achieved by the designers. Once this idea has been identified, it must be separated from everything else, which is then classified as expression. The criticism takes into consideration the fact that the composition of a computer program involves many sub-processes/programs, which work in unison to generate the ultimate goal. It is stated that such sub-programs may involve ideas or goals of their own which may be entirely different from the overall idea intended by the designers thereby rendering the court's classification inadequate.

This principle was however somewhat widened in the case of *Computer Associates International Inc. v. Altai Inc* where the plaintiff, Computer Associates International (CAI) brought an action alleging that the defendant Altai, Inc. had utilised substantial portions of Computer Associates' program while developing Altai's own computer software programs. In deciding whether the defendant Altai was liable for copyright infringement in developing his program and misappropriating the trade secrets of the plaintiff, the U.S Circuit court relied upon a three-step test called the abstraction, filtration and comparison test to determine the scope of the idea/expression dichotomy in the case. The procedure involved was to break down the allegedly infringed program into its constituent structural parts and examine each of these parts for such things as incorporated ideas, expression that is necessarily incidental to those ideas, and elements that are taken from the public domain, thereby sifting out all non-protectable material. The main aim of this was to draw on familiar copyright doctrines as merger, scenes a faire, and public domain and as a result giving due cognizance to the fact that computer technology is a dynamic field which can quickly outpace judicial decision-making.⁹

Step 1: Abstraction

Abstractions constitute the first step to determine substantial similarity. Initially, a court should dismantle the allegedly copied program's structure and isolate each level of abstraction contained within it. This process begins with the code and ends with an explanation of the program's ultimate function. Along the way, it is necessary essentially to retrace and map each of the designer's steps-in the opposite order in which they were taken during the program's creation. At a higher level of abstraction, the instructions in the lowest-level modules may be replaced conceptually by the functions of those modules. At progressively higher levels of abstraction, the functions of higher-level modules conceptually replace the implementations of those modules in terms of lower-level modules and instructions, until only the ultimate function of the program is left. A program has structure at every level of abstraction at which it is viewed. At low levels of abstraction, a program's structure may be quite complex; at the highest level it is trivial.

Step 2: Filtration

Filtration commences after abstraction and examines the structural components at each level of abstraction to determine whether their particular inclusion at that level was necessarily incidental to an idea. These are called considerations of efficiency and functions on the principle that the more efficient a set of modules is, the more closely they approximate the idea or process embodied in that particular aspect of the program's structure. If two programs have the same efficiency components, no copyright persists for either program. Furthermore, filtration also determines whether they are required by factors external to the program itself such as computer specifications, program compatibility, design standards set by manufacturers and demands of the industry etc. Programs, which are similar on account of such procedure, would be denied copyrights and whether they are taken from the public domain and hence constitute non-protectable expressions, thus determining the scope of plaintiff's copyright.

Step 3: Comparison

After the first two steps for the test for substantial similarity are completed and all elements of the allegedly infringed program, which are ideas or are dictated by efficiency or external factors, or taken from the public domain, have been sifted out, what would remain would essentially constitute the copyrightable part of the computer program.

The *Altai* judgment as regards the diversification of the idea/expression dichotomy has been held to be good law as far as the United States is concerned. The court gave a detailed description of a process, which could possibly be most accurate while imposing a partition between the idea and an expression in a particular work. Subsequently, the First Circuit Court came up with a decision in the case of *Lotus Development Corporation v. Borland International Inc.*,¹⁰ which stated that a method of operation, as defined under 17 U.S.C. S 102(b), is a means by which a person operates something, whether it is a car, a food processor, or a computer, and is un-copyrightable. Computer programs using a method of operation cannot operate without a specific command. The court reasoned that while identifying the non-literal elements of a computer program, one must first identify whether such elements fall under the criteria of a method of operation. If such non-literal elements constitute a method of operation, they are un-copyrightable under section 17 U.S.C. S 102(b) and therefore, an idea/expression dichotomy analysis need not be performed. The Court in the *Lotus* case acknowledged that the abstraction, filtration and comparison test was an effective means of identifying copyrightable elements in a computer program, but was ineffective in resolving an issue where factual copying of the program was admitted by a contesting party. The decision in the *Altai* case was read along with the decision of the *Federal Supreme Court in Feist Publications, Inc. v. Rural Telephone. Service. Co.*¹¹ stating that, only original expressions of authors would be given copyright protection and that authors were encouraged to freely build on ideas and information conveyed by a work.¹² Recently, the U.S take on the Idea-Expression dichotomy has been partly rejected by courts in the United Kingdom. Decisions of the Chancery Division have outlined a slightly modified version of the dichotomy. This will be dealt with in the chapters to follow.

3. The Law in the United Kingdom

The Law is divided into two stages – (i) Before 1911 and (ii) After 1911 when the Copyrights Act was passed. Before 1911, Courts adopted the principle that an idea is not subject to copyright protection and that it is only the expressed form of such idea that is subject to such protection. Case law indicates the reasoning adopted by English Courts.¹³ The task of the Court is to apply the contents of the Act while determining a violation of a copyright and the Act does not mention or take into account the existence of an idea/expression dichotomy.¹⁴ The Act stipulates the content that is protected as an original work and that such work may be infringed by the taking of a substantial part. Thus in dealing with the question of copying, the principle is well established that there is no copyright in mere ideas, concepts, schemes, systems or methods.¹⁵ Therefore the scope of copyright is limited to the protection of a particular form of expression of conveyance. If such copying persists, the copyright is infringed.¹⁶ Therefore it is submitted that a defendant is not liable if he has adopted the idea and has made use of it in such a way desired by him, howsoever original it may be. Examples in this regard would be the absence of infringement of the copyright in a literary, dramatic or artistic work by adopting the basic idea underlying such work.¹⁷ Thus far, the principle of idea/expression dichotomy would appear to be identical to that of United States law, but there is a subtle difference in the manner by which UK Courts have diversified the concept.

After 1911, Courts have declared that ideas, thoughts and plans existing in a man's brain are not 'works' as defined by the Copyright Act.¹⁸ But once reduced into writing or other material, such ideas through their material form, may be susceptible to copyright protection. Given the existence of a good copyright in a work, a general idea underlying such copyright is not subject to protection. However a more detailed proposition or a collection of ideas, pattern of incidents, or a compilation of information from the original document/material form may amount to be a substantial portion of such work, the adoption of which may constitute a copyright violation. There exists a substantial body of modern case law indicating that even an expression of an idea itself does not remain

unprotected. Similarly case law indicates that even sole and inseparable methods of expression can be subject to copyright.

Copyright law for Computer Programs in the United Kingdom is no longer confined to the rules imposed by the Copyrights, Patents and Designs Act, 1988. After 1991 there are three legislations, which are consulted simultaneously to derive the rules and regulations governing copyright of computer programs in the U.K. They are, The Copyrights, Patents and Designs Act, 1988, the European Council directive of 14 May 1991 on the Legal Protection of Computer Programs, and the Copyright (Computer Programs) Regulations, 1992. The 1992 Regulations were enacted for the purpose of implementing the 1991 Directive into the 1988 Act, as the provisions of the directive are not self-executing. Furthermore, United Kingdom, being a dualist nation makes it mandatory for the Parliament to enact legislation in order to recognize implement an international convention as applicable law. Therefore all three legislations are read together and applied by Courts to factual situations. Computer programs are read as original literary works by the 1988 Act under section 3(1).

Thus, Courts have determined the correct procedure that is followed while deciding cases involving the idea/expression dichotomy. Although a general idea cannot be copyrighted, instances where the labour involved in expressing such an idea in detail in the form of drawings, writing etc have been adopted, are held to be cases of copyright infringement. Such cases involve the copying of the detailed expression of the idea and not the idea itself.¹⁹ The originality that is required, and through it the protection conferred are related directly to the expression of thought involved in creating the work. This principle has been applied and affirmed by a plethora of decisions that have applied it specifically in relation to the facts involved.²⁰

3.1 Case Laws in the United Kingdom Concerning the Idea-Expression Dichotomy

The principle applied by the Court *Ibcos Computers Ltd v. Barclays Finance Ltd* is an ideal example of the variance between the law applied in the UK and the USA. The case concerned an issue of Copyright violation alleging that the impugned program was identical to the original program as they were both developed and written by the Same Developer in spite of an undertaking taken by the developer not to design or sell similar software upon his resignation from the appellant's company.

The Court in *Ibcos* proposed to examine the case by determining logically the claim in copyright calls to be tested. For this purpose the Court had to consider whether the software in question contained the element of originality. While considering the idea/expression dichotomy issue that arose in connection with the whole package being a copyright compilation (i.e. the question of originality), the Court disagreed with a former ruling which held that an only method of expressing an idea is not the subject of copyright. The Court stated that it was of course true that a copyright cannot protect any sort of general principle, but it can protect a detailed literary or artistic expression. The Court cited the case of *British Leyland v. Armstrong*²¹ where in the case of an exhaust pipe it was said that the copyright was protecting the engineering principles which went into its design apart from the existing copyrights in the drawing and that a copy of the drawing via the medium of an exhaust pipe made from it amounted to an infringement of such copyright. This was so even though there was also a copying of the engineering principles that went into the original design.

The Court said that where an idea was sufficiently general, then even if an original work embodied it, the mere taking of that idea would not infringe a copyright. But if the idea were to be detailed, then there is a possibility of infringement, the determination of which remained a question of degree. This principle applied whether the work was functional or not, and whether visual or literary. Citing an example of a literary work the Court stated that the taking of a plot (the idea) of a novel or play could certainly infringe a copyright if that plot was a substantial part of the work. The Court acknowledged the statement of Judge Learned Hand who said that nobody has ever been able to fix a boundary between idea and expression and that the task is a difficult one.²² However that Court did not ignore the utility of the idea/expression dichotomy and its application in the United States, stating that if the defendant has merely copied a general idea then it is immaterial whether there is copyright in the plaintiff's work. Thus the Court stated that the principle of law applied in the United States was different to that applied in the United Kingdom and this difference was particularly visible in relation to copyright works concerned with functionality and of compilations. Thus, the Court found it appropriate to examine the structure of the computer program as a whole in light of it being a copyright work in addition to the literal bits of code and the program structure within the program. The Court stated that as the component programs and structure are individually subject to copyright as sufficient skill, effort and judgement went into their design.

The ruling in *Ibcos* turned out to be a landmark judgement under United Kingdom Copyright law. Not only did the Court classify and explain in a lucid manner, the extent of applicability of the idea/expression dichotomy in U.K. law, it also contradicted and set right a number of judicial decisions (predominantly citing United States law as an example) which proposed theories contrary to the Courts ruling in the present case.²³ This judgement was cited in the case of *Navitaire Inc. v. Easyjet Airline Company*. The case was a claim for the violation of a copyright in a computer program by alleging that the Defendant's online ticketing program was indistinguishable from the Plaintiff's, in respect of its user interface. The Plaintiffs also claimed that that the copyright in their

program had been infringed by, among other things, non textual copying. They submitted that (1) each of the commands was a copyright work in its own right, or, alternatively, each of the complex commands was a work in its own right; (2) the collection of commands as a whole was entitled to copyright as a compilation; (3) in respect of certain screen displays, the template was a copyright work for each display; (4) presentations of the data in the database, so called reports, had been copied by the defendants and (5) there was non textual copying of the whole of the source code, which was strictly analogous to taking the plot of a book.²⁴

The Court determined that the issue addressing the idea-expression dichotomy was the 'compilation' of the collection of commands that went into creating the program and the issue concerning 'non-textual copying'. The Court stated that such a compilation would be entitled to copyright and cited case law substantiating the same. The Court drew a distinction between the provisions of *Kalamazoo (Aust.) Pty v. Compact Business Systems Ltd*²⁵ and *Baker v. Selden*.²⁶ The former stated that a collection of accounting forms formed a compilation and each collection or group of forms, designed to be used with each other, was entitled to protection as a compilation of the constituent forms even though the constituent forms were not wholly literary whereas in *Baker*, the Court held that a collection of blank forms were not subject to copyright. At this juncture the Court in the instant case pointed out the essential difference between U.S and English law on the matter which rendered *Baker* inapplicable in this case. Although the Court subsequently concluded that the collection of commands in the program was not to be granted copyright on the basis of it being a compilation as there was no pre-existing material to form the subject matter of a compilation, and no compiler in the case at hand, due regard was paid to the distinction in law.

The issue concerning 'non-textual copying' was one wherein the claimant was alleging an appropriation of the end result and business logic (overall functionality, from a business perspective) of the software. Therefore the issue of idea/expression cropped up because in order to arrive at a finding of infringement, something that is not merely inherent in the nature of the business function to be performed by the software must be taken by the defendants. This may not only represent the skill and labour of the designers and programmers but go wider than the details of the command set and the screen displays. In this regard the Court held that every element in the expression of an artistic work (unless it got there by accident or compulsion) constituted the expression of an idea on the part of the author. It was further held that, the expression of such ideas was protected as a whole and also to the extent to which they form a substantial part of the work. The phrase 'substantial part' is indicative of a qualitative analysis of the work rather than a quantitative analysis. As a result, the part which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. The Court cited the example of how the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original.

Thus, where certain ideas expressed by a copyright work are not original, they are not entitled to copyright protection as the borrowing of such idea would not constitute the taking of a substantial part of the work (thus varying from the U.S position). Furthermore, the skill and labour that is appropriated must be relevant to the cause. A mere envisaging of an idea similar to the object sought to be achieved by the computer program, does not amount to the appropriation of the skill and labour necessary to constitute infringement. Therefore, in spite of the fact that the claim for non-textual copyright failed, due regard was given to the distinction between U.S and U.K law as regards the idea/expression dichotomy without prejudice to the utility of either system.

4. The Law in India

The law concerning copyrights in India has been substantively dealt with under the Copyrights Act 1957. Section 16 of the said Act clearly states that a person shall not be entitled to any form of copyright otherwise than a right in accordance with the provisions of this Act or any other law for the time being in force. Section 13 of the Act defines the scope of existence of copyrights by stating exactly for what a copyright is available while Section 14 defines the meaning of a copyright. Section 44 provides for the registration of copyrights with the registrar of copyrights in India though there is no provision that makes registration compulsory. The Act also deals extensively with what exactly amounts to a breach of copyright in Section 51 and has defined a computer program to come within the ambit of a literary work. Though the Act may seem exhaustive, the Act fails to define either an idea or an expression and any difference in the treatment of the two while there has also been a relative dearth of case-law concerning the idea-expression dichotomy.

In *R.G.Anand v. Deluxe Films*,²⁷ which is the only Supreme Court decision concerning the issue of the dichotomy between idea and expression, a careful reading of the judgement given by a three-judge bench shows an inclination to the American law because they do not even consider a contingency where it is impossible to delineate between an idea and its expression. Then again, one cannot really say that the Supreme Court has preferred the American approach to the English one for the simple reason that it appears the Supreme Court has failed to appreciate the fact that English and American laws are different. In this case, the plaintiff who was a part-time playwright and producer of stage plays alleged that the defendant, who was a film-maker had copied substantial portions from his play that had been enacted in Delhi in 1953 and had remade it into a film very shortly

afterwards and alleged a violation of his copyright. The respondent denied this allegation arguing instead that the theme of provincialism that was common to both the play and the movie was a common theme and was not an original idea of the plaintiff. In deciding this issue, the Supreme Court ruled that there can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work. In this instant case, it was further ruled that if the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable, the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy. However in this case, while comparing the play and the film, the Court came to the conclusion that though the theme of provincialism may have been the same, the latter work had been presented and treated differently and that though there were some similarities appearing in the two works, there were also material and broad dissimilarities which negated the intention to copy the original and the coincidences appearing in the two works were clearly incidental. Thus there was no infringement of a copyright in this case.

As recently as 2002, the idea/expression dichotomy issue was addressed by the Delhi Court in *Anil Gupta v. Kunal Dasgupta*²⁸ wherein the plaintiff had conceived of a reality matchmaking television programme and approached the defendant regarding the televising of the same programme. It was alleged by the plaintiff that the defendant had usurped his idea and implemented and claimed a breach of his copyright. The defendant argued that it was only the expression of the idea and not the idea itself which could be protected under the copyright. The Court while agreeing that an idea *per se* cannot be protected by a copyright also ruled that where the concept that has been the subject of the dispute is a novel concept, then it can be copyrighted even though it is just an idea. The rationale for this decision lies as the argument which was advanced by the Court that the concept developed and evolved by the plaintiff is the result of the work done by the plaintiff upon material which may be available for the use of anybody but what makes it confidential is the fact that the plaintiff has used his brain and thus produced a result in the shape of a concept and if defendant is allowed to show their own reality show based on the concept originally conceived by the plaintiff, it will be allowing the defendant to use that concept and to reap the fruit of the labour of the plaintiff.

At this juncture, it is necessary to reiterate the subtle distinctions in the law that have arisen between the United States and the United Kingdom and mention how and why it is of immense relevance with regard to India. It is unclear whether the corpus of Indian Law of Copyrights would be amenable to the concepts of functionality and substantial similarity while deciding the value of a copyright in a computer program, thereby subscribing to the procedure followed by the U.K Courts as laid down in the *Ibcos* and *Easyjet* Cases, or whether the Courts in India would adopt the objective test strategy adopted by the American Courts in the *Whelan Associates case* and substantiate the proposition by using the accepted three step test given in the *Altai Case*. Lastly, there is also a substantial difference between the sources of law in the U.S.A and the U.K. The laws of copyright in the United States stem from Constitutional recognition whereas the principles of copyright law in the United Kingdom stem from the codification of Common Law principles. The general affinity of the Indian Legal system to Common Law principles would create a substantial debate between the applicability of U.S and U.K law in copyright cases within India.

The way the courts have approached the dichotomy in the two jurisdictions itself has been quite different. While it must be acknowledged that it is difficult to make out a clear-cut distinction between an idea and an expression, the American courts have been absolute in their decision to make ideas free from copyrights while the British courts on the other hand have held that where an idea is detailed to such a degree that it is impossible to delineate the idea from its expression, then such an idea can still be copyrighted. This distinction gains importance in light of the fact that there has been as yet no instance of a software programme or technology conceptualised by one person/company being copied by another. Though the Copyright Act does say that only the owner of a computer programme can have the right to adapt or translate it, what happens when another person claims to have developed a similar, though not identical programme on the same theme that fulfils the same objective albeit in a different manner? The second person can very well claim that he has not modified or adapted the former's work and that he has merely worked on the same domain as the first programmer has. So what does an Indian court do in such an instance? Does it follow a British Court and take the approach that the Delhi High Court has adopted earlier in the *Anil Gupta case* by delving into the extent to which the first program is innovative, novel and detailed so as to decide whether the concept of the program itself is novel in which case the very conceptualisation of the programme by the first person can be copyrighted or does it follow the American approach that the purpose for which the programme is created is taken to be the idea and rule that there can be no copyright granted to the first person in this regard because his expression of his concept has not been copied (provided of course that the second person proves that his program is not something that he has created by tampering with the first person's programme)? Under the first approach, even if it is shown that the second person has not created his programme by tampering with or modifying the work of another, a copyright can still be granted to the first person as long as

he can show that his idea is something novel and so detailed that the expression and idea cannot be separable or that the idea is an integral part or a substantial part of the expression itself.

In the *R.G. Anand* case that has been discussed earlier and which is to date, the only Supreme Court judgement concerning this particular issue, the Supreme Court has liberally cited a number of American and English authorities while justifying their decision. However, the Supreme Court never adverted to the fact that the English and American law on this subject are quite different, at the very least in theory, though this judgement tends to favour the English approach. The law of the land is to that extent inadequate and should have ideally examined both jurisdictions in isolation as was carried out in the subsequent and more contemporary *Anil Dasgupta Decision*. The outcome in *R.G. Anand* concerned a copyright issue pertaining to the adoption of the theme or plot of an artistic work. Had the Supreme Court paid due regard to the differences of law in the America and the United Kingdom, then it is a logical conclusion that Indian law will have been able to accept the fact that situations will arise where the borrowing of a theme or a detailed idea may violate the copyright of the original author. The Court in *R.G. Anand* has unfortunately omitted this distinction and as a result any future case concerning computer programs where a detailed analysis of copyrightable elements is required at every stage of the program's preparation would automatically align itself under the decision in the *R.G. Anand* case and hence the pro-UK decision, which is definitely more progressive in its scope laid down in the *Anil Gupta* case has, as a result been rendered as obiter dicta.

There will be a time in the near future when the Supreme Court will have to come to terms with this difference between the English and American laws and make a pronouncement regarding the same. It would be unwise to ignore the American law altogether as it presents an accurate method of analysing a computer program and breaking it down through a step by step method to obtain the copyrightable element with respect being given only to the original expression of the author and not to general ideas or knowledge. This minute attention to detail as outlined by the American courts is extremely relevant in identifying the extent to which it is possible to delineate an idea from an expression. Thus the American system is more liberal in allowing development in various fields by encouraging authors to freely use available ideas and knowledge. However the English system, on the other hand gives more attention to the original work of the author as a whole as against identifying particular elements of expression that may be copyrighted. Importance is given to the detailed application of general principles of knowledge applied by the author in expressing his work and as a result can be protected by a copyright, going by the decisions in *Ibcos* and *Navitaire*. Indian courts have traditionally followed the latter and more conservative approach with regard to general copyright law and there is nothing to suggest that Indian courts will make an exception with regard to the idea-expression dichotomy as and when they have to deal with this distinction. Thus there is always a balance of interests – between the interests of the person whose ingenuity has created a particular idea that is novel and cannot be delineated from its expression on one hand and interests of society on the other, which will suffer if a copyright is granted to an idea itself, for it will discourage people other than the inventor himself from developing on this idea. The liberal approach is manifestly in favour of protecting the interests of the society at the expense of those of the inventor. So on the face of it, the traditional approach might seem to work against the greater good where the interests of society are sacrificed in favour of those of the individual inventor. However that is not the case as the liberal approach might in fact work against the greater good as well. This is because of the fact that by failing to grant protection to novel and innovative ideas by following the liberal approach, American Courts tends to discourage people from developing novel ideas. The interests of Society would be affected more in a scenario where a person is discouraged from developing such ideas than in a one wherein a novel idea has been thought of by someone and protected for a prescribed period. This is often the reason why Indian courts have preferred the traditional approach to the liberal one with regard to copyright laws in general.

5. Conclusion

This distinction becomes relevant in light of the *Anil Gupta* case where it appears that the Delhi High Court has followed the principles laid down by the British courts rather than those laid down by their American counterparts. However it appears that Indian courts have not appreciated this distinction which becomes evident when the Supreme Court actually cited both American and British authorities in its judgement. Given the recent stand taken by the Delhi High Court, one would not be too presumptuous if one were to assume that it would be the British law that would be of greater application in India. The entire Indian system of civil law has been given to the nation by the British and India has also extensively incorporated principles of common law and in fact, the original Copyright Act first framed in 1914 was itself a product of the British administration. Furthermore, the distinction between an idea per se and an idea from which the expression cannot be delineated – a distinction that has been ignored by American Courts – is one that is necessary as it would be manifestly inequitable in law if one person were allowed to use an idea or concept of another even though an idea per se cannot be copyrighted, especially in a case where the latter has put in considerable amount of ingenuity to add a touch of novelty to his idea. If this distinction were removed, then one needs to pause and consider the plight of such a person who is put in a

situation where he gets no reward for his ingenuity. So removing this distinction would in effect also result in removing incentives for creating new and novel concepts which will, in the long run, inevitably hamper the growth of software technology. However for the reasons that have been cited, the American law cannot be completely cast aside either. So it is important to analyse the pros and cons of applying either of these laws in India and as is often the wont when faced with choosing between two completely different viewpoints, it is best if one were to take a *via media* approach to solving this problem in the sense that we will have to work out a system where we can successfully incorporate American law to the extent that we adopt their three step approach in analysing a computer program into the traditionalist English approach.

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NOTES

¹ See, e.g., *Apple Computers v. Formula International Inc.*, 725 F.2d 521, 525 (9th Cir. 1984).

² See, e.g., *Baker v. Selden* 101 U.S. 99 (1879)

³ This holding of the idea/expression dichotomy was apparently codified in Section 102(b) of the US Copyright Act of 1976, which provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

⁴ Section 106 of the same act says thus: To constitute a derivative work, the infringing work must be based upon the copyrighted work and incorporate a portion of the copyrighted work in some form. A derivative work is defined in 17 U.S.C. Section 101 as a work based upon one or more pre-existing works, such as a translation, musical arrangement, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.

⁵ See Section 102 of the same act.

⁶ See the Final Report of the National Commission on New Technological Uses of Copyrighted Works, 3 *Computer/Law J.* 53, 77 (1981) [rep.].

⁷ See, e.g., *Apple Computer v. Formula Int'l*, 725 F.2d 521, 524 (9th Cir. 1984); *SAS Inst. v. S & H Computer Sys.*, 605 F. Supp. 816, 818 (M.D. Tenn. 1985); *Videotronics v. Bend Elec.*, 564 F. Supp. 1471, 1477 (D. Nev. 1983); *Tandy Corp. v. Personal Micro Computers*, 524 F. Supp. 171, 173 (N.D. Cal. 1981); 17 U.S.C. at sections 101-117 (1982).

⁸ See, e.g., *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

⁹ See, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693.

¹⁰ 49 F.3d 807.

¹¹ 499 U.S. at 349-50, 111 S.Ct. at 1290.

¹² *Lotus Development Corporation v. Borland International Inc.*, 49 F.3d 807.

¹³ See, e.g., *Toole v. Young* (1874) LR 9 QB 523; *Boosey v. Wight* [1900] 1 Ch 122

¹⁴ See, e.g., *Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd* [1994] FSR 275.

¹⁵ See, e.g., *L.B. (Plastics) Ltd v. Swish Products Ltd* [1979] R.P.C. 551 at 619, 633; *Johnstone Safety Ltd v. Peter Cook (Int.)* [1990] F.S.R. 161; *Harman Pictures N.V. v. Osborne* [1967] 1 W.L.R. 723 at 728; *Hollinrake v. Truswell* [1894] 3 Ch. 420; *McCrum v. Eisner* (1917) 87 L.J. Ch. 99.

¹⁶ See, e.g., *Hollinrake v. Truswell* [1894] 3 Ch. 420 at 424.

¹⁷ See, e.g., *Wilmer v. Hutchinson & Co Ltd* [1936-45] Mac. C.C. 13; *Kenrick & Co v Lawrence & Co* (1890) 25 Q.B.D. 99; *Gleeson v H.R. Denne Ltd* [1975] R.P.C. 471.

¹⁸ Refer to the Copyright Acts 1956 and 1988.

¹⁹ See, e.g., *L.B. (Plastics) Ltd v. Swish Products Ltd* [1979] R.P.C. 619; *William Hill (Football) Ltd v. Ladbroke (Football) Ltd* [1980] R.P.C. 539 at 546; *Leco Instruments (U.K.) Ltd v. Land Pyrometers Ltd* [1982] R.P.C. 140.

²⁰ See, e.g., *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 W.L.R. 273 at 277; *Ibcos Computers Ltd v. Barclays Finance Ltd* [1994] F.S.R. 275.

²¹ See, e.g., *British Leyland v. Armstrong* [1986] R.P.C. 279 at 296.

²² See, e.g., *Nichols v. Universal Pictures* (1930) 45 F. (2d.) 119.

²³ See, e.g., *Wilmer v. Hutchinson & Co Ltd* [1936-45] Mac. C.C. 13; *Kenrick & Co v Lawrence & Co* (1890) 25 Q.B.D. 99; *Gleeson v H.R. Denne Ltd* [1975] R.P.C. 471; *Total Information Processing Systems v. Daman* [1992] F.S.R. 171; *John Richardson Computers v. Flanders*, [1993] F.S.R. 497.

²⁴ See, e.g., *Navitaire Inc. v. Easyjet Airline Company* [2004] EWHC 1725 at ¶ 87.

²⁵ (1985) 5 I.P.R. 213.

²⁶ 101 U.S. 99 (1879).

²⁷ AIR 1978 SC 1613

²⁸ IA 8883/2001 in Suit no.1970 of 2001.