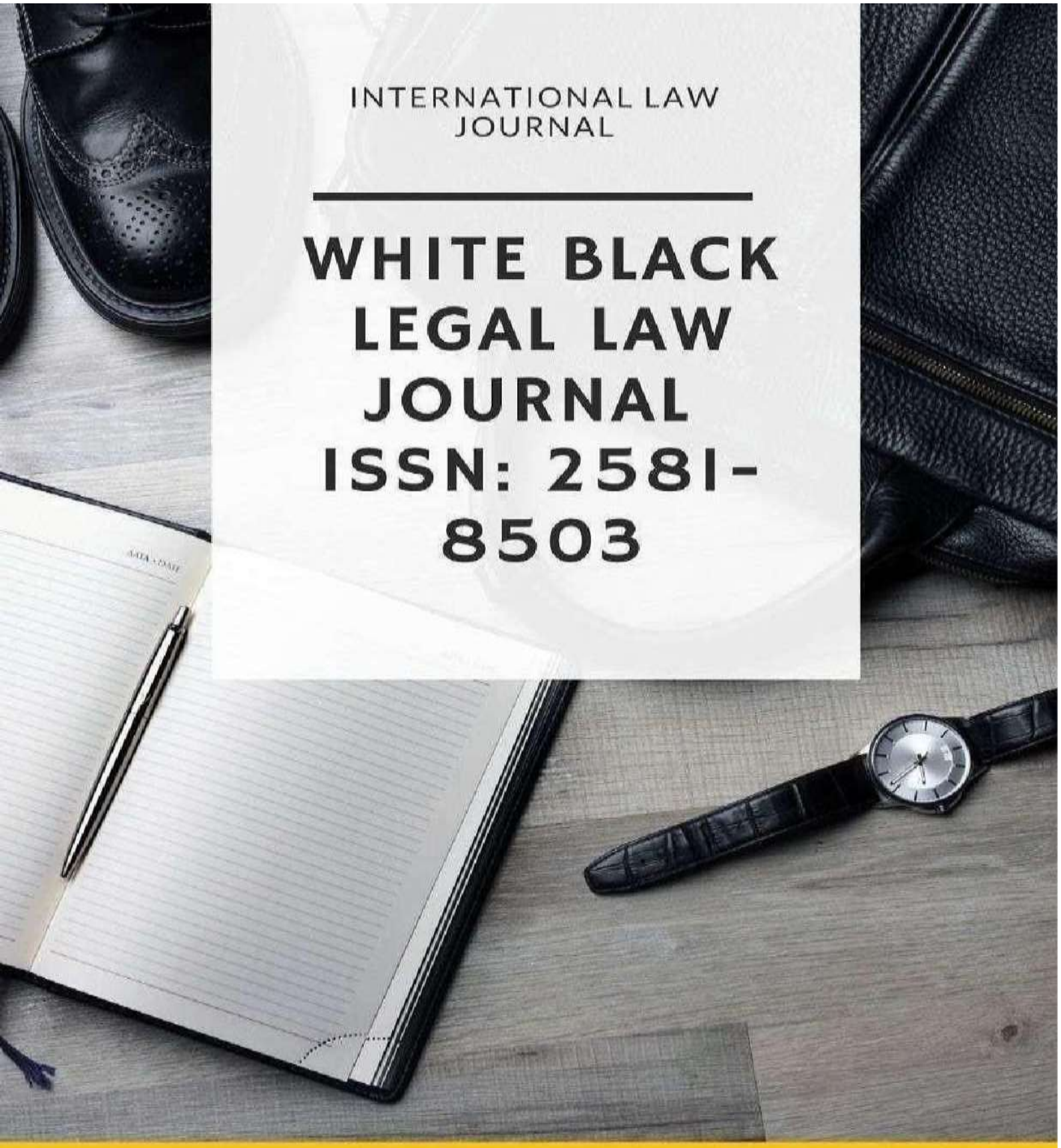

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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With this thought, we hereby present to you

www.whiteblacklegal.co.in
Volume 3 Issue 1 | May 2025 ISSN: 2581-8503

A STUDY ON DATABASE PROTECTION IN INDIA AND U.S

AUTHORED BY - SREE LEKHA. V[1] & KUMUDHA. S[2]

INTRODUCTION

Many different technologies systematise and order information: encyclopaedias, textbooks, and other sources with information places in a usable format. Databases are other obvious examples. While the database has existed for a long time in many different ways, now database takes its form in a digitalised manner. This kind of digital databases collects a lot of information and gives access to a lot of information or data; best examples to be stated to a lawyer shall be a Lexis and Westlaw and other examples such as CD-ROMs, index and periodicals can also be stated as databases. The value of data in these databases depends not only on the information but on the ease to access, rather than in a way which it is ordered. All these databases shall cost an extensive amount to be prepared but then they shall be copied easily. This paves in the way for the databases to be protected as an intellectual property. In today's world, governments of various countries are involved in collection of data for a digital revolution; example, Government of India has taken initiative to change the country into 'Digital India'. Not just the public sector but even the private sectors are largely involved in this process of data collection not just for that sectors benefit but there comes in a contravention into a person's privacy and a problem of national security. On all this basis, the article discusses on the protection of databases in U.S and India.

Database protection:

Literal meaning of database shall be that a collection of data. "A database is a collection of persistent data that is used by the application systems of a given enterprise." C.J. Date. "A database is an organized collection of data." By Merriam-Webster. "A database is defined as a collection of independent works, data, or other materials that are arranged in a systematic way, and are individually accessible by electronic or other means"[3]. From all these definitions it

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[3] Reg. 12 of European Database Regulation, 1998.

shall be understood that database shall be a collection or organised set of information which shall be managed and be accessed.[4] Every time we purchase something online or use a service or register something in online, there are number of chances our data being stored by the services or websites that we use; the only method by which we people can have safety or prevent this is, is by protecting the data that are stored in these websites by data protection policies and legislations minimise state and corporate data exploitation.

Copyright cannot protect database as such but shall be protected on a compilation basis which can also be stated as sui-generis basis. This shall be given on the basis of a recognition and a protection of the investment made in the process of compilation.[5] In the year 2002, Standing Committee on Copyright Related Rights, the WIPO secretariat studied the protection of intellectual property of non-original databases. The conference of 1996, WIPO Diplomatic conference on certain Copyright and neighbouring Rights Questions adopted the recommendation on databases. Member states of WIPO wants to protect non-original databases, which cannot be protected neither on a sui-generis basis or an alternative method shall be used;[6] amidst, all these the Database Directives were implemented into United Kingdom through the Database Regulation in the year 1998. This involves a two tier mechanism whereby the first one protects the databases that are original in nature and the second tier protects those on a sui-generis basis.[7]

Article 10 of Agreement on Trade Related Aspects of Intellectual Property Law states about computer programs and compilation of data. Clause 2 of the article states that the data being compiled in any form, whether in readable form or not; since works have been made in the compilation of data or selection or arrangement of data shall be considered as intellectual property and is subject to protection. Also, protection shall not be given to just a data or material itself and does not come under copyright. Thus the data collection or database is said to have given protection under the TRIPS agreement. [8]

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[4] See. LIONEL BENTLY AND BRAD SHERMAN, INTELLECTUAL PROPERTY LAW, 350 (4th Ed, 2014).

[5] Hari Manasa Mudunari, *Comparative Study Of Protection Of Database In US, EU, And India*, IPLEADERS (Oct 29, 2019 11.00pm), http://www.ipleaders.html

[6] Ibid

[7] See. LIONEL BENTLY AND BRAD SHERMAN, INTELLECTUAL PROPERTY LAW, 350 (4th Ed, 2014).

[8] Article 10 of Agreement on Trade Related Aspects of Intellectual Property. "Computer Programs and Compilations of Data 1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). 2. 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."

Thus the member countries of WIPO following TRIPS were under the provision and shall follow this compilation of data as database protection and many countries started following the database protection such as United Kingdom, Spain, Switzerland, Sweden, Australia, China (Taiwan), Thailand, Singapore and Russia.

U.S does not have a separate database protection law but protects it as compilation of data. Also, a compilation of data lacking creativity shall not be given protection. 17 US Code 101 defines a compilation as "a collection and assembling of pre-existing materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship." There is some creativity needed in the compilation. For example, a list of 10 billionaires shall be protected as a data compilation but not the names of those billionaires are not protected as a data. For example, in the case of Feist publications v Rural telephone service company, the Court held that the telephone directory (white pages) shall not be protected since it is only a compilation of data and there is no creativity involved in the process.[9] Before this decision in the case, even the compilation of data were given protection on the basis of the "sweat of the brow doctrine". An example given for this shall be a list of billionaires made with their birthdates together with it shall also be given a protection and no one was given the right to copy the dates as given in the list; this sweat of the brow practise was set aside by the Feist decision.

After the Feist decision there were no protection given to the factual information or data and this was totally prevented by the "Hot news doctrine". Factual information sometimes such as stock, and other statistics which involved the time-taking mechanism shall be protected by this doctrine. In the case of NBA v Motorola[10], the Supreme court held that the scores of games and other atheletic events are not protected under the copyrights law. "The Court applied the hot news doctrine from International News Service v. Associated Press[11], to the misappropriation claim. In this older Supreme Court decision, it was decided that Associated Press had a property right to any hot news it acquired first. To determine whether some collection of information was protected under this doctrine, the Court gave the following criteria:

1. the plaintiff generates or collects information at some cost or expense, or;

[9] See.Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, (1991).
[10] See. NBA v. Motorola, Inc., 105 F. 3d 841, 2d Cir. (1997).
[11] See. International News Service v. Associated Press, 248 U.S. 215 (1918)

2. the value of the information is highly time-sensitive;
3. the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it;
4. the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and
5. the ability of the other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."[12]

For a long period from these, the Congress of United states has been asking for a law to protect databases but till date no law has been passed. The copyright act of United States has made a criteria of originality and the courts have interpreted originality and is stringent in nature. And there are two bills pending in the House of Representatives based on this and is based on database producers and prohibits uses which could harm the primary or related primary market of the related data market. There are also exceptions stated such as by excluding the data made by the government for protection and those exceptions which are stated in the Copyrights Act.[13]

In India, unlike the United Kingdom, no database protection laws are available in a separate legislation. But then in various other legislations such as Indian Penal Code, Indian Constitution, and The Copyrights Act, 1957, there are provisions supporting the protection of databases. The Indian Penal Code protects database protection by the provisions of theft and this shall be substantiated in a way that the movable property definition includes corporeal property except land and that which is not attached to earth.[14] Article 21 of Constitution also provides "the right to life and personal liberty".[15] Also if a breach of privacy happens, that shall also be considered to have an action under torts law. The copyrights act also protects database since the interpretation clause of "literary works" includes the computer programmes and compilation of works which is databases; Thus, Indian Copyrights Act protects the database.[16]

But, apart from all these laws, the principal law protecting the databases in India is the

[12] Ibid

[13] *Database protection in the USA*, (01 October, 2005, 11.10pm) IUSMENTIS, https://www.iusmentis.com/databases/us/.

[14] See Indian Penal Code, 1860. Act 45 of 1860

[15] See INDIAN CONST. Art 21. "No person shall be deprived of his life or personal liberty except according to a procedure established by law."

[16] See Indian Copyrights Act, 1957. Act 14 of 1957. Sec 2 (o) "literary work includes computer programmes, tables and compilations including computer [databases]"

Information Technology Act, 2000.[17] The act includes online regulations such as e-commerce and cybercrime. The act divides itself on two basis cyber contravention (civil) and cyber offences (criminal). The civil part takes in actions such as unauthorised access, downloading or extracting data from website or computers. While, the offences take in actions tampering, hacking and breach of confidentiality and privacy. But after this an amendment was made in the year 2008 especially stating on the sensitive data protection considering data protection to be a main aspect. Thus the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data and Information) Rules, 2008[18] was specially framed within sec 43a of IT act, 2000.

Apart from this, each sector such as the telecom sector, medical sector etc has different laws and regulations for the database protection. Some of which are "Unified License Agreement issued to telecom service providers by the Department of Telecommunications; Telecom Commercial Communication Preference Regulations, 2010; Clinical Establishments (Central Government) Rules, 2012; Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002".

Thus are the provisions for the data protection in India. While there are many different legislations, there exists some landmark judgements in India where data protection contravenes with the Right to privacy of an individual. In the case of People's Union of Civil Liberties v Union of India[19], which is otherwise called as the telephone tapping case, the tapping of telephone which is also a data collection was included contravention to the right to privacy.

Another important case was K. S. Puttaswamy v Union of India[20], where the case was based on data collection for an initiative of digital India. Also known as Adhar Card case, it was held by a nine judge bench that "The reference is disposed of in the following terms: (i) The decision in M P Sharma which holds that the right to privacy is not protected by the Constitution stands over-ruled; (ii) The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled; (iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the

[17] Information Technology Act, 2000. Act 21 of 2000.
[18] Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data and Information) Rules, 2008
[19] (1997) 1 SCC 318.
[20] K.S. Puttaswamy (Retd.) v Union of India, (2015) 8 SCC 735.

freedoms guaranteed by Part III of the Constitution. (iv) Decisions subsequent to Kharak Singh which have enunciated the position in (iii) above lay down the correct position in law." Hon'ble Mr. Justice D.Y. Chandrachud, clearly held that: - "(A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution; (C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III; (F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being; (H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and (I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual."[21]

Thus, comes the complete constitutional protection to the right to privacy and a concept of

[21] Ibid

safeguarding or protecting personal information or databases even by the government.

Even though data protection is made on different legislations and interpreted in different manner in different cases, the basic concept is that protection should be given to databases and compilations shall be considered as databases. Also only database that is a compilation or arrangement of data shall be protected but no data or information shall be protected.

But, since there is a transition in the economy, there is a need for database protection since data or information has become the case in every aspect of a business, trade and economy. As already stated both public sector that is the government and the private sector that is the company, enterprise or business does make data transaction in one or the other way. Since database consists of personal and other data, sometimes this is in contravention to the right to privacy. Also in countries like India and U.S, which is diverse in nature, the government or state is an important person which plays a major role in protecting this or having a surveillance over the databases. The major reason for this shall be the national security. Only continuous surveillance shall protect the database but government cannot have a sector or any other factor to do this job, instead a separate legislation shall be brought in such that what data is protected, who should protect the database and other conditions. Also since in the globalising world each and every country is interdependent on each other in various aspects, data transaction shall be made and to protect the data, there should be a separate legislation for the protection of databases.

Data protection legislation shall be made with respect to the following factors: technological flexibility- it shall be flexible in a changing technology; general approach- both public and private sectors shall come under the law; informed consent- consent is an expression of human autonomy and the expression should informed and meaningful; data minimisation- collected data shall be for only a purpose and minimal in nature; controller held accountable- the controller shall be accountable for the databases; structured enforcement- high power statutory authority should be there; deterrent penalty. This shall also take into account that not just data involved in trade but in hospital or medical sectors, telecom sectors and financial sectors shall also be considered for the legislation of database protection. [22]

Also, from the principles of U.S and U.K, the following factors should also be considered such that notice shall be given to the person from whom the data is collected; choice, security, onward transfer, data integrity, access and enforcement.[23]

[22] See. html://www.wipo.com.

[23] Aashit Shah and Nilesh Zacharias, RIGHT TO PRIVACY AND DATA PROTECTION, Nishith Desai Associates (2001).

In India, database protection Bill has been sent to the Parliament but the Act has not been passed. And the paper is based on practices from United Kingdom, European or Union and Canada. This draft has divided data into personal sensitive data and other data and it has widened the scope of the protection of databases. The government along with the Information Technology sector is working a law for this.

Conclusion:

Thus, both India and United States does not have a separate legislation to protect database but there are other provisions in both the territories for this. But then, with these provisions in hand, there shall be no change achieved since there is transition in the economy of the world. The international trade, economy and globalising world asks for the protection of database in India because of which some countries are not interested to work or have a trade relationship with country. Ex of European Union shall be stated. This is because India has become very backward in the back office works such as medical transcription, credit processing. And also a threat of privacy is found because of the lack of legislation. Only if India proceeds in this aspect, then it shall protect the offers given by other developed country to our country which is a developing nation.

"The need for a law on data protection is paramount if India is to sustain investor confidence, especially among foreign entities that send large amounts of data to India for back-office operations. Data protection is essential for outsourcing arrangements that entrust an Indian company with a foreign company's confidential data or trade secrets, and/or customers' confidential and personal data. The proposed legislation for data protection will ensure adequate safeguards, and also appoint a regulator to monitor the collected data and its usage."

A legal framework is needed for offline data and online data over the internet and the consumers should be aware of the fact that the data given is saved somewhere. Also the framework should be of the fact that it does not affect the privacy and also promotes economic growth.

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8. Indian Penal Code, 1860.
9. Indian constitution.
10. Indian Copyrights Act, 1957.
11. Information Technology Act, 2000.

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[1] Reg. 12 of European Database Regulation, 1998.

[2] See. LIONEL BENTLY AND BRAD SHERMAN, INTELLECTUAL PROPERTY LAW, 350 (4th Ed, 2014).

[3] Hari Manasa Mudunari, *Comparative Study Of Protection Of Database In US, EU, And India*, IPLEADERS
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[5] See. LIONEL BENTLY AND BRAD SHERMAN, INTELLECTUAL PROPERTY LAW, 350 (4th Ed, 2014).

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