

## **Copyright and Related Rights Law**

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**WEEK - 01**

**LECTURE - 05**

### **Database**

Welcome back to this course on copyright and related rights law. In the previous sessions, we have discussed subject matter systems, the introduction to the subject matter of literary works to the definitions in various acts in various countries. We have also looked at the relevance of qualitative assessment and quantitative assessment in determining whether an expression can become a literary work. We've also taken a look at a peculiar type of introduction into the spectrum of literary works, which is computer software. In today's discussion, we are going to be taking a look at another peculiar addition, which is databases. So the issue we are looking to consider in this session is how is a database a literary work? Let us go back to one of the cases that we had discussed.

In *Noah versus Shuba*, it was stated that an expression must provide sufficient information, instruction or literary enjoyment. We had discussed certain types of expression. And we had attempted to categorize them into its information purpose, instructional purpose, or its purpose towards the pleasure of literary enjoyment. But does a database fit within these categories? What is then the purpose of a database? A database is looking to collect information together from which this information can be accessed. In terms of what the database then does is that it improves accessibility of this information.

In large, voluminous collections of information, for a person to find a distinct piece of information, it could be very difficult. If it's not properly organized, if there is no systematic way of identification, then finding such information could prove to be very difficult. It is not just collection of information that a database concerns itself with. A database should ideally consider the ease of accessibility because then it would just be a collection of things putting the user through a lot of trouble to find any specific piece of

information. So therefore, How does a database improve accessibility? Through selecting information and arranging it in a particular manner.

But what does copyright protect? What we have been discussing over the last few sessions is that our understanding of literary works is that - there must be some expression in words or in numbers or some other such symbols if an expression has to be considered as a literary work. But at its foundation, it is the expression which is protected by copyright. Where is the expression in selection and arrangement? If a database is looking to improve accessibility through selecting and arranging information, where is this expression? And which is why we said that a database is a peculiar addition to the spectrum of literary works. Say we try and identify what the expression is. Can we say that there is a structural form that such a selection and arrangement creates? Now, although this structural form may not be particularly delineated in some kind of an expression, but the form nevertheless can be very helpful in determining the ease of accessibility that such a database provides.

Can such a structural form be expressed differently? It can. And therefore, this leads us to understand that selection and arrangement can in fact be considered as an expression in itself and therefore would seem to fall within the domain of literary works. Consider these two images. In the first image you can see colored pencils that are kept in a cup. There is an ease of accessibility as far as a person looking to find a pencil of a particular color is concerned.

But where the ease of access issue is still the same issue which is being considered in the second image, there is a different way in which the selection and arrangement has been done. And therefore, we understand that there can be distinctive ways of satisfying a particular purpose. And these distinct ways are in fact expressible through structural formats. And therefore, we can say that structural formats seem to fit within the framework of an expression and therefore are literary works. In this image, you can see broadly the kind of structure that must be planned in order for a database to be effective.

Information which is contained within individual files is kept within folders. These folders are kept within larger folders. In fact, this exercise is also something many of us do on a routine basis with our electronic devices. In order to find a particular photograph within our gallery, Do we not create separate albums? But electronic databases are only one type of database. Traditionally, filing was done non electronically.

But electronic databases have brought in a much efficient system to categorize data, and to efficiently find a single file. Consider the EU database directive. Now the EU database directive provides an explanation of what database is. What it states is that for the purposes of this directive, Database shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible

by electronic or other means. It then says, this directive concerns the legal protection of databases in any form.

Further, selection arrangement should be the author's own intellectual creation. Looking at these provisions, which have been taken from the database directive, we find that the database directive is not only looking to protect electronic databases, but also non-electronic databases. It also provides a foundational understanding of what exactly a database is, which is an arrangement in a systematic or methodical way. Therefore, there is a plan. There is a plan that is attached to the creation of a database.

The Directive also explains that in creating such a plan and the eventual expression of the database is in fact an intellectual creation. What the Directive is also telling us is that creation of a database can go beyond an expenditure of labor and involve some aspect of creative thought. On that point, let's take a look at how the TRIPS Agreement talks about such compilations of information and such databases. TRIPS Agreement, as we have discussed earlier, is the agreement on trade-related aspects of intellectual property rights. It is a constituent agreement within the sphere of the WTO.

What Article 10 Clause 2 of the agreement states is: compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such. Such protection which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself. This provision, if we split it into its two components, help us first understand what is it that makes a database come within the ambit of copyrightability; and second, The information itself which it is arranging is that in some way affected by the copyright that is granted to the database. So it says that such protection shall not extend to the data or material itself. But why will it not extend to the data or material? Take a look at this image.

Now in this image you can see a newspaper, an image that we have seen earlier in one of our sessions. In this newspaper you can see articles which have essentially been compiled together. Can we not say that a newspaper or a magazine is in some way a compilation of various literary works. But a compilation need not always be of expressions that are literary works; or to put it in better terms, a compilation need not always be of works which are copyrighted literary works. In fact, the information that is being compiled might just be information which is free for use for anybody.

And this information because it is free to use for anybody such as facts. Then the mere fact that the database has a copyright in it will not lead to the extension of that copyright to these facts. So the facts themselves will remain free with a copyright in the compilation itself. Which means what? The facts which have been compiled by one compiler who is claiming copyright protection over the systematic arrangement cannot be

prevented. He or she cannot prevent the use of those facts in a different compilation which could be a different intellectual creation in itself.

Similarly, in India as well, and this is similar to what we had seen in the EU database directive - in the Indian Act as well, we see that because databases are effectively compilations, in its interpretation of a literary work, where the copyright act says literary work includes computer programs, tables and compilations including computer databases. We can say that a compilation could include non-electronic databases and computer databases could extend to electronic databases. But a computer database has not been interpreted within the Copyright Act itself. In fact, to understand computer databases just a little better, we must look to the Information Technology Act. Explanation 2 to section 43 reads: Computer database means a representation of information, knowledge, facts, concepts, or instructions in text, image, audio, video that are being prepared or have been prepared in a formalized manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network.

Therefore, what we see is that The Indian Act, just like the EU database directive, seems to be extending database protection to both electronic and non-electronic databases. But what is the difference between a table and a database? It can be stated that a compilation is something under which a database could fall. But what about a table? Now, when you think about a table, you're thinking about information that has been placed in some arrangement. But this arrangement need not be systematic. It could still be a table without any specific system of arrangement.

Second, the consideration of individual accessibility of information. That is something which is not satisfied or need not be satisfied by a table. And therefore, we can then conceptually make a difference between a table and a database. But the items that are present, be it whether in the table or a compilation, can it not have its own copyright? As we had seen in this example, when we look at a newspaper, a newspaper is effectively a compilation of many different literary works. And these literary works can have different authors who are copyright holders in the right themselves.

Theoretically that is possible. And therefore we can then say, to answer this question, that items in a compilation or items in a table, they can have their own copyright. They need not if the expression is something that is freely available, if they are talking about events or facts, then that doesn't have a copyright. But as we have discussed, literary works, if they are original, they can very well have their own copyright. So the copyright in the compilation would not disturb the copyright in the content.

Let's take a look at a case that arose before the Delhi High Court. This is Burlington Home Shopping versus Rajnish Chibber. Now in this particular case, we are looking to

understand - one, whether customer lists or information on customers that is prepared by businesses, can such lists be considered as databases and as such literary works? And second, the fact that these lists are unpublished or secret, does this in any way affect the literary work protection if at all it is present. So in this particular case, the issue arose when a business that was dealing in mail order service - [a mail order service is where a customer doesn't have to be physically present at a store. He can essentially order things from where he is. He can use the telephone and place an order or go to the internet and place an order and based on the address that he is providing, the shipment will arrive at his doorstep.]

In transacting with customers, businesses often create their own customer list. And in this case also, this particular business over a period of some three years had generated a list of customers. The ex-employee used this particular customer list to emerge as a competitor to the original business. Now on the question, That whether such a customer list is a literary work, this is what the Court stated: "A compilation of addresses developed by anyone by devoting time, money, labor and skill, though the sources may be commonly situated, amounts to a literary work wherein the author has a copyright."

What the Court effectively explained is that in creating such a list there is a database that gets created because of the investment that is made; and therefore such an investment can in fact be considered as a sufficient consideration for considering copyright in the database. But as we had discussed in the University of London case, that the question of whether a literary work is original or not, that's a second step consideration. And that is something over which we will be spending much more time in the coming sessions when we will be discussing about originality. And then we will make a clear distinction between doctrine of sweat of brow and the creativity theory. But in order to understand the relevance of database protection, this particular case is helpful because in clear terms, it helps us understand that customer lists can amount to databases.

And the question of whether it is original or not is a second step consideration. Another issue that we must consider here with respect to the copyright itself is that this database potentially is unpublished. The business is interested in keeping it within the business for its own use and it is not interested in issuing it to the public. Which leads us to the question: Can non-publication affect copyrightability of the database? Now this is a distinct requirement that may in fact be required in the law of a particular country. But in the Copyright Act of India for example, Even if a work is unpublished, copyright will still subsist in that particular subject matter; and therefore just because a database is unpublished doesn't bring it outside the scope of copyrightability.

But there is another factor here which we must consider - that this information. Because it is kept as a secret, in keeping it a secret and the secret itself having a commercial value, is it something that can be brought within the sphere of some distinct type of intellectual

property? And this distinction is a distinction between copyright and trade secret law. Copyright as we know is looking to protect the expression whereas trade secret law under article 39 clause 2 as is explained by the TRIPS agreement we can see it reads: Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by or used by others without their consent in a manner contrary to honest commercial practices so long as such information is secret in the sense that it is not as a body or in the precise configuration and assembly of its components generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, has commercial value because it is secret and has been subject to reasonable steps under the circumstances by the person lawfully in control of the information to keep it secret. All of us have seen this particular brand in the market. Coca-Cola is in fact a trade secret. The product, Coca-Cola, the beverage, that is a trade secret.

And it is a trade secret because its recipe has been kept secret, its recipe has commercial value and reasonable steps have been taken by the business to keep it a secret. Similarly, in any situation where we are considering, for example, an expression that could qualify as a literary work, trade secret protection could also be considered as an intellectual property that could protect such information. How would you enforce such a trade secret protection? Through contracts. In the last bit that we will be looking at in this particular session, we will take a look at a very important Supreme Court decision of US called Feist publication versus Rural Telephone Service. What had happened in this particular case was that Rural Telephone Service had published a telephone directory which was made in a very simple manner.

There was alphabetic arrangement of the names of individuals who were part of that particular telephone directory. In creating a larger directory, Feist publication had taken the information that was expressed in the list that was prepared by Rural Telephone. Now the challenge that was posed was whether such a copying of the listing was something which would amount to copyright infringement. And what the Supreme Court had stated was that factual databases, they lacked creative organization. Simple alphabetic arrangement was something which could be done by any person and in that sense reflected a lack of ingenuity which copyright should ideally be promoting.

In doing so, what the Supreme Court brought in was a distinct test that could be applied beyond the test of mere labor expenditure. And this test is a very significant test and something that we will be discussing in the course of this particular understanding on copyrights. It is not information which is coming from a consideration on what is the copyrightable nature of the content itself. what we see is that in a telephone directory, such as the one prepared by Rural Telephone, the information is something which is open for anybody to find. And this information, because it is not original, is something that we call as information that is in public domain.

In fact, in prior usage of this term I had expressed, that something which is in public domain is free for use. With this, we come to the end of week one in which we discussed literary works. In the next week, we will take up the subject matter of artistic works. Thank you for joining me. See you in the next session.