

Idea/Expression Dichotomy in Computer Programme- Judicial View in India and Us

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ABSTRACT:

The *idea-expression dichotomy* is a cornerstone of copyright law that draws a clear boundary between an abstract idea and its concrete expression. Under this doctrine, an idea by itself cannot be monopolised; only the particular way it is expressed can attract copyright protection. This distinction is especially significant in the realm of computer programmes, where the line between underlying concepts and written code often blurs.

In the United States, the doctrine has deep roots in seminal cases such as *Baker v. Selden*³, where the Supreme Court held that methods or systems described in a book are not protectable, only the author's specific expression of them is. Over time, U.S. courts developed specialised tests to apply this dichotomy to software. For example, early software cases like *Whelan v. Jaslow*⁴ extended protection beyond literal code to structural elements, prompting debate over how much non-literal expression should be protected and giving rise to analytical tools like the Altai three-step test.

In India, although the Copyright Act of 1957 does not explicitly mention the dichotomy, courts have consistently embraced it in principle. The Supreme Court's decision in *R.G. Anand v. Deluxe Films*⁵ reaffirmed that copyright cannot subsist in an idea, theme, or concept - only in its expression. Indian judges have repeatedly clarified that similarity in ideas alone does not constitute infringement; it is the manner and detail of expression that matters.

Thus, while the U.S. jurisprudence on software shows nuanced and technical evolution of the idea-expression dichotomy, Indian courts rely heavily on traditional copyright principles, applying the core doctrine with less specialised machinery but with equivalent respect for creative freedom and competition.

Keywords: Idea-Expression, software Piracy, non-literal, computer programs.

CHAPTER I

INTRODUCTION

1.1 Introduction:

The claim that copyright law safeguards the specific expression of an idea by an author & never an idea itself is fundamental to traditional copyright doctrine. In calculating what is safeguarded in infringement

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³ 101 U.S. 99 (1879).

⁴ 797 F.2d 1222 (3d Cir. 1986)

⁵ AIR 1978 SC 1613

cases, the courts consider this idea/expression dichotomy to be the central axiom of copyright law. As computer programs prima-facie compose of expressions in terms of written code, they came to be extensively protected under copyright as forming part of the category of literary works. Problems started cropping in after copyright protection available for literal codes be easily defeated because similar programs could be generated by extensive variations in such literal codes. Thus programs came to be judged for non-literal infringement of copyright thereby invoking the traditional doctrine of idea-expression dichotomy. The doctrine simply states that only expressions are protected under copyright and not the idea. This presented difficulties in determining what constituted 'ideas' and 'expressions' in a given program. Any minor possibility of covering functionality of the program would mean covering idea, which the copyright law does not protect. However, after initial slips, the courts in the US have successfully come up with tests that are technically sophisticated and hence the idea/expression dichotomy in the context of computer program protection has been thoughtfully deciphered.⁶ India also recognizes the coherent doctrine of idea/expression dichotomy. In fact, the Supreme Court of India in one of its pronouncement has clearly outlined the tests to be followed in resolving such an inquiry, although not in the context of computer program infringement.⁷

It is not always easy to separate expressions from the underlying ideas as it sounds. When it comes to computer programs, both literal and technical expressions make it more difficult. The parameters for distinguishing between the idea and expressions have all been developed by the courts and no statutory guidance is available. Article 9 (2) of the TRIPS Agreement provides that only expressions are protected, not ideas, procedures or mathematical terms. Article 1 (2) of the Software Directive of the European Union states that ideas underlying any computer program element cannot be protected. Nowhere the term idea or expression is defined within Indian Copyright Act 1957. Therefore, the task of distinguishing amongst the two is left entirely to the courts. The courts have the right to determine the protectable elements in computer programs from the Whelan case⁸ to the recent Oracle case⁹.

This project provides in detail about the concept of Idea/Expression dichotomy in Computer Programme and covers all relevant aspects related with it.

1.2 Elements of Dichotomy:

1.2.1 Idea & Expression:

The earliest case concerning the dichotomy of the idea-expression is the United States case i.e Baker v. Selden¹⁰ Supreme Court decision concerning copyright in an “account book”. Selden wrote a book that described an improved bookkeeping system by a specific arrangement of columns and headings that made it easier to read the ledger book. Baker achieved a similar result, but using a different column and heading arrangement. The court held that while there may be copyright in the publication and sale of a book, it does not cover the ideas and art illustrated in the book.

The U.S. Supreme Court created a clear description between an idea and its expression, the main reason being that, otherwise, the holder of copyright would be given an undue monopoly and an anti-competitive practice. As Justice “Learned Hand” once held in Nichols v. Universal Pictures Corp¹¹, especially in the

⁶ Computer Associates International v. Altai , 982 F.2

⁷ R.G. Anand v. Delux Films Ltd, PTC (Supp) (1) 80

⁸ Whelan Associates v Jaslow Dental laboratories, 797 F.2d 1222

⁹ Oracle v Google, 750 F.3d 1381k2

¹⁰ Baker v. Seldon , 101 U.S .99

¹¹ 45 F.2d 119 (2d Cir. 1930)

context of scripts and plays: Any work, and in particular a play, will fit a large number of patterns of growing generality equally well, as more and more of the incident is left out.

The latter may not be more than the most general statement of what the play is about, and may sometimes consist only of its title, but there is a point in this series of abstractions where they are no longer protected, because otherwise the playwright could prevent the use of his ideas, to which his property is never extended, apart from their expression¹².

1.2.2 Merger Doctrine:

As the above case illustrates, while the idea-expressions dichotomy can be understood in practical terms, one may also contemplate a situation where such a strict distinction cannot be made. On certain occasions, there may just be one way to express an idea. In such cases, as per this doctrine of merger, the idea and its expression are said to be ‘merged’ and the work cannot be copyrightable. In such instances of merger, the expression is no longer copyrightable because granting copyright over the expression will effectively confer the owner with a monopoly over the idea itself, which was the avowed objective of creating the idea-expression dichotomy in the first place

Position in US:

The plaintiffs sued the defendants in *Herbert Rosenthal Jewelry Corporation v. Kalpakian*,¹³ asking them to refrain from producing jewellery pins in the form of bees. “The Court held that the bee pin in the form of a jewel was an idea that anyone was free to copy, which could only be expressed in a few ways, therefore, there was no copyright”.¹⁴

Position in India:

The High Court of Delhi in the *Mattel, Inc and ors case v. Jayant Agarwal and others*¹⁵ elaborated the doctrine of merger in the following words: In the area of copyright law, it would not be possible to distinguish between two the doctrine of merger postulates, which were the idea and expression, are inextricably linked. In other words, the phrase should be such that it is the idea and vice versa, which leads to an inseparable merger of the two. Applying this doctrine, the courts have refused to protect (through copyright) the expression of an idea, which can only be expressed in a very limited way, since this would give monopoly to the ideas themselves.

In *Oxford Chancellor Masters v. Narendra*,¹⁶ the Supreme Court of India's Publishing House held that mathematical issues are expressions of nature laws. Since language is a limited medium, these natural laws can only be expressed in a few ways. Therefore, extending the protection of copyright for issues would deny access to the ideas they contain. For these reasons, the Court held that the question of copyright could not be extended. The application of this doctrine has been refused by the courts to protect the expression of an idea, which can only be expressed in a very limited way, since this would give the idea a monopoly.

1.2.3 Scene-a-Faire Doctrine:

Scene-a-faire is a French term which means “Scene to be made or done”. In certain instances where an idea cannot be expressed without the use of certain elements, so that the idea cannot exist without these elements or forms of expression. These essential elements of features are considered by the courts to be

¹² *Nicholas v. Universal Pictures Corp*, 45 F.2d 119(2d Cir. 1930)

¹³ 446 F.2d 738 (9th Cir. 1971)

¹⁴ *Herbert Rosenthal Jewelry Corporation v. Kalpakian*, 446 F.2d 738 (1971)

¹⁵ (2008) 153 DLT 548

¹⁶ (2008) 38 PTC 385 (Del)

“non-copyrightable”, since their protection effectively leads to the safeguarding of an idea. These essential elements are called Scenes a Faire.¹⁷

Position in USA:

This doctrine first evolved in the famous US case of *Cain v. Universal Pictures Co*¹⁸, in which the Court admitted that the scene from the plaintiff's book and the defendant's film were somewhat similar while passing the order in favour of the defendant, but it cannot be said to constitute an infringement of copyright.

The judge also gave an example that the “idea” of a couple taking shelter from a storm in a church was regular and as old as the time when the first churches came and could not be made a copyright issue. He noted that there was some homogeneity between the adaptations of the book and films, such as playing piano in the church, praying and suffering. He revealed the French term "scenes a faire" for these similarities, stating that it was inevitable that incidents such as these and others, which are necessarily associated with such a situation, would force the writer to develop the theme. The doctrine is an essential part of American jurisprudence to promote and promote the growth and development of individual creativity. The doctrine requires a copyright owner to demonstrate that the alleged work is largely similar to his work and is not based merely on the common theme used by both the applicant and the defendant. Further in the case of *Thomas Walker v. Time Life Films Inc*¹⁹, the Court has commented on what constitutes "scenes-a-juste." In that case, the appellant, Walker, an officer once posted as a lieutenant for a year in South Bronx, published a book based on his experiences entitled "Fort Apache," which narrated the harrowing impressions of myriad crimes, ranging from killings to robberies and drawing a social pattern of South Bronx. The defendant's company contracted another person to write a screenplay for a film titled "Fort Apache-The Bronx," which was also related to the crimes committed in Southern Europe. In a copyright infringement suit lodged by Walker, the Court held that any realistic work relating to the occupation of policemen in the “South Bronx” would include elements such as drunks, prostitutes, vermin and abandoned cars. Therefore, these similarities were considered to be unprotectable under the doctrine of "fair scenes. Indeed, fair scenes do not extend the exclusivity of copyright to "stock" themes commonly associated with a particular genre.

Position in India:

Scene-a-faire doctrine is not expressly stated in India's Copyright Act. The court discussed this issue following what their counterparts in the United States and the United Kingdom have already stated. The doctrine is essentially American and the Indian courts have not deviated much from the settled law in the United States.

This doctrine was discussed in reference to the famous Supreme Court case of *NRI Film Production Associates v. Twentieth Century Fox Films*²⁰ and *R G Anand v. M/s Delux Films & ors.*,²¹ Where it was held that in an idea, subject-matter, themes, plots or historical or legendary facts, there can be no copyright and in such cases the violation of copyright is limited to the copyrighted work.

Furthermore, the Court held that if the theme is the same, but is presented and treated differently so that the subsequent work becomes an entirely new work, there is no question of copyright infringement.

¹⁷ Pai, Yogesh A. “Copyright Protection For Computer Programs: Walking On One Leg?” *Journal of the Indian Law Institute*, vol. 48, no. 3, 2006, pp. 359-399. JSTOR, www.jstor.org/stable/43952047.

¹⁸ 1013 (S.D. Cal. 1942

¹⁹ 615 F. Supp. 430

²⁰ 1LR 2004 KAR 4530

²¹ 1978 AIR 1613

Chapter II

IDEA/EXPRESSION DICHOTOMY: US APPROACH

2.1 Introduction:

Section 102 (b) of Title 17 USC provides that in no case does the protection of copyright extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, irrespective of the form in which it is described, explained, illustrated or embodied in such a work. Copyright does not give a monopoly on ideas. However, if the structure, flow and sequence of operations expressed in a computer program were copied in another programming language, the copyright in the original work would be infringed.²² Copyright is therefore not limited to duplication of the original work, but extends its scope to a wider area.

The dichotomy of the idea-expression in the United States is due to the ground-breaking case of *Baker v. Selden*,²³ the US Supreme Court held that the books and the art they intended to illustrate were clearly distinguished. The art description in a book, i.e. the expression, although copyright, did not entitle the claimant to the art, i.e. the idea in this case. The principle laid down in the aforementioned case has since been followed in later court decisions and has also been incorporated into computer software. "Copyright law" grants the computer program author the exclusive right to reproduce copies, prepare derivative works, Distribute copies, perform and display the copyrighted work for his lifetime plus 50 years.²⁴ However, certain exceptions to this exclusive right, such as personal use, teaching, research or scholarship, do not constitute a breach of the principle of fair use. The statute also recognizes the principle of common law that ideas are not protected. The "US Copyright Act" defines the dichotomy of ideas / expressions in the following words:

*"In no case does the protection of copyright for the original work of authorship extend to any idea, procedure, procedure, process, system, method of operation, concept, principle or discovery, irrespective of the form in which it is described, explained, illustrated or embodied in such work"*²⁵.

Despite the presence of the foregoing provision, the dichotomy of the idea expression remained unresolved on a bitter note. Then, in the 1980s, the National Commission on New Technological Use of Copyrighted Works (CONTU) devised four copyright targets in computer programs, which would demonstrate the traditional attempt to balance protection and competition:

- a. Unauthorized copying of these works should be prohibited by copyright.
- b. Copyright should not inhibit the proper use of these works in any way.
- c. Copyright should not interfere with the development and dissemination of these works.
- d. Copyright should not give anyone more economic power than the incentive to create is necessary.²⁶

2.2 Idea/Expression Dichotomy in Computer Programme:

The piracy of software is a major problem today and costs the industry billions of dollars each year. Many software developers are protected by copyright. The basic principle of copyright is that ideas cannot be protected only because of the need for ideas to remain free as building blocks of creativity. This concept is known as the dichotomy of idea/expression and is the basic doctrine for determining which one.

²² Jain Pankaj and Rai Sangeet Pandey, Copyright and Trademarks Laws relating to Computers, 28 Ed. (Lucknow: Eastern Book Company, 2005).

²³ 101 US 99 (1879)

²⁴ US Copyright Act 1976- Sec. 106: "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"

²⁵ Id at sec.102

²⁶ Final Report of the National Commission on New Technological Uses of Copyrighted Works 3 Comp. L. J. 53, 77 (1981)

Although, this recognition of computer programs as literary works resolved the issue of protection, it did not determine the scope of protection at the same time. The courts reacted to this by developing a framework that would protect time, effort and money spent on the production of copyrighted material in order to exclude everything else.

“Software piracy” is a major problem today and is costing billions of dollars to the industry every year. Many software developers rely on copyright for protection. The basic principle of copyright is that ideas are not protectable only specific expressions are and this is because of the need for ideas to remain free as building blocks of creativity. This concept is known as the idea/expression dichotomy and is the basic doctrine used to determine which all protectable elements are there in a copyrighted work.

This recognition of computer programs as literary works, although settled the issue of protection ability, but at the same time, it did not determine the scope of protection. To this, the courts reacted by evolving a framework which would protect time, effort, and money spent in the production of copyrighted material to the exclusion of everything else.

2.2.1 Literal copying:

Literal copying is usually understood as line-by-line copying that can be noticed in no time. The new work, derived from the original work, resembles all aspects of the original work. Copying an original program in terms of structure, displays, formats, methodology, micro and macro functions and programming language together with all other functions to create a duplicate work is a literal copy. The creation work is so similar in literal copying of a computer program that printouts are taken from both. There would be no dissimilarity in programs. Computer programs are susceptible to copyright infringement, as modern technology not only facilitates computer program piracy, but also facilitates the easy copy of the entire program code once it has been disclosed. This infringement mode can be described as a "literal copy." The computer program's literal elements may include:

a. Object code: The term “object code” means the literal text of a binary language computer program through which the computer receives its instructions directly.²⁷

b. Source code: The text of a program instruction written in a specific “programming language” means the literal text. The “computer program's” literal elements, i.e. their object code and source code, are protected by copyright.

2.1.1 Judicial View on Literal Copying of Software:

The facts of *IBCOS Computers v. Barclays Mercantile Highland Finance Ltd*²⁸, revolve around a situation of literal copyright infringement in computer programs/software. The facts of the case are that the second defendant Mr Poole wrote and made a version of a cluster of computer programs. Mr Poole subsequently obtained the copyright of the programs, then with another person he established a company called PK Computer Services. When Mr Poole left the company, he transferred all software rights and programs to the company and joined another company to write the same software. After a few days of transfer of PK Computer Services all its assets were transferred to the plaintiff. The complainant learned about Mr Poole's creation of similar software and thus took action against Mr Poole and the company in which he prepared such software. Mr Poole argued that the similarity in programming style was the result. However, this argument completely failed to impress judge Jacob, who held that the literal copying of both works between Mr Poole and his company was held responsible for copying all elements of the software program

²⁷ Rosen, Allen, Reconsidering the Idea/Expression Dichotomy, University of British Columbia Law Review vol. 26, no. 2 (1992): p. 263-280. *HeinOnline*, <https://heinonline.org/>.

²⁸ [1994] FSR 275 2

together with the programming language, leaving no room for doubt that the defender had infringed the copyright of the plaintiffs.

2.2.2 Non-Literal Copying:

Copying an original program to a novel program with similar structural features, screen displays, formats and methodology, micro and macro functions, however non-literal copying can be called with different programming languages. The language used in a new program can therefore be different from the language used in the original work. Elements of the original program are copied in non-literal copying, although the program code is not copied directly. In contrast to literal copying, the printouts of the original work and the new work would show little or no similarity.²⁹

Judicial view on Non-Literal Copying of Software:

In the United States, non-literal copying of computer software was decided for the first time in *Altai*. The correct method for determining the scope of copyright protection to be granted was determined, *Ferris, J.* turned to the American case law as set out in *Computer Associates v Altai*³⁰, the court broadly agreed that the idea in the “non-literal” parts of the computer program should be separated from the expression. However, in the application of the abstraction stage in its analysis, the court diverged from the *Altai* test. The court first investigated whether the whole program of plaintiffs is entitled to copyright protection. It then decided whether there was a similarity to copying which was found in the defendant's program was a copy of a significant part of the applicant's program. In determining whether there was a substantial similarity, the court subsequently took into account the distinction between the idea and expression and applied parts of the filtration stage of the *Altai* test. The program similarities were evaluated and divided into four categories:

- a. Similarities, which were the result of the copying of a substantial part of the applicants' programme.
- b. Similarities, which were the result of the copying, but which did not involve the copying of substantial parts of the applicants' programme.
- c. Similarities, which may be the result of the copying, even if the copying did not involve the copying of substantial parts of the play itself.
- d. Similarities not the copying result. Following the final phase of the comparison, the test was formulated to determine whether the similarities in category (2) would indicate the copying of a substantial part of the applicants program to a greater extent than only similarities in category.

"Finally, *Ferris, J.*, concluded that there was a limited infringement of copyright in the plain.³¹

Further the issue of idea expression dichotomy in the context of computer programmes was considered in the case of *Whelan Associates Inc. v. Jaslow Dental Laboratory Inc.*³² the first so called look and feel case. The case involved a program intended to assist in managing a dental laboratory. The Third Circuit Court of Appeals found that the appropriation of the structural aspects of computer program constituted infringement even without copying any program code. It seriously considered the question of non literal infringement of software. Thus the court gave literal and non literal elements of computer program the same copyright protection as is accorded to the structural features of other literary works. Some of the individual elements that other courts held to be copyrightable include:

- a. Internal programming structures such as data structures or file structures.

²⁹ Supra note, 1

³⁰ 982 F.2d 693

³¹ *ibid*

³² 797 F.2d 1031 (1987).

- b. Sequences for communicating between programs
- c. Programs that govern other program modules.
- d. Various expressive elements of a program user interface including the content and arrangements of audio visual screen display elements.

The court relied upon *Baker v. Selden*³³ which provided a way to distinguish idea from expression and concluded in the *Whelan* case that keeping in mind the above case court should deny protection to everything that is necessary to the purpose or function of computer program. In discussing this rule two long standing doctrines that prevent copyright law from protecting material necessary to an idea's expression doctrine of merger and scenes a fair were touched. The *Whelan* court held that in a computer program the function or purpose of the program would be the idea and everything else was a part of expression and therefore copyrightable. According to the court the concept of having program to manage dental lab was an idea and therefore beyond the scope of copyright. The structure of program however would be protected expression.³⁴

Further Refinement of Idea-Expression Standard: *Computer Associates International v. Altai Inc.*³⁵ the Federal Court of Appeals rejected the scope of copyright protection given in *Whelan* case. In this case Computer Associates developed an operating system compatibility component, which enabled a program to work with a number of different operating systems. One of the members of the team that developed this system was employed by Altai to develop a version of one of its own programs, which could be used on various operating systems. The programs based that program on the Computer Associates program and also literally copied some 30% of the code of the original program. When Computer Associates sued Altai for copyright infringement, Altai used different programmers to create a new version.

However, Computer Associates alleged that even the second program made use of the non-literal elements of their original program and went, on to sue for infringement of both programs. Apparently, the Court found that there had been infringement as far as the first program is concerned. However, the Court precluded from establishing the liability of Altai with regard to the second program. Computer Associates then appealed to the second circuit, which established a three-step test for determining the scope of copyright over the non-literal elements of a computer program:

a. Abstraction:

In the first step the computer program is divided into its various levels of abstraction. Through this stage the reverse engineering process discovers various non-literal elements.³⁶

b. Filtration:

This involves the examination of the structural components of the software at each level of abstraction to determine-

- a. Whether their particular inclusion at that level was "idea" or was dictated by consideration of efficiency. If yes, then it is a non- protectable expression.
- b. Whether their inclusion was required by factors external to the program itself, such as required data input or output protocol.

³³ 101 US 99 (1879)

³⁴ 740 F. Supp. 37.

³⁵ 20 US PQ 2nd 1641 (1992).

³⁶ Ang, S. (1994). The idea-expression dichotomy and merger doctrine in the copyright laws of the US. and the UK. *International Journal of Law and Information Technology* 2(2), 111-153.

c. Whether their structural components were taken from the public domain. If any of the three conditions is satisfied then it is not protectable and need not to be considered in the third and the final step of the test

c. Comparison:

The third and final step involves the comparison of both the programs. In this stage it is determined whether the defendants have copied a substantial part of the protected expression in the plaintiffs computer program.

Further, the researcher has tried to explain the concept of computer programme under idea/expression dichotomy through the recent judgement of Oracle v Google which is still pending in the SC.

2.3 Case Analysis of Oracle v. Google³⁷

It is a current legal case within the United States related to the nature of computer code and copyright law. **Facts-** Oracle sued Google in 2010 over copyright and patent infringement allegations for its use of the Java programming language in its Android mobile operating system. Oracle obtained the rights to Java when it acquired Sun Microsystems. Google insists that under fair use laws it didn't need a license for the open-source software.

Oracle became concerned that the Android operating system was a competing product, and filed a lawsuit against Google, claiming both copyright and patent violations. Google claimed that it was unaware of any patent and copyright infringements and that its use of the freely available APIs was within fair use allowances.

Decision:

In May 2012, the jury trial at District Court found for Google, stating that Google had not infringed on the Java patents, and that the APIs were uncopyrightable. On appeal in May 2014, the Federal Circuit partially reversed the district court ruling, ruling in Oracle's favor on the copyrightability issue, and remanding the issue of copyright and fair use back to the District Court.

Court noted that- In the U.S. to copyright a work there should be two parameters to be fulfilled which are as follows:

- a. The work has to be requisite level of creativity.
- b. It has to be fixed into a tangible medium of expression.

The legislative history explains that literary works include "computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves". To qualify for copyright protection a work must be original.³⁸ The court was therefore first to assess whether the expression is original to the programmer, something that Google had already conceded. This led the court to conclude "that the overall structure of Oracle's API packages is creative, original, and resembles a taxonomy. It therefore reversed the district court on the central issue, holding that the "structure, sequence and organization" of an API is copyrightable.

A second jury trial related to the fair use issue still ruled in favor of Google in May 2016, in that the use of the APIs by Google fell within fair use. Oracle appealed to the United States Court of Appeals for the Federal Circuit, which found in March 2018 that Google's reuse of the APIs had not been fair use³⁹, ruling in favor of Oracle. The Court considered the reuse was neither minimal nor transformative, and that

³⁷ 750 F.3d 1381 (2014).

³⁸ 17 U.S.C. § 102(a).

³⁹ The purpose was commercial, and was not fair use,

Google's actions affected the value of Oracle's copyright. The case is currently remanded to the lower district court to determine damages, though Google has petitioned the Supreme Court of the United States to rule on the fundamental questions related to the copyrightability of APIs.

Second Supreme Court Petition:

Google filed a petition for writ of certiorari with the Supreme Court of the United States in January 2019 to challenge the two rulings that were made by the Appeals Court towards Oracle's favor. In its petition, Google centered their case on whether copyright extends to a software interface like an API, and whether the use of the Java API by Google fell within fair use as found at the jury trials.

Criticism:

Many criticisms have been leveled against the decision like splitting of the Altai doctrine into two components like one of copyrightability and infringement analysis. The question is was Altai doctrine meant to be split and if so how can things not abstracted go through the process of filtration and comparison. Further how the options available to creator can be the benchmark for determining whether there are multiple ways of expressing the same. This is in the light of the fact that instances can take place where a creator might know of 10 methods but the vast majority of the industry might not be aware of it. So the correct approach might be to let an expert decide as to the possible options of expressing the same rather than leaving it to the creator.

Chapter III

IDEA-EXPRESSION DICHOTOMY IN INDIAN JURISDICTION:

3.1 Introduction:

The law concerning copyrights in India has been comprehensively dealt with under the Copyrights Act, 1957. The Copyright Act, howsoever exhaustive it may seem, defines neither an idea nor expression and is also silent on the difference in the treatment of the two. From the judicial angle too, there has not been much development in the principle of idea-expression dichotomy due to sparseness of case laws. In *R.G. Anand v. Deluxe Films*,⁴⁰ the issue of idea-expression dichotomy came before the Supreme Court. 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 and had remade it into a film. The plaintiff alleged a violation of his copyright. The respondent argued that the theme was common to both the play and it was not plaintiff's original idea. In deciding the issue, the Supreme Court on carefully examining, considering and elucidating various authorities and case laws, evolved the following propositions:

1. 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.
2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal limitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in

⁴⁰ Supra note, 2

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.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.
5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.
6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case laws.
7. Where however the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, a wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.

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 presentation and treatment of the latter work was different and though there were some glaring similarities in the two works, there were also material and broad dissimilarities which negated the intention to copy the original. Thus there was no infringement of a copyright in this case.

This seven-point test of R.G. Anand case⁴¹ was applied by Kerala High Court in R. Madhavan v. S.K. Nair.⁴² The court found that the resemblance or similarity in the theme, scenes and situations of the film and the novel was clearly lacking. The material incidents, situations and scenes portrayed on the film were substantially and materially different from those in the plaintiff's novel. In 2002, it was the turn of the Delhi High Court to address the issue of idea-expression dichotomy in Anil Gupta v. Kunal Dasgupta.⁴³ The plaintiff had thought of a reality match-making television programme and approached the defendant regarding the televising the same.

The plaintiff argued that the defendant had toppled his idea and implemented it and claimed for infringement action against violation of his copyright. The defendant said that it was only the expression of the idea and not the idea itself which could be protected under the copyright. The Court agreed that an idea per se cannot be protected by a copyright and 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. In *Barbara Taylor Bradford v. Sahara Media Entertainment Ltd.*⁴⁴ the Calcutta High Court attempting to explain the idea-expression dichotomy, pointed out that the law protected originality of expression and

⁴¹ *ibid*

⁴² AIR 1988 Ker. 39

⁴³ IA 8883/2001 in Suit no.1970 of 2001

⁴⁴ (2004) 28 PTC 474 (Cal) (DB)

not originality of the central idea due to the balancing of two conflicting policies. The first policy was that the law must protect originality of work, thereby allowing the authors to reap the fruits of their labour and stopping unscrupulous pirates from enjoying those fruits. The second policy was that the protection must not become over-protection eventually limiting future creativity.

In the recent times, judgment reporting was added as another dimension to idea expression dichotomy when in 2008, the Supreme Court came up with the ruling of Eastern Book Company and Ors. v. D.B. Modak⁴⁵ The court held that the Copyright Act does not concern with the originality of ideas, but with the expression of thought. On the issue of whether copy-edited judgments were entitled to copyright protection, it was decided that the judgments of a Court are in the public domain and therefore no copyright can be claimed on the same.

Conclusion:

It is clear that Indian Courts have indeed appreciated and applied the concept of the idea expression dichotomy under copyright law. At the same time, the kind of nuanced approach seen in the USA is not really present in India. One example is the merger doctrine; another example is the three-step process to determine infringement of a copyrighted computer programme, whereby certain essential elements necessary to write a program are excluded from the scope of copyright exclusivity. It may be that Indian courts never had any real opportunity to deal with such questions. However, the trend of relying on both UK and US jurisprudence, indicates that Indian Courts are ready and willing to borrow appropriate principles from other jurisdictions and therefore, will be ready to face any doctrinal challenges.

3.2 Copyright in Computer Programmes:

The Copyright Act, 1957 is the law governing copyright protection in India. It protects 'original' works, tacitly galvanizing the distinction between idea and expression.⁴⁶ It extends protection to computer program under the category of literary works provided they constitute 'original literary works'. The word "computer" and "computer program" have been graciously defined. Section 2(ffc) defines computer program thus:

“Computer programme” means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

In India the Copyright Act, 1957 grants protection to original expression and computer software is granted protection as a copyright unless it leads to a technical effect and is not a computer program per se. As among any other work, copyright in a computer program is infringed by making without authorization a copy of a program or substantial part thereof.⁴⁷ The definition of 'computer program' in India can comfortably deal with situations of literal copying. However, as already seen, there can also be non-literal copying which has its origin in infringement of other works, particularly, plays and stories, where courts have expressly stated that copyright protection does not strictly end only to words. Hence, the statutory protection is not explicit of situations of non-literal infringement of computer programs. Thus, the determination of non-literal infringement in any given case would have to heavily rely on judicial understanding of the idea-expression dichotomy.

⁴⁵ AIR 2008 SC 809

⁴⁶ Such a distinction is although not expressly provided in Indian Copyright Act as in case of section 102(b) US Copyright Act. However, India being committed to the TRIPS common minimum standard, it is expected that its copyright law be in consonance with Art. 9(2) of TRIPS that provides for such a dichotomy.

⁴⁷ Sec. 14 (b) of the Copyright Act, 1957, which provides exclusive rights in exploitation of the work

Position in India: Is the dichotomy in threat?

The position in India is shallow due to a dearth of case law rendered either by the Supreme Court of India or the High Courts even after two decades of inclusion of the provisions relating to protection of computer programs under the Copyright Act. However, there are few decisions delivered by the courts with reference to determining non-literal infringement in other class of works.

Decision of the Supreme Court of India in R.G. Anand,⁴⁸ where the court evolved a test for determining non-literal infringement.

The one of test that the court laid down has large positive upshot in the context of protecting computer program. The test reads, "Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises". In case of computer programs, same themes/ideas may be found at different levels of abstraction and presentation of these by using different expressions surely passes the test. Technically speaking, every program using a different language and which is not a verbatim of the allegedly copied work, in the words of the court ' becomes a completely new work.

It makes us conclude that the 'abstraction' test approved by the judge as he applied them to concomitant facts so as to endorse our understanding of it.

However, In India as such there are no settled tests which deals with the protection of computer programme like US follow. Hence, the court should understand the complexities of the program, the fine sense of balance between competition and protection and should arrive at beneficial conclusions based on the enshrined doctrinal coherence governing the copyright law.

Further, in MAI System Corp. v. Peak Computer Inc.⁴⁹ the court held that "loading of copyrighted computer software from a storage medium into the memory of the computer causes a copy to be made". Thus copies made into the random access memory hereinafter referred to as RAM are copies. Meaning that every time a user browses on the internet, copies of the web pages or software or any other material that are made into the RAM of the user's computer will amount to "copying" and therefore one can be held liable for violation of copyright even if ones aim was to read and not to copy. Also making an arrangement or altered version of the program or converting it into or out of one computer language or code into a different computer language or code is also an infringement. Article 10 of the Trade Related Intellectual Property Rights Agreement (TRIPs) provides that computer programs, whether in source code or object code shall be protected as literary works.⁵⁰

CHAPTER IV- CONCLUSION

From above analysis we see that the line distinguishing an expression from the underlying idea is thin and tricky. When it comes to computer programmes it gets all the more confusing. The attempts of the courts in the above cases have been to prescribe parameters and tests for removing the confusion and uncertainty. The trend seems to be that when a court tries to settle a particular factual situation within no time more complex situations arise and the judiciary seems to be struggling to apply the tests evolved in upcoming legal issues. A simple example of this we see in the Oracle case where the court has tried to apply the Altai test. But the question is when the tests are being interpreted differently so as to suit the new situation, is it permissible for the courts to ignore the basic objective with which the test was evolved? In the Oracle case

⁴⁸ (AIR 1978 SC 1613)

⁴⁹ 991 F2 d 511 (9 Cir.1993).

⁵⁰ Nair Pramod, Copyright Protection For Computer Software, SCC Journal Section, October 14, 2004, Vol. 7, p. 31.

court seems to be carried away a bit by the need to address the situation by using the Altai test which is widely used by the ninth circuit and to reach a particular result. Some basic inferences which we get from above is that since computer programme does not exactly fit into the realm of copyright or software protection the traditional principles of copyright also is not able to aptly address the challenges involved. However, to use the Altai test to justify monopolies in idea, as done in Oracle, would be to destroy the very fabric of copyright law. Java API SSO is a building block for new invention and improvements, especially in the smart phone sector and its use is necessitated by developers primary due to considerations of operability and comparability with existing platforms. By allowing Oracle to claim monopoly over what is a technical solution to such compatibility issues, court has rendered the dichotomy null and void. Concluding we see that computer programme is an emerging field so new challenges are bound to arise and legal uncertainty is to be removed by evolving new doctrines to meet the novel situations.

REFERENCES:

Articles and Journals:

1. Ang, S. (1994). The idea-expression dichotomy and merger doctrine in the copyright laws of the US. and the UK. *International Journal of Law and Information Technology*
2. Rosen, Allen, Reconsidering the Idea/Expression Dichotomy, *University of British Columbia Law Review* vol. 26, no. 2 (1992): p. 263-280. HeinOnline,
3. Andrew J. Harrington, Drawing the Line Between Idea and Expression in Oracle v. Google: Questioning the Copyrightability of Java's Application Programming Interface, *21 Lewis & Clark L. Rev.* 813 (2017)

Books:

1. William Landes and Richard Posner; *An Economic Analysis of Copyright* (1989)
2. Jisuk Woo, *Copyright Law and Computer Programs: The Role of Communication in Legal Structure* (2000)

CASES:

Indian Cases:

1. Eastern Book Company and Ors. v. D.B. Modak, AIR 2008 SC 809
2. R.G. Anand v. Delux Films Ltd, PTC (Supp) (1) 80

US Cases:

1. Baker v. Selden, 101 US 99 (1879)
2. Cain v. Universal Pictures Co, 1013 (S.D. Cal. 1942)
3. Computer Associates International v. Altai Inc, 20US PQ 2nd 1641 (1992)
4. MAI System Corp. v. Peak Computer Inc, 991 F2 d 511 (9 Cir.1993)
5. Oracle v. Google, 750 F.3d 1381 (2014)
6. Whelan Associates Inc. v. Jaslow Dental Laboratory Inc, 797 F.2d 1031 (1987)

Statutes:

1. The Copyright Act 1957
2. The US Copyright Act of 1976
3. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)