



Theoretical Underpinnings of Copyright and Design Laws: Decisions of the Supreme Court of India

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This Paper seeks to examine the theoretical underpinnings, as discovered or constructed by the Supreme Court of India in the last 70 years, as to ‘why’ of two distinct copyrights envisaged by The Copyright Act, 1957 and The Designs Act, 2000. An analysis of decisions of the Supreme Court reveals that: (i) in none of the cases validity of either of two copyrights was challenged; (ii) both Labour and Utilitarian Theories, and not any other theory, have been simultaneously used to justify ‘why’ of two distinct copyrights; (iii) inherent differences between these theoretical frameworks have been neglected; (iv) deployment of these two theories appear to be more mechanical than reasoned for logic of tangible subject matter has been unhesitatingly extended to intangible subject matter of two copyrights; and (v) judicial ratiocination does not transcend Labour-Utilitarian Framework except in one judicial opinion which highlights the Un-Indian features of Copyright Law but exercises judicial restraints to invoke it. It has been argued once that these theories were invoked, it had been expected that the Court would apply judicial standards to rigorously scrutinize theoretical underpinning of two copyrights from all possible angles. Decisions of the Supreme Court nonetheless provide an insight into theoretical underpinnings of two copyrights.

Keywords: Labour Theory, The Copyright Act, 1957, Utilitarian Theory, Theoretical Underpinning, Social Planning Theory, Supreme Court of India, Copyright, Design, Intellectual Property, Labour Theory, IP Statutes

Literature on theoretical underpinnings of copyright under The Copyright Act, 1957,¹ and copyright under The Designs Act, 2000,² as discovered or constructed by the Supreme Court of India (Supreme Court) is conspicuous by absence.³ These statutory rights shall be referred to as ‘two copyrights’ in this paper. An analysis of theoretical underpinnings of these two copyrights is necessary to appreciate the bases and reasons thereof to strengthen the respect for and effective enforcement of these exclusionary rights. Theories provide a framework for meaningful engagement in the debate relating to the subject matter under study. Knowledge of theoretical framework helps identify and question the assumptions thereof and the validity of logical arguments flowing from there. An analysis without theoretical framework is unguided, rootless and infertile.

The Court generally weaves theories around the naked provisions of Statutes to ratiocinate and build justification. Ratiocination is the hallmark of judicial process in the common law system. It helps promote

realization of non-negotiable values of fairness, reasonableness and non-arbitrariness. Ratiocination brings about certainty, calculability, and predictability and helps people respect, accept, plan and organize their affairs within the framework of law. The Supreme Court is not expected to invoke or build a theoretical framework to justify its decisions. Judicial reasoning is a process much rigorous than mere theorization. Judicial reasoning is a persistent quest for search of a ground that cannot be further grounded. A ground which is both theoretical and practical. A ground which is both efficient and just. Judicial search for such a ground is necessitated for balancing the competing interests of the right holders, competitors and society at large. These competing interests define the contours of discourse on intellectual property rights (IP) in general and of the two rights in particular.

It is generally accepted that knowledge should be *publicijuris* necessary for human flourishing and development of society. IP is considered to be an effective and necessary device to encourage creation of new knowledge. Idea of “exclusivity” is central to IP. IP may restrict access to and use of

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knowledge without the authorization of right holder. Exclusivity, therefore, does not fit within the scheme of *publici juris*.

IP is a negative-private property to exclude or prevent others. IP is not a positive right. For Socialists and Communists, private property is bad. IP is also a monopoly to exclude others. Monopoly is considered an evil not only in socialists' economies, but also in capitalist systems. Competition is the soul of a capitalist economy. Monopoly is antithetical to competition. At Common Law, however, competition and monopoly were born together. The Statute of Monopolies, 1623 enacted in England sought to curb monopolies but recognized grant of patents for inventions as an exception to competition. It is believed that the monopoly in the form of IP is in furtherance to competition, *i.e.*, the monopoly in the form IP promotes rather than stifling competition by enforcing exclusive rights to encourage creativity. The Competition Act, 2002⁴ enacted by the Parliament of India also recognizes IP as an exception.⁵ The question, therefore, is why law makes monopoly enforceable in the form of IP? A related question is whether rationalization is enough to justify an evil? These questions are perennial and persistent and have not been answered in a way which can convince everyone. Contest between the models of property regime is also continuous. Neither capitalist model, nor socialist model, nor communist model has been able to provide a just and fair compromise between the public and the private. IP is a dominant attribute of capitalist model. Therefore, it has all the strengths and weaknesses of the capitalism. Although, the Preamble to the Constitution of India declares India to be 'Socialist' yet since the year 1991 India is fast tracking on the path of capitalism. Private property in general and the IP in particular is an essential feature of capitalism. Inclusion of IP in the Agreement establishing World Trade Organization 1994⁶ added unprecedented value to trade in IP and this inclusion also brought about significant increase in the number of litigations relating to IP not only in India but also in other countries.

IP Law, like most of other Indian laws, is a colonial legacy. The genesis of IP Law in India may be traced to the time of Transfer of Power from the East India Company to the British Crown in the year 1858 AD. For the first time, British Statutes relating to patents were extended to India. The first IP Statute that British Parliament enacted for India was the Patents

and Designs Act, 1911,⁷ and the second Statute was the Indian Copyright Act, 1914.⁸ During the British Raj there was no specific Statute relating to trademarks. Trademarks were registered under the Registration Act, 1940. Only three IP, namely: (i) patents (ii) designs and (iii) copyright were statutorily recognized before the Independence of India. Trade secret was and is recognized by Indian common law. Perhaps this is the reason why entry 49 of List I of Seventh Schedule to the Constitution of India recognizes only "Patents, Copyright and Trademark". Interestingly all the seven IP Statutes for the time being in force in India are post-Independence Statutes, namely: (i) The Copyright Act, 1957,¹ & The Copyright Rules, 1958,⁹ (ii) The Patents Act, 1970,¹⁰ & The Patents Rules, 2003,¹¹ (iii) The Trade Marks Act, 1999,¹² & The Trade Marks Rules, 2002,¹³ (iv) The Geographical Indications of Goods (Registration and Protection) Act, 1999,¹⁴ & The Geographical Indications of Goods (Registration and Protection) Rules, 2002,¹⁵ (v) The Designs Act, 2000,² & The Designs Rules, 2001,¹⁶ (vi) The Semiconductor Integrated Circuits Layout-Design Act, 2000,¹⁷ & The Semiconductor Integrated Circuits Layout-Design Rules, 2001,¹⁸ and (vii) The Protection of Plant Varieties and Farmers' Rights Act, 2001,¹⁹ & The Protection of Plant Varieties and Farmers' Rights Rules, 2003.²⁰

In addition to the aforementioned seven Statutes, some provisions relating to IP have been made in the Biological Diversity Act, 2002,²¹ and the Biological Diversity Rules, 2004.²² There is a draft known as [Draft] National Innovation Act, 2008,²³ which seeks to promote innovation and provide mechanism for the protection of confidential information (trade secret). In all, there are eight types of IP in India. Out of these eight rights, seven of them have been legislated upon by the Parliament of India through the aforementioned seven Statutes. Trade secret is an IP recognized by courts in India²⁴ but is not legislated upon.

Since IP rights are having statutory and common law sanctions, the bar of justification of these rights is not very high. However, the fact that these rights are species of private monopoly property rights raises the bar of their justification. In other words, unlike right to equality, and right to freedom of speech and expression, IP does not enjoy the ready acceptance and respect from the public and this fact raises the bar of its justification. Socialists and communists readily reject the idea of private property including IP.

Generally, the justification of private property including IP is taken for granted.

No decision of the Supreme Court is available in which the constitutional validity of any type of IP has been raised. Since there is a very strong presumption of constitutionality of a Statute, the burden of proving the unconstitutionality of any of the IP is very high for seven out of eight IP which are having statutory backing.

Theoretical underpinning of decisions on IP by the Supreme Court is based on English Philosophy developed by John Locke and Jeremy Bentham. There are only few Supreme Court decisions on two copyrights in comparison to the number decisions relating to other types of IP.²⁵ Maximum number of judgments is on trademark, then on patents, then on copyright, and then on designs. No decision of the Supreme Court is available on geographical indications, semiconductor integrated circuits, and protection of plant variety. There are decisions of the Supreme Court on trade secret. These decisions, however, relate to the interpretation of the provisions of Section 27 of the Indian Contract Act, 1872,²⁶ relating to employment contracts. No decision of the Supreme Court is available for the explicit proposition that trade secret is an IP.

During the research, it has been found that all the decisions relating to two copyrights do not identify theoretical underpinnings thereof.

Although the Supreme Court has deployed only Labour and Utilitarian theories, yet the Paper refers to other theoretical frameworks²⁷ to explain, justify or question IP. The paper seeks to identify, describe and generalize about the theoretical underpinnings of the decisions of the Supreme Court so far it relates to 'why' of two distinct copyrights envisaged by the two statutes — and aims to fill some void in IP literature particularly relating to theoretical frameworks of the two statutes.

Copyright under The Copyright Act, 1957: Theoretical Underpinnings

A total of six Supreme Court decisions invoke the theoretical framework to justify 'why' of copyright under The Copyright Act, 1957.

First decision is *Indian Performing Right Society Ltd v Eastern India Motion Pictures Association*.²⁸ Lead opinion was delivered by Justice Jaswant Singh by use of harmonious construction to avoid the seeming conflict between the provisions of The

Copyright Act, 1957, (Copyright Act). Lead opinion did not delve into the theoretical underpinnings of copyright. The separate but concurring opinion by Justice Krishna Iyer raised the fundamental questions about copyright law 'solely to belight a slightly penumbral area of the law and to voice a need for legislative exploration to protect a category now left in the cold.' This penumbral area of law was described by him 'in a cosmic perspective' as 'a thing of beauty has no boundary and is humanity's property but in the materialist plane on which artists thrive, private and exclusive estate in art subsists.'²⁹ He reasoned that 'Man, the noblest work of the Infinite Artist, strangely enough, battles for the finite products of his art and the secular law, operating on the temporal level, guardian's material works possessing spiritual values. The enigmatic smile of Mona Lisa is the timeless heritage of mankind but, till liberated by the prescribed passage of time, the private copyright of the human maker says, "hands off".²⁹ Highlighting the locus of creative mind in economic system, he observed as:

*'The creative intelligence of man is displayed in multiform ways of aesthetic expression but it often happens that economic systems so operate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluable, are victims of piffling payments.'*²⁹ (emphasis added)

Focusing on coexistence of twin rights in musical work and cinematograph films, Justice Krishna Iyer notes as:

*'Our copyright statute protects the composite cinematograph work produced by lay-out of heavy money and many talents but does not extinguish the copyrightable component parts into. The music which has merged, through the sound track, into the motion picture, is copyrighted by the producer but, on account of this monopoly, the music composer's copyright does not perish. The twin rights can coexist, each fulfilling itself in its delectable distinctiveness. Section 14 has, in its careful arrangement of the rights belonging to each copyright, has a certain melody and harmony to miss which is to lose the sense of the Scheme.'*³⁰

Justice Krishna Iyer was the only judge to notice and explain the un-Indian feature of the Copyright Law in the following words:

*'A somewhat un-Indian feature we noticed in the Indian Copyright Act falls to be mentioned. Of course, when our law is intellectual 'borrowing from British reports, as admittedly it is, such exoticism is possible.'*³⁰

In his inimitable style, Justice Krishna Iyer described the essence of music in musical words as under:

*'Therefore, copyrighted music is not the soulful tune, the superb singing, the glorious voice or the wonderful rendering. It is the melody or harmony reduced to print, writing or graphic form. The Indian music lovers' throng to listen and be enthralled or enchanted by the nada brahma, the sweet concord of sounds, the rags, the bhava, the laya and the sublime or exciting singing.'*³⁰

Highlighting the requirement of fixation or reification of music on a tangible medium, Justice Iyer wrote as follows:

*'Printed music is not the glamour or glory of it, by and large, although the content of the poem or the lyric or the song does have appeal. Strangely enough, 'author', as defined in Section 2(d),³¹ in relation to a musical work, is only the composer and Section 16 confines 'copyright' to those works which are recognized by the Act. This means that the composer alone has copyright in a musical work. The singer has none. This disentitlement of the musician or group of musical artists to copyright is un-Indian, because the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician. Perhaps, both deserve to be recognized by the copyright law.'*³²(emphasis added)

He offered a suggestion to the Parliament to belight the penumbral area of copyright law in the following words:

'I make this observation only because Act in one sense, depends on the ethos and the aesthetic best of a people; and while universal protection of intellectual and aesthetic property of creators of 'works' is an international obligation, each country in its law must protect such rights wherever originality is contributed. So viewed, apart from the music composer, the singer must be conferred a right. Of course, lawmaking is the province of Parliament but the Court must

*communicate to the lawmaker such infirmities as exist in the law extant.'*³²

The chasms of Copyright Law as recognized by Justice Krishna Iyer may be formulated as the chasms between: (i) the spiritual and the material, (ii) the humanity's property and private property, (iii) the creator and the master (capitalist) (iv) the colonial legacy and Indian values, (v) the meaning of "musical work" in the copyright law sense and the meaning of music in the Indian sense, (vi) the maker (composer) of music and the singer, musician or group of musical artists, (vii) the international obligation and demands of originality, and (viii) the enacted law and her infirmities.

Justice Krishna Iyer did not look for support in the extant theories of IP. He also did not provide the solution to the problem. Rather he communicated the problem to the Parliament for appropriate solution. Had the constitutionality of The Copyright Act been challenged, perhaps Justice Krishna Iyer instead of adding a 'footnote' and 'in a sense otiose' would have either dissented or applied his theoretical approach to the facts of the case and would not have exercised judicial restraint. His opinion in his own words is otiose because it does not have any bearing whatsoever on concrete judgment. Nevertheless, his opinion is the North Star in the sense of identifying the infirmities of copyright law. His observation 'Each country in its law must protect such rights wherever originality is contributed. So viewed, apart from the music composer, the singer must be conferred a right'³² places the highest premium on originality, originality as the determiner of protection. In other words, it is the originality which brings the copyright protection at the central stage. It may be said that by treating originality Justice Krishna Iyer is invoking the theories of Locke and Hegel. No observation made in this case can be extended to invoking the Utilitarian or Social Planning Theory.

In the most celebrated Full Bench decision in *RG Anandv Delux Films*,³³ Justice MurtazaFazal Ali delivered the lead opinion. Justice Jaswant Singh delivered a separate but concurring opinion in full agreement with Justice MurtazaFazal Ali. Justice R S Pathak delivered a separate and concurring opinion. He would have perhaps dissented but for a concurrent finding of facts by both the Courts below. As to the theoretical underpinnings of copyright law, Justice Fazal Ali noted that the case was of first impression and observed as under:

*'[I]t seems. . .that the fundamental idea of violation of copyright imitation is the violation of the Eighth Commandment: "Thou shall not steal" which forms the moral basis of the protective provisions of The Copyright Act of 1911. It is obvious that when a writer or a dramatist produces a drama it is a result of his great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the copyrighted work, his act amounts to theft by depriving the original owner of the copyright of the product of his labour.'*³⁴

The aforesaid observation clearly invokes Labour Theory. He further observed that *'When an idea is given embodiment in a tangible form, it becomes the subject of common-law property rights which are protected by the courts, at least when it can be said to be novel and new.'*³⁵

Use of the word "novel" and "new" by the Court deviates from the well-established principle of originality under copyright law. Court should have been careful in choosing the vocabulary. Novelty or newness is a requirement under patent law. Further, not every embodiment of an idea into a tangible form rise to the dignity of originality. Furthermore, copyright is not merely a common law right but is a statutory right under Section 16 of The Copyright Act. Lead opinion invokes the Labour Theory in the following words:

*'Nevertheless, it is the unfair appropriation of the labour of the author whose work has been infringed that constitutes legal infringement.'*³⁶

Identifying the protectable subject matter under the Copyright Law, the Court observed as:

'Thus, the position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist

*Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Julius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance, elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great playwright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of the dramas constitutes a masterpiece of English literature. It has been rightly said that "every drama of Shakespeare is an extended metaphor". Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case, there is no violation of the copyright.'*³⁷

The lead opinion declares that one who produces a work in the copyright law sense, deserves that the fruit of his labour receives legal protection.

Justice Pathak observed that *'[I]t is always possible for a person intending to take advantage of the intellectual effort and labours of another to so develop his own product that it*

*covers a wider field than the area included within the scope of the earlier product, and in the common area covered by the two productions to introduce changes in order to disguise the attempt at plagiarism.*³⁸

The Supreme Court in *RG Anand*³⁹ explicitly talked about “great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the copyrighted work, his act amounts to theft by depriving the original owner of the copyright of the product of his labour.” This is an explicit recognition of Labour Theory of IP. The Supreme Court is not saying that the work is the extension of the personality of the author, or copyright serves a social purpose, or copyright is a thing of social utility, or copyright is an instrument of social planning. The Court has declared “*Thou shall not steal*” as the “*moral basis of the protective provisions of*” the Copyright Law. Invoking the natural right approach for justification of copyright law can hardly minimize the chasm between the friends and foes of copyright law.

In *Gramophone Company of India Ltd v Birendra Bahadur Pandey*,⁴⁰ Justice O Chinnappa Reddy delivered the judgment on behalf of the unanimous Court. The opinion relating to theoretical underpinning is identified as under:

*‘An artistic, literary or musical work is the brainchild of its author, the fruit of his labour and so considered to be his property. So highly is it prized by all civilized nations that it is thought worthy of protection by national laws and international Conventions relating to Copyright.*⁴¹

It seems that the Supreme Court in this case invoked the Labour Theory of property by making the above observation that an artistic, literary or musical work is the brainchild of its author, the fruit of his labour and so considered to be his property.

In *State of AP v Nagoti Venkataramana*,⁴² the Supreme Court started to reason from the Statement of Objects and Reasons to Amendment⁴³ to The Copyright Act which reads as ‘Piracy has become a global problem due to the rapid advances in technology. It has assumed alarming proportions all over the world and all the countries are trying to meet the challenge by taking stringent legislative and enforcement measures. The problem of piracy and the necessity for taking sufficient anti-piracy measures were also voiced by Members of Parliament at the time of the consideration of the Bill to amend The

Copyright Act.’⁴⁴ Discussing the problem generated by copyright piracy (infringement), the Supreme Court observed as under:

‘Mainly there are three types of piracy, namely, piracy of the printed word, piracy of sound recordings and piracy of cinematograph films. The object of the pirate in all such cases is to make quick money and avoid payment of legitimate levies and royalties. In respect of books, it is estimated that four hundred to five hundred titles are pirated every year in India and on each of the pirated titles, the loss to the Government in the form of tax evasion amounts approximately to Rs 11,000. Apart from books, recorded music and video cassettes of films and TV programs are reproduced, distributed and sold on a massive scale in many parts of the world without any remuneration to the authors, artists, publishers and producers concerned. The emergence of new techniques of recordings, fixation and reproduction of audio programs, combined with the advent of video technology have greatly helped the pirates. It is estimated that the losses to the film producers and other owners of copyright amount to several crores of rupees. The loss to Government in terms of tax evasion also amounts to crores of rupees. In addition, because of the recent video boom in the country, there are reports that uncertified video films are being exhibited on a large scale. A large number of video parlors have also sprung up all over the country and they exhibit such films recorded on video tapes by charging admission fees from their clients. In view of these circumstances, it is proposed to amend The Copyright Act suitably to combat effectively the piracy that is prevalent in the country.’⁴⁵

The basic reason underlying the approach of the Supreme Court in *Nagoti Venkataramana*,⁴² seems to be loss of revenue to the State, *i.e.*, pirated copies of the copyrighted materials help promote the problem of tax evasion. In other words, lost revenue is a loss to the public at large for functions of the State including the welfare functions cannot be adequately discharged without collection of taxes. Protecting copyright, therefore, not only protects the interests of the owner of copyright but it also generates revenue for the State. This approach of the Supreme Court is purely Utilitarian, *i.e.*, protection of copyright is in the interest of the State and the public at large.

In *Gramophone Co of India Ltd v Mars Recording Pvt Ltd*,⁴⁶ the unanimous decision on behalf of the Court was delivered by Justice Rajendra Babu. In this case, no opinion as to the theoretical basis of copyright was expressed. Perhaps, had the case been decided on merit by the Supreme Court, there would have been some opinion in this regard. The same remained the position of the Supreme Court in *Exphar SA v Eupharma Laboratories Ltd*⁴⁷ and *Dhodha House v S K Maingi*.⁴⁸

In *Entertainment Network (India) Ltd v Super Cassette Industries Ltd*,⁴⁹ the judgement on behalf of the unanimous Court was delivered by Justice S B Sinha. As to the theoretical underpinning of copyright, the relevant observation of the Supreme Court is reproduced as:

*'There cannot be any doubt whatsoever that an artistic, literary or musical work is the brainchild of an author, the fruit of his labour and, so, considered to be his property. A copyright, however, unlike a trade mark is a right created under the Act as is evident from Section 16 thereof. When an author of a copyright and other claims a copyright, it is subjected to the provisions of the Act. The rights and obligations of the author ought to be found out within the four corners of the Act. It is not necessary to dilate more upon these aspects of the matter as the object behind enacting the Act is absolutely clear and explicit. It creates a monopoly in favor of the author. Copyright also creates a monopoly in favor of the copyright society. What requires protection is unlawful reproduction of the author's work by others. It is the long period which encourages the authors to create works of literature, music and art.'*⁵⁰

The Supreme Court cited the observation of the Court in *Gramophone Company of India Ltd*⁵¹ and further cited from Copinger and Skone James on Copyright⁵² that

'Finally, it is considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large. These four fundamental principles are cumulative and interdependent and are applied in the justification of copyright in all countries, although different countries give varying

*emphasis to each of them. To generalize, it is true to say that in the development of modern copyright laws, the economic and social arguments are given more weight in Anglo-American laws of common law tradition, whereas, in Continental law countries with civil law systems, the natural law argument and the protection of authors are given first place.*⁵³ . . . *'The protection of copyright, along with other IP, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest.'*⁵³

The Court described the essential features of The Copyright Act as under:

*'The Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works, on the other. The extent to which the owner is entitled to protection in regard to his work for which he has obtained copyright and the interest of the public is a matter which would depend upon the statutory provisions. Whereas the Act provides for exclusive rights in favor of owners of the copyright, there are provisions where it has been recognized that public has also substantial interest in the availability of the works.'*⁵⁴

The Court explained the philosophy of Copyright Law as under:

'The underlying philosophy of The Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licenses on terms mutually acceptable to him and the licensee. The Act confers on the copyright owner the exclusive right to do the various acts enumerated in Section 14. An infringement of copyright occurs if one of those acts is done without the owner's license. A license passes no interest, but merely makes lawful that which would otherwise be unlawful. The Act also expressly recognizes the notion of an "exclusive license" which is defined in Section 2 (j). But that does not mean, as would be noticed from the discussions made. . . that it would apply in all situations irrespective of the nature of right as also the rights of others. It means a license which confers on the licensee, to the exclusion of

all other persons (including the owner of the copyright) any right comprised in the copyright in a work. An exclusive licensee has specific rights under the Act such as the right to have recourse to civil remedies under Section 55 of the Act. This Scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.’⁵⁵

Explaining the scheme of The Copyright Act, the Court observed as under:

‘The scheme of the Act affirms the freedom to contract as being the primary machinery by which the copyright owner publishes his work through a voluntary license regime in terms of Section 30. Compulsory licenses are an exception to the general freedom of the copyright owner to contract.’⁵⁶

As to the question whether the concept of property is applicable to copyright, the Court observed as:⁵⁷

‘An owner of a copyright indisputably has a right akin to the right of property. It is also a human right. Now, human rights have started gaining a multifaceted approach. Property rights vis-a-vis individuals are also incorporated within the ‘multiversity’ of human rights. As, for example, any claim of adverse possession has to be read in consonance with human rights. The activist approach of the European Court of Human Rights is quite visible from the judgment of Beaulane Properties Ltd v Palmer⁵⁸ and JA Pye (Oxford) Ltd v Graham.’⁵⁹

Explaining the significance of property right, the Court observed as under:

‘This Court recognized need of incorporating the same principle for invoking the rule of strict construction in such matters in PT Munichikkanna Reddy⁶⁰ stating “Adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor’s

positive intent to dispossess. Intention to possess cannot be substituted for intention to dispossess. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession.’⁵⁷

Further, in *Peter Smith v Kvaerner Cementation Foundations Ltd*,⁶¹ the Court allowed the appellant to reopen the case despite a delay of four years as he had been denied the right to which Article 6 of the European Convention on Human Rights entitled him to a fair hearing before an independent and impartial tribunal.⁵⁷

Elucidating the nature of property right, the Court observed as under:

‘But the right of property is no longer a fundamental right. It will be subject to reasonable restrictions. In terms of Article 300A of the Constitution, it may be subject to the conditions laid down therein, namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation.’⁶²

As to the interface of private property and public interest, the Court observed as:

‘What would be a public interest? Would it depend upon the facts and circumstances of each case and the provisions of the statute? General meaning of the word “public policy” has always been held to be an unruly horse by this Court. . . The right to property, therefore, is not dealt with its subject to restrict when a right to property creates a monopoly to which public must have access. Withholding the same from public may amount to unfair trade practice. . . In our constitutional Scheme of statute monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.’⁶²

The Supreme Court reiterated the opinion expressed in *Gramophone Company of India Ltd*⁶³ as to the theoretical underpinning of copyright by invoking the Labour Theory. However, while citing from Copinger and Skone James on Copyright, the Court emphasized that copyright is “considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large.” This

observation is based on Utilitarian Theory. The Court is invoking both the Labour Theory and Utilitarian Theories simultaneously. Still quoting from Copinger and Skone James on Copyright, the Court noted “To generalize, it is true to say that in the development of modern copyright laws, the economic and social arguments are given more weight in Anglo-American laws of common law tradition, whereas, in Continental law countries with civil law systems, the natural law argument and the protection of authors are given first place.” However, the Court did not explicitly identify whether the Indian law gives more weight to social and economic arguments or to the natural law argument. It appears that the Court was tracing the theoretical underpinnings of the copyright law in both the common law and Continental law traditions. The Court further quoted from Copinger and Skone James on Copyright as “The protection of copyright, along with other IPR, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest.”

While describing the essential features of The Copyright Act, the Court noted that “The Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works, on the other.” This observation of the Court traces the theoretical underpinning of copyright law in the Utilitarian Theory.

The Court also observed that copyright is a property right. Being a property right it is constitutional right. The Court further noted that copyright is a human right. Concluding the discussion as to the theoretical underpinnings of copyright the Court observed, “In our constitutional Scheme of statute monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.”

It may be said that the Supreme Court in *Entertainment Network (India) Ltd.*,⁴⁹ traced the theoretical underpinnings of copyright in both the Labour and the Utilitarian Theories. However, it placed the Utilitarian Theory at the highest pedestal in comparison to the Labour Theory. In other words, the Court declared that Labour Theory may justify the existence of copyright but it may not justify the

exercise of copyright. In case of conflict between the interest of the fruit of labour and social interest the former must yield to and succumb to the latter. The justification of the copyright lies in the end of social purpose. In other words, the Court declared that copyright is a means to achieve the ends of creativity and dissemination of knowledge, i.e., copyright as a monopoly can be only tolerated to the extent it serves social purposes of creativity and dissemination of knowledge. In the light of this judgment, it may be said that mechanism evolved by the Court for minimizing the chasm between the friends and foes of copyright is to primacy to public interests of creativity and dissemination of knowledge over the monopoly in the name of copyright coming into existence due the labour of the author.

In *Eastern Book Company v DB Modak*,⁶⁴ the judgment on behalf of the unanimous Court was delivered by Justice P PNaolekar. Describing the theoretical basis of copyright, the Supreme Court observed as:

‘The copyright, protection finds its justification in fair play. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make a profit but of the skill and labour of the original author and it is for this reason The Copyright Act gives to the authors certain exclusive rights in relation to the certain work referred in the Act. The object of the Act is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. Copyright is a right to stop others from exploiting the work without the consent or assent of the owner of the copyright. A Copyright Law presents a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute. One of the key requirements is that of originality which contributes, and has a direct nexus, in maintaining the interests of the author as well as that of public in protecting the matters in' public domain. It is a well-accepted principle of copyright law that there is no copyright in the facts per se, as the facts are not created nor have they originated with the author of any work which embodies these facts. The issue of Copyright is closely connected to that of commercial viability, and commercial consequences and implications.’⁶⁵

Tracing the development of Copyright Law, the Court noted that ‘The development of Copyright Law in India is closely associated with the British Copyright Law Statute of Anne, the first Copyright Act in England, was passed in 17th century which provided that the author of any book already printed will have the sole right of printing such book for a term mentioned, therein. Thereafter, came the Act of 1814, and then the Act of 1842, which repealed the two earlier Acts of 1709 and 1814. The Copyright Act of 1911, in England had codified and consolidated the various earlier Copyright Acts on different works. Then came The Copyright Act of 1956. In India, the first Copyright Act was passed in 1914. This was nothing but a copy of The Copyright Act of 1911, of United Kingdom with suitable modifications to make it applicable to the then British India. The Copyright Act of 1957, which is the current statute, has followed and adopted the principles and provisions contained in the UK Act of 1956, along with introduction of many new provisions. Then came The Copyright (Amendment) Act 1983, which made a number of amendments to the Act of 1957, and The Copyright (Amendment) Act 1984, which was mainly introduced with the object to discourage and prevent the widespread piracy prevailing in video film and records. Thereafter, The Copyright (Amendment) Act, 1994, has effected many major amendments in The Copyright Act of 1957.’⁶⁵

As to the nature of copyright, the Court observed as under:

*‘Copyright is purely a creation of the statute under the 1957 Act. What rights the author has in his work by virtue of his creation, are defined in Sections 14 and 17 of the Act. These are exclusive rights, but subject to the other provisions of the Act. In the first place, the work should qualify under the provisions of Section 13, for the subsistence of copyright. Although the rights have been referred to as exclusive rights, there are various exceptions to them which are listed in Section 52.’*⁶⁶

After discussing decisions of various Courts, the Court described the threshold requirement of copyright protection as:

‘These decisions are the authority on the proposition that the work that has been originated from an author and is more than a mere copy of the original work, would be sufficient to generate copyright. This approach

*is consistent with the “sweat of the brow” standards of originality. The creation of the work which has resulted from little bit of skill, labour and capital are sufficient for a copyright in derivative work of an author. Decisions propounded a theory that an author deserves to have his or her efforts in producing a work, rewarded. The work of an author need not be in an original form or novel form, but it should not be copied from another’s work, that is, it should originate from the author. The originality requirement in derivative work is that it should originate from the author by application of substantial degree of skill, industry or experience. Precondition to copyright is that work must be produced independently and not copied from another person. Where a compilation is produced from the original work, the compilation is more than simply a rearranged copyright of original, which is often referred to as skill, judgment and or labour or Capital. The copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his skill, labour and investment of capital, maybe it is derivative work. The courts have only to evaluate whether derivative work is not the end-product of skill, labour and capital which is trivial or negligible but substantial. The courts need not go into evaluation of literary merit of derivative work or creativity aspect of the same.’*⁶⁷

In *DB Modak*,⁶⁴ the Supreme Court emphasized that “The Copyright Protection finds its justification in fair play.” The fair play between the person who produces something with his skill and labour, on the one hand and public interest. The fair play requires that the produce should normally belong to the producer and the other person should not be permitted to make a profit out of the produce of the skill and labour of the original author. The fair play further requires the copyright law to present a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute. Describing the requirement of originality as the key requirement contributing and having a direct nexus, in maintaining the interests of the author as well as that of public in protecting the matters in public domain. Elaborating the requirement of

originality, the Court note that, “*It is a well-accepted principle of copyright law that there is no copyright in the facts per se, as the facts are not created nor have, they originated with the author of any work which embodies these facts.*” The Court also emphasized the connection between copyright with commercial viability and commercial consequences and implications.

In *DB Modak*,⁶⁴ the Supreme Court invoked both the Labour and Utilitarian Theories. In the opinion of the Court the chasm between the friends and foes of copyright can be minimized by a fair balancing of the interest of the author and that of the public by protecting public domain. However, the Court did not make a distinction between the interest of the author and the interest of the owner of copyright for in most of the cases the balancing is required to be done between the interest of the owner of the copyright and that of the public. What justifies ownership in copyright where the owner of the copyright is a person other than the author of the work. Whether it is the money, investment and capital that justifies copyright in such cases?

In *Dabur India Ltd v KR Industries*,⁶⁸ *Academy of General Education, Manipal v B Malini Mallya*,⁶⁹ *Phonographic Performance Ltd v Entertainment Network (India) Ltd*⁷⁰ and *Paragon Rubber Industries v Pragathi Rubber Mills*,⁷¹ the Supreme Court did not discuss or expressed any opinion as to the theoretical underpinnings of copyright.

In *Krishka Lulla v ShyamVithalrao Devkatta*,⁷² the Supreme Court observed as:

‘[N]o copyright subsists in the title of a literary work and a plaintiff or a complainant is not entitled to relief on such basis except in an action for passing off or in respect of a registered trademark comprising such titles. This does not mean that in no case can a title be a proper subject of protection against being copied as held in Dicks v Yates⁷³ where Jessel MR said “there might be copyright in a title as for instance a whole page of title or something of that kind requiring invention” or as observed by Copinger.’⁷⁴

In *Krishka Lulla*,⁷⁵ the Supreme Court reiterated the point that copyright protection can only be extended to ‘work’ in the copyright law sense. In other words, the person must put in some labour, some skill, some judgment to claim copyright protection. The Court seems to have invoked the

Labour Theory for copyright protection. In most of the cases, the Court invoked the Labour Theory for copyright protection. In some of the decisions, both the Labour Theory and Utilitarian Theory have been invoked by the Supreme Court.

No decision of the Supreme Court identified the real rub of the problem, *i.e.*, people do not criticize copyright because it protects the interest of the author. Foes of copyright claim that the fruit of the labour, skill and judgment of the author is appropriated by the employer, by the business houses, by the government. What justifies this appropriation? Can this appropriation be called a fair play? We need a theory which can justify or demolish or at least may construct a middle path which brings the ownership (not authorship) of copyright at the center stage. Following seeks to examine theoretical underpinnings of copyright under The Designs Act, 2000.

Copyright under The Designs Act, 2000: Theoretical Underpinnings

Only one decision of the Supreme Court deals with the theoretical underpinnings of copyright under The Designs Act, 2000 (Designs Act).

In *Bharat Glass Tube Ltd v Gopal Glass Works Ltd*,⁷⁶ the decision on behalf of the unanimous Court was delivered by Justice A K Mathur. The Court reproduced the Statement of Objects and Reasons of Bill introduced for the enactment of The Designs Act which reads as ‘Since the enactment of The Designs Act, 1911, considerable progress has been made in the field of science and technology. The legal system of the protection of industrial designs requires to be made more efficient in order to ensure effective protection to registered designs. It is also required to promote design activity in order to promote the design element in an article of production. The proposed Design Bill is essentially aimed to balance these interests. It is also intended to ensure that the law does not unnecessarily extent protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs’.⁷⁷

Explaining the purpose of The Designs Act, the Court observed as:

‘In fact, the sole purpose of this Act is protection of the IPR of the original design for a period of ten years or whatever further period extendable. *The object behind this enactment is to benefit the person for his research and labour put in by him to evolve the new*

and original design. This is the sole aim of enacting this Act (emphasis added).

It has also laid down that if design is not new or original or published previously then such design should not be registered. It further lays down that if it has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration then such design will not be registered or if it is found that it is not significantly distinguishable from known designs or combination of known designs, then such designs shall not be registered. It also provides that registration can be cancelled under Section 19 of The Designs Act if proper application is filed before the competent authority *i.e.*, the Controller that the design has been previously registered in India or published in India or in any other country prior to the date of registration, or that the design is not a new or original design or that the design is not registerable under this Act or that it is not a design as defined in Clause (d) of Section 2. The Controller after hearing both the parties if satisfied that the design is not new or original or that it has already been registered or if it is not registerable, cancel such registration and aggrieved against that order, appeal shall lie to the High Court. *These prohibitions have been engrafted so as to protect the original person who has designed a new one by virtue of his own efforts by researching for a long time (emphasis added).* The new and original design when registered is for a period of ten years. Such original design which is new and which has not been available in the country or has not been previously registered or has not been published in India or in any other country prior to the date of registration shall be protected for a period of ten years. Therefore, it is in the nature of protection of the IPR. This was the purpose as is evident from the statement of objects and reasons and from various provisions of the Act.⁷⁸

The Court also quoted from a book⁷⁹ as under:

*'Object of registration of designs. The protection given by the law relating to designs to those who produce new and original designs, is primarily to advance industries, and keep them at a high level of competitive progress.'*⁸⁰ (emphasis added)

Explaining the reason of copyright under The Designs Act, the Court observed as:

*'Those who wish to purchase an article for use are often influenced in their choice not only by practical efficiency but the appearance. Common experience shows that not all are influenced in the same way. Some look for artistic merit. Some are attracted by a design which is a stranger or bizarre. Many simply choose the article which catches their eye. Whatever the reason may be one article with a particular design may sell better than one without it: then it is profitable to use the design. And much thought, time and expense may have been incurred in finding a design which will increase sales. The object of design registration is to see that the originator of a profitable design is not deprived of his reward by others applying it to their goods.'*⁸⁰ (emphasis added)

Explaining the purpose of The Designs Act, the Court observed as:

*'The purpose of The Designs Act is to protect novel designs devised to be applied to (or in other words, to govern the shape and configuration of) particular articles to be manufactured and marketed commercially. It is not to protect principles of operation or invention which, if profitable at all, ought to be made the subject-matter of a patent. Nor is it to prevent the copying of the direct product of original artistic effort in producing a drawing. Indeed, the whole purpose of a design is that it shall not stand on its own as an artistic work but shall be copied by embodiment in a commercially produced artefact. Thus, the primary concern, is what the finished article is to look like and not with what it does and the monopoly provided for the proprietor is effected by according not, as in the case of ordinary copyright, a right to prevent direct reproduction of the image registered as the design but the right, over a much more limited period, to prevent the manufacture and sale of article of a design not substantially different from the registered design. The emphasis therefore is upon the visual image conveyed by the manufactured article.'*⁸⁰

The Court in *Bharat Glass Tube Ltd.*,⁷⁶ recognized the following justifications of copyright under The Designs Act, namely:

- (i) The object behind this enactment is to benefit the person for his research and labour put in by him to evolve the new and original design. This is the sole aim of enacting this Act; and
- (ii) The protection given by the law relating to designs to those who produce new and original designs, is primarily to advance industries, and keep them at a high level of competitive progress.

The first justification (a) reiterates the Natural Right justification of copyright under The Designs Act and second justification (b) bases the justification in both Natural Right Theory and Utilitarian Theory for the emphasis in this approach is that protection of design is a means to achieve the ends of advancement of industries and keep them at a high level of competitive progress.

In *Godrej Sara Lee Ltd v Reckitt Benckiser Australia Ltd*,⁸¹ Justice Altamas Kabir delivered the unanimous opinion on behalf of the Court. No opinion as to the theoretical underpinnings of Design Law was expressed in this case.

Though, only two decisions of the Supreme Court are available on Design Law and only in one of the decisions, the Court explained the theoretical basis of Design Law, yet the Court articulated the reasons very clearly. The first object that the Court identified is to encourage creative minds to come up with new designs by putting in their labour and research. The Court called it the “sole aim” of The Designs Act. The Court, however, did not stop and proceeded to observe that creation of “new and original design” is not an end by and itself rather than the protection of such designs is “primarily to advance industries” and “keep them at a high level of competitive progress.” In other words, the labour put in by the producer of new and original design promotes the advancement of industries and keep them at a high level of competitive progress.

Conclusion

An analysis of the decisions of the Supreme Court reveals that in no case relating to two copyrights the constitutional validity of these statutory copyrights was challenged. In a sense, therefore, there was no need to engage in philosophical discourse. Be that as it may, once the Court was engaged in such a discourse, it was expected that the Court would apply judicial standards to rigorously scrutinize theoretical underpinning of two copyrights from all possible angles. It was also expected that names of theoretical

frameworks with the names of their proponents should have been referred. Nonetheless, the idea underlying these two theoretical frameworks is very much present in the decisions of the Supreme Court.

Initially the Supreme Court invoked only Labour Theory to justify ‘why’ of copyright under The Copyright Act but later on the Court employed both the natural right and utilitarian justifications for copyright. The Court completely ignored the inherent distinction between the two theoretical frameworks. The Court did not refer to Bentham’s description of Labour Theory as ‘nonsense on stilts’.⁸² The Court nowhere referred to John Locke’s criticism of copyright.⁸³ The Court also did not notice the inherent distinction between the ‘intangible’ subject matter of two copyrights and ‘tangible’ subject matter of private property for which these theoretical frameworks were constructed. Mechanical application of these theoretical frameworks could have been avoided and judicial standards of fairness and reasonableness should have been used to construct a sound and objective justification as to ‘why’ of two copyrights.

In the opinions of the Supreme Court, the author deserves a copyright for he puts in his labour, skill, judgment, and capital and therefore the fruit of his labour must belong to him. However, this requirement of labour, skill, judgment, and capital has been modified in *DB Modak*,⁸⁴ in cases of reporting of judgments of Courts, as skill and judgment. Nevertheless, the idea of applying intellectual labour is central to copyright justification. The Court also recognized that protection of copyright also serves social purpose. The Supreme Court is of the opinion that copyright protection finds its justification in fair play. The object of The Copyright Act is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. A copyright law presents a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute. One of the key requirements is that of originality which contributes, and has a direct nexus, in maintaining the interests of the author as well as that of public in protecting the matters in public domain. The Court also emphasized the significance of copyright in terms of revenue to the State. The black or grey marketing of copyrighted materials has been identified as one of the reasons of criminalizing copyright infringements. This is clearly a utilitarian justification.

An analysis of cases relating to copyright under The Designs Act reveals that: (i) the object behind The Designs Act is to benefit the person for his research and labour put in by him to evolve the new and original design. This is the sole aim of enacting the Designs Act, and (ii) the protection given by the law relating to designs to those who produce new and original designs, is primarily to advance industries, and keep them at a high level of competitive progress.

The first justification reiterates the Labour Theory justification of copyright under The Designs Act and second justification bases the justification in both Labour Theory and Utilitarian Theory for the emphasis in this approach is that protection of design is a means to achieve the ends of advancement of industries and keep them at a high level of competitive progress.

It may be concluded that the Court seems to have used both the theoretical frameworks as supplementary and complimentary to each other. Later judgments of the Court lay primary emphasis on Utilitarian Theory to justify the two copyrights. In the later judgments, Labour Theory has been assigned the supporting role to the Utilitarian Theory. The Supreme Court has not said that only because someone has come up with an IP therefore, he is entitled to exclude others from making and using it. Current approach of the Supreme Court to two copyrights may be described as utilitarian. Since this is an analytical study, no suggestion is offered as to the reform in the law. However, it is suggested that since the extant theoretical frameworks are wanting as they do not factor the problem of appropriation of fruit of labour of the author or inventor by the big or small corporate or business houses. The extant theoretical frameworks, therefore, cannot provide a convincing explanation for the vices of IP. Since IP is a species of property and shares only attribute of right to exclude others, the wholesale import and mechanical extension of theoretical frameworks of property rights in tangibles cannot fully explain the nuances of IP in intangibles. Hence, there is a need to construct a theory of IP which can provide a reasonable and convincing explanation making out a strong case for a fair and equitable regime of IP in general and the two copyrights in particular.

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- 29 *Indian Performing Right Society Ltd v Eastern India Motion Pictures Association* [1977] 3 SCR 206, 223.

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- (i) in relation to a literary or dramatic work, the author of the work;
 - (ii) in relation to a musical work, the composer;
 - (iii) in relation to an artistic work other than a photograph, the artist;
 - (iv) in relation to a photograph, the person taking the photograph;
 - (v) in relation to a cinematograph film or sound recording, the producer; and
 - (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;
- Sub-clauses (v) and (vi) were substituted by Act 38 of 1994, Section 2, with effect from 10 May 1995.
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- 63 *Gramophone Company of India Ltd v BirendraBahadurPandey*[1984] 2 SCR 664.
- 64 2008 (36) PTC 1 (SC).
- 65 *Eastern Book Co v DB Modak*2008 (36) PTC 1 (SC), 29.
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