



Originality in Derivative Works: The Academy Logo in the Light of United Kingdom, South African and Ghanaian Copyright Laws

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This paper provides an insight into the test of originality, dwelling on the perspectives from three common law countries. These perspectives are measured against the United States threshold of originality, using the Academy Logo (the *Work*) as a mirror. In the main, the paper argues that even though the U.S. standard, set for satisfying the requirements of originality, particularly for derivative works, is high and difficult to meet, the test of originality under the common law is equally not of a low threshold. Nonetheless, whereas common law, in many respects, attempts to reward labour, the U.S. test on originality leans towards the progress of science and useful arts.

Keywords: copyright, originality, derivative works

[T]o make the copyright turnstile revolve, the author should have to deposit more than a penny in the box. (Kaplan, 1967, as cited in Parchomovsky & Stein, 2009, p. 1505)

Introduction

Copyright deals with the rights of intellectual creators. It is concerned primarily with all forms and methods of communications whether printed or in sound or retrieval form (World Intellectual Property Organization [WIPO], 2004). Works which exist in physical form, such as books, paintings, or drawings equally enjoy copyright protection. Similarly, works, such as music or computerized systems are also vested with copyright (WIPO, 2004). Article 9(2) of the Trade-Related Aspects of Intellectual Property (TRIPs) Agreement provides that “copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such”. In *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*¹, Lord Hoffman remarked that “there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work”. Thus, the scope of copyright protection extends to only the form of expression of ideas and not the ideas themselves.

The rights enjoyed by copyright owners may exist in two forms—one which is afforded the work and the rights offered the author of the work (WIPO, 2004). Article 5(2) of the Berne Convention provides that “the

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¹ *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.* [2000] 1 W.L.R. 2416 (U.K.: House of Lords).

enjoyment and the exercise of these [authors'] rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work" (WIPO, 1886). Nonetheless, some countries, including the United States, have registration requirements for works which provide only evidential advantage to their authors (WIPO, 2002).

It has been argued that a country's development depends, not only on the creativity of her citizens, but on the level of protection afforded literary and artistic work and other forms of intellectual creations (WIPO, 2004). Copyright Law thus ensures that intellectual creators enjoy a certain level of protection from undue exploitation of their works. Consequently, copyright ensures the promotion, enrichment, and proper dissemination of the culture of a people (WIPO, 2004).

For a work to be eligible for copyright protection, it must be an original creation. In essence, an author's work must have its origin in the labour of the author (WIPO, 2004). The work needs not pass the test of imaginativeness or inventiveness. Suffice to note that protection offered a work is independent of the quality thereof. This was affirmed in *Sawkins v Hyperion*² where the court held that the visual effect of a design is not a condition precedent to copyright protection.

The test of originality is applied differently in many jurisdictions. Several courts in different jurisdictions have had the occasion to examine certain works and to determine whether or not such works fall within the ambit of the test of originality to be afforded copyright protection. In this paper which is basically rudimentary, we attempt a discourse of the test of originality, using the case of the Academy Logo as a mirror to examine the position of the United Kingdom law, the South African law, and Ghanaian law on originality. The choice of the Academy Logo is proper for the study because recent technological feet demands that Copyright Law must move from the traditional view of rewarding labour to a more a fulfilling case of promoting science and innovation in all its forms. We seek, through this paper, to draw lessons and provide guidance for the Ghanaian court on the test of originality since case law in this area of law remains undeveloped.

However, to give the paper a focus and to situate it within its proper context, the work is divided into three parts. The first part gives a background to the Academy Logo case and by extension discusses the general approach to the test of originality within the U.S. context. The second part focuses on the scope of copyright protection and the test of originality under United Kingdom law, South Africa law, and Ghana law, drawing from statutes and case law. In the main, the final part attempts an analysis of the approaches to the test of originality in the three common law countries in the light of the United States requirements.

Background to "the *Work*"

In June 2017, the Academy of Motion Picture Arts and Sciences (AMPAS or simply the Academy), a professional honorary organization in the United States of America, filed an application to register the Academy Logo³ known as the *Work*. The *Work* was denied registration in June 2018 on the grounds that it lacked the

² *Sawkins v Hyperion* [2005] 1 W.L.R. 3288.

³ In a proper context, the Academy Logo (the *Work*) may be classified as a derivative work because it constitutes a variation of a pre-existing work. See Boyd (2000). Indeed the Copyright Act, 17 U.S.C. § 101, defines a derivative work as: "A work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'".

authorship necessary to support a copyright claim. In a letter dated September 2018, the Academy requested the USA Copyright Office (herein after the Office) to re-consider its initial refusal to register the *Work*. After reviewing the *Work*, it held the “combination of the [*Work*’s] component elements to be insufficiently creative to support a claim in copyright”. In response, the Academy requested the Office to reconsider for the second time its refusal to register the *Work* claiming that the *Work* “conveyed sufficient copyrightable authorship, asserting that the expertise involved in creating the *Work* resulted in creative expression” (United States Copyright Office, 2017, p. 2).

The Office justified its refusal to register the *Work* by first considering the legal framework covering copyright claims. It argued that a work may be registered if it qualifies as “an original work of authorship fixed in any tangible medium of expression”.⁴ Relying on the landmark decision in *Feist Publications Inc. v Rural Tel Serv. Co.*,⁵ the Office took the view that the term “original” consists of two components: independent creation and sufficient creativity. Thus, for a work to be copyrightable, first, it must have been independently created by the author and not copied from another work. Secondly, the work must possess sufficient creativity. Only a modicum of creativity is required. Indeed, in the *Feist Publications* case, the court emphasized that “as a constitutional matter, copyright protects only those constituent elements of a work that possesses more than a *de minimis* quantum of creativity”.⁶ The court further found that there can be no copyright in a work in which “the creative spark is utterly lacking or so trivial as to be virtually non-existent”.⁷

The Office argued that the test of originality, in the *Feist Publications* case, rested squarely on the longstanding requirement of originality set forth in the Copyright Act 37 C.F.R. s 202.10(a) stating that “to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form”. Indeed, 37 C.F.R. s 202.1(a) (prohibits registration of “[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; [and] mere variations of typographic ornamentation, lettering, or coloring”).

The Office acknowledged that some combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright. Nonetheless, it noted that not every combination or arrangement will be sufficient to meet this test as was emphasized in the *Feist Publications* case.⁸ Consequently, the Office took the view that a mere simplistic arrangement of non-protectable elements does not demonstrate the level of creativity necessary to warrant protection. The Office quoted with approval the holding of the Ninth Circuit Court in *Satava v Lowry*⁹ saying:

It is true, of course that a combination of unprotectable elements may qualify for copyright protection. But it is not true that *any* combination of unprotectable elements automatically qualifies for copyright protection. Our case law suggests, and we hold today, that a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.

⁴ See also 17 U.S.C. s 102(a).

⁵ *Feist Publications Inc. v Rural Tel Serv. Co.* [1991] 499 U.S. 340, p. 345.

⁶ See also 17 U.S.C. s 102(a).

⁷ *Feist Publications Inc. v Rural Tel Serv. Co.* [1991] 499 U.S. 340, p. 359.

⁸ *Ibid.*, p. 358.

⁹ *Satava v Lowry* [2003] 323 F. 3d 805, 811 (9th Cir.).

In response to the Academy's argument that the *Work* demonstrated sufficient authorship because of its artistic quality, the Office rejected this argument on the basis that the quality of a work had no effect on the considerations for copyright claim. The language of the Office on this matter is particularly instructive and requires quoting in full:

Copyright Office Registration Specialist (and the Board) do not make aesthetic judgments in evaluating the copyrightability of particular works. The attractiveness of a design, the espoused intentions of the author, the design's visual effect or its symbolism, the time and effort it took to create, or the design's commercial success in the marketplace are not factors in determining whether a design is copyrightable.¹⁰

Derivative Works Under United States Law

Under U.S. Copyright Law, derivative works are equally protected. However, originality in derivative would suffice where the deposit material contains new authorship with sufficient amount of original expression.¹¹ The "new authorship" implies that "the derivative work must be independently created and it must possess more than a modicum of creativity".¹² The 17 U.S.C. s 103(b) provides that copyright in a derivative work is "independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material".

In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*¹³, it was emphasized that

the amount of creativity required for a derivative work is the same as that required for a copyright in any other work: [a]ll that is needed to satisfy both the Constitution and the statute is that the "author" contributed something more than a "merely trivial" variation, something recognizably "his own".

In the recent case of *Schrock v. Learning Curve Int'l, Inc.* (United States Copyright Office, 2017),¹⁴ it was emphasized that "the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the pre-existing work in some meaningful way".

Thus, according to the test as established by the courts, derivative works which lack sufficient degree of originality are not copyrightable. Indeed as stressed by the Office, minor variations such as merely changing the size of the pre-existing work or recasting a work from one medium to another do not satisfy the requirement.¹⁵

After a careful examination of the *Work* and applying the legal standards, the Office found that the work lacked the requisite authorship necessary to sustain a claim in copyright. Specifically, the Office found that the new expression in the *Work* consists of "merely trivial" combinations of standard shapes and colours and therefore does not possess the "modicum of creativity" required to merit registration as a derivative work. The Office acknowledged that the *Work* was based on the Oscar Statuette: a pre-existing work protected by copyright. However, in the *Work*, the new expression consists solely of a black isosceles triangle that surrounds the pre-existing white Oscar Statuette and a white trapezoid that is placed below. These elements were held not to be protectable.

¹⁰ Supra note 3, p. 4. See also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

¹¹ 17 U.S.C. s 103(a).

¹² *Satava v Lowry* [2003] 323 F. 3d 805, 811 (9th Cir.).

¹³ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* [1951] 191 F.2d 99, 102-103 (2d Cir.).

¹⁴ *Schrock v. Learning Curve Int'l, Inc.* [2009] 586 F.3d 513, 521 (7th Cir.).

¹⁵ 17 U.S.C. s 103(a), p. 4.

Copyright Law and the Test of Originality in United Kingdom

Like, in many other jurisdictions in the world, literary, dramatic, musical, or artistic work must be original to enjoy copyright protection under United Kingdom (U.K.) law. However, the test of originality first appeared in the Sculpture Copyright Act of 1814 which amended the Models and Busts Act 1798. Prior to this copyright issues had been governed by the Statute of Anne, 1710 (Liu, 2014). The Sculpture Copyright Act of 1814 was promulgated to protect “any new and original sculpture, or model, or copy, or cast” of human figures, or busts and any matter being subject invention in sculpture.¹⁶ In addition, it “vested the sole right of making new and original sculpture, models, copies and casts in the original proprietor” (Liu, 2014, p. 2). The Act of 1814 introduced for the first time, the requirement of originality into Copyright Law while retaining the requirement of novelty.¹⁷ The requirement of originality was incorporated into subsequent Acts including the Imperial Copyright Act, 1911 and the current Act, the Copyright, Designs and Patents Act, 1988 as amended (herein after the CDPA 1988) (Liu, 2014). The CDPA 1988 requires that for a literary or dramatic or musical or artistic work to be copyrightable, it ought to be original.¹⁸ Nonetheless, the concept of originality is not defined in the Act. What is known about the meaning of originality is the guidance that is provided in case law. In *University of London Press Ltd. v. University Tutorial Press Ltd.*¹⁹, Peterson J. provided guidance as follows:

...The word “original” does not in this connection mean that work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of “literary work”, with the expression of thought in print or writing.

In *Macmillan & Co. Ltd. v Cooper*²⁰ which case centered on abridgement or compilation, Lord Atkinson held that

to secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.²¹

Similarly, in *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.*²², it was held that “the requirement of originality means that the product must originate from the author in the sense that it is the result of a substantial degree of skill, industry or experience employed by him”²³. However, what constitutes a sufficient degree of labour, skill, or judgment depends on the facts of each case.²⁴ This position on sufficient amount of labour, skill, and judgment may be said to be rooted in the “sweat of the brow” doctrine which aims at rewarding authors for time and capital expended in creating a work. In *Walter v Lane*²⁵, Lord Rosebery made a public speech extempore. A skilled shorthand writer of *The Times* noted it down and reported it verbatim in the newspaper. When another newspaper copied the report, *The Times* claimed copyright infringement. The House of Lords found infringement.

¹⁶ 17 U.S.C. s 103(a), p. 2.

¹⁷ 17 U.S.C. s 103(a), p. 2.

¹⁸ Section 1(1)(a) of the Copyright, Designs and Patents Act, 1988.

¹⁹ *University of London Press Ltd. v. University Tutorial Press Ltd.* [1916] 2 Ch.601 Ch D, p. 605.

²⁰ *Macmillan & Co. Ltd. v Cooper* [1924] 40 T.L.R. 186 PC.

²¹ *Ibid.*

²² *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.* [1964] 1 W.L.R. 272 HL.

²³ Per Lord Devlin, p. 289.

²⁴ *Supra* note 20.

²⁵ *Walter v Lane* [1900] A.C. 539 HL.

The court held that Lord Rosebery composed the actual thoughts and words and hence was the author of them; but the reporter enjoyed copyright in the newspaper report. The report was the reproduction of the speech, but the manner of reproduction was unique in that the reporter was not a mere transcriber; rather, he was a shorthand writer and accordingly exercised his labour and special skill in getting the words down accurately and faithfully. Lord Halsbury L.C. explained that the reason for the decision was that the law did not permit “one man to make profit and to appropriate to himself the labour, skill, and capital of another”.²⁶

After the decision in *Infopaq International A/S v Danske Dagblades Forening*²⁷, the English test of originality seems to have added some other requirements. Modern English test of originality requires the author’s intellectual creation. That is for a work to enjoy copyright registration; it must exhibit a certain level of creativity. In the *Infopaq* case, the European court took the view that for a work to attract copyright protection, it has to be original in the sense that it was its author’s own intellectual creation. It must be noted however that this is yet to receive judicial approval in individual countries of the European Union community. Nonetheless, gleaned from the case discussed under U.K. Copyright Law, one could deduce that derivative works (adaptations) are equally protected. The fundamental requirement is that any derivative work would have to elicit an element of artistic flair that would render the new work distinct from that of its predecessor. The point ought to be made that traditional English test of originality does not require creativity, though some old English cases may have incorporated the element of creativity (Liu, 2014). Lord Atkinson’s requirement of extra quality in respect of compilation and abridgment in *Macmillan* (Liu, 2014), and Lord Oliver’s obiter statements in *Interlego AG v Tyco Industries Inc.*²⁸ requiring some material change, may be cited as examples. However, given the recent decision in *Taylor v Maguire*²⁹, which places emphasis on only independent skill and labour for artistic works, one wonders whether the *Infopaq* case would receive wider acceptance within the European Community.

To conclude on this, it would appear that the U.K. originality test projects a rather low threshold and is extremely simple. It is clear that the test appears to reward labour as opposed to the promotion of “the progress of science and useful arts” in the United States (Liu, 2014). It must, however, be noted that originality of a work is independent of its artistic quality or purpose. In *Sawkins v Hyperion*³⁰, Lord Mummery stated that “a work may be completely rubbish and utterly worthless, but copyright protection may be available for it”. Indeed Section 4(1)(a) of the CDPA 1988 provides that the artistic quality of a work is no condition to copyright. Thus, in the absence of proper guidance in the CDPA 1988, one may turn to case law if only to appreciate the concept of originality under U.K. Copyright Law.

Copyright Law in South Africa

Under South African law, copyright automatically subsists in a work provided it meets the requirements of originality and existence in material form and creation by a qualified person (Bergenthuin & Gibson, 2019). Nonetheless, there is provision for the registration of cinematographic films under the Registration of Copyright

²⁶ Ibid.

²⁷ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-656.

²⁸ *Interlego AG v Tyco Industries Inc.* [1989] A.C. 217 PC (Hong Kong).

²⁹ *Taylor v Maguire* [2013] EWHC 3804 (IPEC); [2014] E.C.D.R. 4 at [6] and [8].

³⁰ *Sawkins v Hyperion* [2005] 1 W.L.R. 3288.

in Cinematographic Films Act, 1977 (Holland, 2017). This is however voluntary as the cinematographic film is already covered by the Copyright Act No. 98, 1978. South African copyright is governed primarily by the Copyright Act No. 98, 1978. However, because South Africa is also a signatory to the Berne Convention (WIPO, 1886) and the TRIPS Agreement (World Trade Organization [WTO], 1994), regard is also had to these international legal instruments in copyright matters (Bergenthuin & Gibson, 2019). South Africa is yet to ratify WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT) although it has signed the instruments.

The Test of Originality

Legal discourse on the test of originality points to the fact that the threshold required by the Act for the subsistence of copyright in a work is low (Bergenthuin & Gibson, 2019; Holland, 2017). As was held in *Barker & Nelson (Pty) Ltd. v Procast Holdings (Pty) Ltd.*³¹, all that is required is that “the work must be the product of its author’s labour, skill and endeavor” (WTO, 1994, p. 5) and not be copied.

It is trite that for a work to be considered original under South African law, it needs not be novel or unique or inventive. Rather, it must be the product of the owner’s endeavour and labour. A work must not be copied from other sources.³² This rule is not without exception. As was held in *Accesso CC v Allforms (Pty) Ltd.*,³³ work may be regarded as having passed the originality test although copied from a previous work provided it bears sufficient skill and effort of its creator.

The requirement that a work must be embodied in a material form is premised on the fundamental copyright principle that copyright does not subsist in ideas. Thus, as was stressed in *Saunders Valve Co. Ltd. v Klep Valves (Pty) Ltd.*³⁴ and *Waylite Diaries CC v First National Bank Ltd.*³⁵, South African Copyright Law, like many others, protect the material form of expression of ideas. Consequently, a work must be reduced into writing or some other material form except for broadcasts, which must have been broadcast (WTO, 1994). Additionally, for a work to be deemed original, its author must be a qualified person under South African law. As per the provisions of the Copyright Act No. 98, 1978, a qualified person is one who is, either, a citizen, or domiciled or resident in South Africa or a country to which the operation of the Copyright Act No. 98, 1978 has been extended by proclamation. In respect of body corporate, the law requires that such a body must have been incorporated under South African law or a country to which the operation of Copyright Act No. 98, 1978 has been extended.³⁶ Under Copyright Act No. 98, 1978, copyright arises in literary, musical and artistic works.³⁷ In addition, the Act provides for sound recordings, cinematographic films, and sound and television broadcasts, programme carrying signals, published editions and computer programs (WTO, 1994).

³¹ *Barker & Nelson (Pty) Ltd. v Procast Holdings (Pty) Ltd.* 195 JOC (C), p. 197.

³² *Sawkins v Hyperion* [2005] 1 W.L.R. 3288.

³³ *Accesso CC v Allforms (Pty) Ltd.* [1998] 4 All SA 655.

³⁴ *Saunders Valve Co. Ltd. v Klep Valves (Pty) Ltd.* [1985] 1 SA 646 (TPD) at 649E-F. This case concerned engineering drawings of “diaphragm valves”, used particularly in the mining industry. The respondent denied the claimed originality of the drawings on the basis that they had been deduced from earlier drawings. O’Donovan J held that the respondent’s case on this aspect was based on the false premise that the Copyright Act was concerned with novelty of design. The court held that originality does not mean novelty or uniqueness, nor does it necessarily involve inventiveness.

³⁵ *Waylite Diaries CC v First National Bank Ltd.* [1995] 1 SA 645 (AD) at 653C.

³⁶ *Ibid.*

³⁷ Section 2(1)(a) of Copyright Act No. 98, 1978.

The test of originality became recognisable in judicial decisions in the early 1900s. At least, one could point to the case of *Natal Picture Framing Co. Ltd. v Levin*,³⁸ in which the court considered the concept of originality. Even though the court had no clear guidance as to what constituted original artistic work, Bristowe J. found the applicant's pictorial representation of the Nationalist Deputation to the 1919 Peace Conference sailing from Cape Town to be original basing its decision on no concrete reason.

Subsequent decisions laid the test of originality to include skill, labour, and judgement. For example, in *Pan African Engineers (Pty) Ltd. v Hydro Tube (Pty) Ltd.*³⁹ which case centred on a technical drawing by a director of Pan African Engineers, although substantially amended, it was found to be an original work entitling it to copyright protection. In this case, Boshoff J. provided guidance on originality holding that "the work must be original in the sense that it was not copied from another work, but originated from the author".⁴⁰ Thereafter, the test was applied in *Kalamazoo Division (Pty) Ltd. v Gay*⁴¹, *Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd.*⁴², *Saunders Valve Co. Ltd. v Klep Valves (Pty) Ltd.*⁴³, *Waylite Diaries CC v First National Bank Ltd.*⁴⁴, *Jacana Education (Pty) Ltd. v Frandsen Publishers*⁴⁵, *Accesso CC v Allforms (Pty) Ltd.*⁴⁶, and *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd.*⁴⁷

Ghana's Copyright Narratives

Ghana's Copyright Laws date back to the colonial days. The earliest Copyright Law was the Copyright Ordinance, 1914 (Cap 126) with its enabling Regulation of 1918. The Cap 126 was based on the British Copyright Act of 1911 (Adusei, Anyimadu-Antwi, & Halm, 2010). What accounted for this is Ghana's colonial ties with the British. Cap 126 offered protection to literary, dramatic, musical, and artistic works. It was an offence under the law to sell or make for sale, hire, or exhibit or distribute copyrighted works within the colony.⁴⁸ According to Adusei et al. (2010), a major characteristic of Ordinance was that although it made no express provision for fair use for any work, the parent Act (British Copyright Act of 1911) from which Cap 126 originated, provided for fair dealings with works for the purposes of private studies, research, criticism, review, or newspaper summary. Similarly, civil remedies were not provided for under the Ordinance but remedies, such as injunctions and damages were available. It was considered criminal for any person to make hard copies of a copyrighted work with an industrial machine. The term of protection under the Ordinance was the life time of the author plus 50 years after the author's death.

³⁸ *Natal Picture Framing Co. Ltd. v Levin* [1920] WLD 35.

³⁹ *Pan African Engineers (Pty) Ltd. v Hydro Tube (Pty) Ltd.* [1972] 1 SA 471 (WLD) at 471D, 472G.

⁴⁰ *Natal Picture Framing Co. Ltd. v Levin* [1920] WLD 35 472D-472E.

⁴¹ *Kalamazoo Division (Pty) Ltd. v Gay* 1978 2 SA 184 (CPD).

⁴² *Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd.* 71 JOC (A), p. 74. In this case, Galgut AJA held that "what is protected is the original skill and labour in execution and not the originality of thought. All that is required is that the work should emanate from the author himself and not be copied".

⁴³ *Saunders Valve Co. Ltd. v Klep Valves (Pty) Ltd.* [1985] 1 SA 646 (TPD) at 649E-F.

⁴⁴ *Waylite Diaries CC v First National Bank Ltd.* [1995] 1 SA 645 (AD) at 653C.

⁴⁵ 624 JOC (T) 624, p. 629.

⁴⁶ *Sawkins v Hyperion* [2005] 1 W.L.R. 3288.

⁴⁷ *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd.* [2005] (1) SA 398 (C), pp. 413-414. After considering the position in the United States as laid down in *Feist Publications Ltd. v Rural Telephone Service Company Inc.* 449 U.S. 340 (1991), Erasmus J held that "under South African law an electronic database, like any other work, should be 'original', and required no higher standard of creativity". Originality is a matter of degree depending on the amount of skill, judgment or labour involved in making the work.

⁴⁸ *Supra* note 47.

Upon attainment of independence, the Ordinance was repealed and in its place, the Copyright Act, 1961 (Act 85) was enacted. There was also Legislative instrument in 1969 known as the Copyright (Fee) Regulation of 1969 (L.I. 174).⁴⁹ This was the first attempt by Ghana to secure for itself, a home-made Copyright Law. Under the Act 85, protection was extended to cover a wide range of works including cinematograph films, gramophone recordings, and broadcasts (Adusei et al., 2010).⁵⁰ A work was protected if sufficient effort had been expended on it to give it an original character (Adusei et al., 2010). Thus, under the Act 85, a work was deemed original if it bore the independent labour of its author. Stated differently, for a work to be considered original, there must be evidence to the effect that it is the product of the author's labour.⁵¹

Additionally, Act 85 made changes to the term of protection for works. For instance, on the one hand, the term of protection for published works was up to the end of the year in which the author died or 25 years after the end of the year in which the work was first published (Adusei et al., 2010).⁵² Unpublished literary works on the hand were protected for 25 years after the end of the year in which the author died. Clearly, unpublished works enjoyed a longer life span than published works.

Another remarkable change that Act 85 made was that it provided for remedies which were hitherto not expressly provided for under the Ordinance such as injunctions, damages and others. Fair dealing was also expressly provided for under Act 85. Nonetheless, under Act 85, writing was a pre-requisite for granting protection to a work including musical works. This requirement was given effect in the case of *CFAO v Achibold*⁵³ which many describe as a disincentive to musical composers (Adusei et al., 2010).⁵⁴ Again, Act 85 made no provision for derivative works.

In Ghana's quest to meet with international standards and to fulfil its international obligations under international legal instruments such as the Berne Convention for the Protection of Literary and Artistic Works (WIPO, 1886), a new Copyright Law was promulgated in 1985 under the Provisional National Defense Council (PNDC) regime known as the PNDC Law 110. In a comparative analysis with the Act 85 of 1961, PNDC Law 110 was an improvement upon Act 85. In addition to the economic rights of the author, the PNDC Law 110 also introduced moral rights which were to be held in perpetuity. Fair use for the purposes of private studies, research, and teaching was also provided for under the law.

Nonetheless, in 2005, amidst stiff opposition and controversy, a new Copyright Act was promulgated (Copyright Act 2005, Act 690). This is the current law that governs copyright issues in Ghana. Act 690 was enacted to bring the provisions on Copyright Law in conformity with the Ghana's 1992 Constitution. Apart from the fact that Act 690 is compartmentalized (copyright, duration of copyright, permitted uses of copyright, etc.), to a large extent, it is similar to the PNDC Law 110 in substance. For instance, the aspect of eligibility of works copyright under PNDC Law 110, it appears to have been adopted wholesale into Act 690. Like the PNDC Law 110, Act 690 provides that for a work to be eligible for copyright, it must be original in character. The definition

⁴⁹ Supra note 47.

⁵⁰ See Section 1(1).

⁵¹ See Section 1(2) of the Copyright Act, 1961 (Act 85).

⁵² See Section 14 of Copyright Act, 1961 (Act 85).

⁵³ *CFAO v Achibold* [1964] GLR 718.

⁵⁴ See Section 1(1).

of original in Act 690⁵⁵ is same as in the PNDC Law 110.⁵⁶ It is important to note that even though PNDC Law 110 provided for cinematographic works, programme-carrying signals and broadcasts, these are clearly missing under Act 690. Rather, Act 690 provides for audio-visual works and computer software or programme.

The Test of Originality

The Ghanaian position of originality shares resemblance with the South African position. Like the South African law, for a work to be eligible for copyright protection under Act 690, it must be original in character.⁵⁷ In addition, the work must be fixed in a definite medium of expression now known or later to be developed with the result that the work can either directly or with the aid of any machine or device be perceived, reproduced, or otherwise communicated.⁵⁸ Again, the work must be created by a citizen.⁵⁹ The only point of departure is whereas the South African Copyright Act does not define originality, Ghana's Copyright Act defines originality. Per Section 1(4) of Act 690, a work is deemed original if it the product of the independent effort of the author. Adusei et al. (2010) maintained that "independent effort" as used in the Act implies that the work must be an independent creation of its author and not copied. There is no sufficient case law in this area of law in Ghana⁶⁰ but the case of *Ellis v Donkoh and Another*⁶¹ provides some guidance on the matter. In that case, Brobbey J. gave a strict interpretation to the law and took the view that originality entails independent creation of the author and that for a derivative work to be considered original, it must be distinct in many respects, from the original work. The learned judge further held that merely taking some else's original music and substituting the vocals with one instrument, such as piano did not sufficiently amount to an independent creation which was original in character. According to Brobbey J.,

in order for a musical work to constitute derivative work under PNDCL 110, it should on analysis and comparison be conspicuously different from the original work and should reveal originality or innovation by the musician in adapting the original work. (McDave & Hackman-Aidoo, 2019, p. 335)⁶²

Thus, on the authority of the *Ellis v Donkoh and Another* and the provisions of the Act 690, the *Work* may equally not survive the test of originality under Ghanaian law and may therefore be denied protection. As

⁵⁵ See Section 1(2)(4) of Copyright Act 2005, Act 690.

⁵⁶ Section 2(2) of PNDC Law 110.

⁵⁷ Section 1(2)(a).

⁵⁸ Section 1(2)(b).

⁵⁹ Section 1(2)(c).

⁶⁰ A number of reasons may account for the near absence of case law on the subject of copyright in Ghana. Adusei et al., maintain that most Ghanaians are generally interested in using the court process to safeguard their *tangible* properties as opposed to their *intangible* properties. It has also been argued that undue delays in the court process discourage many from using the court. Rather, aggrieved persons resorted to an arbitration process provided for under the copyright law of 1985. At least, the arbitration process has proven to be less expensive and not time consuming. It is rather disappointing that this arbitration process no longer exists under the 2005 Copyright Act. Another factor which is seldom mentioned relate to the punitive measures adopted by the court. To the extent that some of the sentences are less punitive, infringers usually feel empowered to engage in their illegal activities. This, if not checked, would not only erode public confidence in the judiciary, intellectual creators would have no reward for their works.

⁶¹ *Ellis v Donkoh and Another* [1993-94] 2 GLR 17-35. In this case, the plaintiff, a pianist, sued the defendants, a music publisher and his publishing company respectively, for, inter alia, damages for copyright infringement and perpetual injunction to restrain them from the continued infringement of his copyright. In support of his case, the plaintiff claimed that he created some piano music by substituting the vocals in some five songs which had been composed and recorded by others. He contended that his piano rendition of the vocals in the five songs constituted an adaptation which was a totally different musical work from the original songs as to amount to derivative work under Sections 1(a), 2(4) and 55 of the Copyright Law, 1985 (PNDCL 110) and therefore the copyright in the album was vested in him.

⁶² *Ellis v Donkoh and Another* [1993-94] 2 GLR 17-35.

indicated by the U.S. Copyright Office, the *Work* does not possess sufficient creativity to sustain a claim for copyright protection.

Analysis

It is evident that the U.S. requirements of originality are of a high threshold. Per the *Feist Publications* case, for a derivative Work to be deemed original, it must be independently created by its author and possess sufficient creativity. Indeed, in the *Feist Publications* case, the court stressed that “copyright protects only those constituent elements of a work that possesses more than a *de minimis* quantum of creativity”.⁶³ In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*⁶⁴, it was emphasized that “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own’”.

Nonetheless, the U.K. requirement places emphasis on skill, labour or judgment of the author. Thus, the traditional English approach rewards labour. In respect of literary work, it would appear that judicial leaning is towards originality in the expression of thought as was held in *University of London Press Ltd. v. University Tutorial Press Ltd.*⁶⁵, However, in *Walter v Lane*⁶⁶, emphasis was placed on labour and skill of the shorthand writer. For compilations and abridgment, the test of originality is on skill, labour, or judgment of the author as emphasized in *Macmillan & Co. Ltd. v Cooper*.⁶⁷ The *Infopaq* case has added the requirement of the independent creativity of the author. The requirement of originality is that the work must not be copied from another as was held in *Interlego AG v Tyco Industries Inc.*⁶⁸ If a substantial part of another work is taken, then copyright in the pre-existing work will be infringed (Li et al., 2014). What is substantial is largely qualitative rather than quantitative (Adusei et al., 2010). Thus, if one was to apply the traditional U.K. requirement of skill, labour, or judgement, the *Work* would not pass the originality test as the *Work* does not exhibit a great deal of skill, labour, or judgment. Besides, a substantial part, the pre-existing Oscar Statuette, was taken in creating the *Work* which, in the strict application of the law, constitutes an infringement. Moreover, if one was to apply the U.S. test of author’s independent creativity, again, the *Work* would not pass the originality test as the *Work* does not demonstrate independent creativity.

But would the *Work* pass the originality test under South African law? As indicated earlier, South African law also stresses that for a work to be deemed original, it must be the product of the author’s skill, labour, and endeavour and must not be copied as was held in *Barker & Nelson (Pty) Ltd. v Procast Holdings (Pty) Ltd.*⁶⁹ *Accesso CC v Allforms (Pty) Ltd.*,⁷⁰ held that a work may be regarded as having passed the originality test although copied from a previous work provided it bears sufficient skill and efforts of its creator. As indicated earlier, the *Work* does not bear sufficient skill and effort as indicated by the U.S. Copyright Office. On that basis, it would be denied copyright protection under South African law and may be deemed to be an infringement.

⁶³ Sawkins v Hyperion [2005] 1 W.L.R. 3288, p. 363.

⁶⁴ Alfred Bell & Co. v. Catalda Fine Arts, Inc. [1951] 191 F.2d 99, 102-03 (2d Cir.).

⁶⁵ University of London Press Ltd. v. University Tutorial Press Ltd. [1916] 2 Ch.601 Ch D, p. 605.

⁶⁶ Walter v Lane [1900] A.C. 539 HL.

⁶⁷ Macmillan & Co. Ltd. v Cooper [1924] 40 T.L.R. 186 PC.

⁶⁸ Interlego AG v Tyco Industries Inc. [1989] A.C. 217 PC (Hong Kong).

⁶⁹ Barker & Nelson (Pty) Ltd. v Procast Holdings (Pty) Ltd. 195 JOC (C), p. 197.

⁷⁰ 624 JOC (T) 624 at 629.

It would appear that South African courts do not countenance slavish copying for artistic works. However, the rule appears relaxed for literary works. In *Jacana Education (Pty) Ltd. v Frandsen Publishers*⁷¹, in application for an interdict to restrain alleged copyright infringement of a map of the Kruger National Park, it was held that in spite of the time and effort invested, a map correctly showing the physical features such as road, rivers, koppies, camps of the Kruger National Park, had no originality. Dijkhorst J. held the view that the only way by which originality could be ascribed to a “skeleton” of a map would be if it were the first one, based on a survey and photographs made of the Park. The applicant’s base or skeleton was thus not original but only a copy of an existing material upon which the applicant superimposed much of its own data. One may, however, contrast that with *Accesso CC v Allforms (Pty) Ltd.*,⁷² where Le Roux J. held a certain medical account form as original literary work on the basis that sufficient skill, judgement, and labour had been expended on the layout to merit its protection. In *Tie Rack plc v Tie Rack Stores Pty Ltd.*,⁷³ the “Tie Rack” was found to have been infringed on the basis that the respondent adopted the substance of applicant’s logo upon which its design artist’s skill and labour had been expended. Thus, relying on the decision in *Tie Rack plc v Tie Rack Stores Pty Ltd.*⁷⁴ and other decisions cited above, one could safely conclude that the *Work* would not pass the originality test under South African law.

The Ghanaian position on originality requires that there exist an independent creation of the author. This position satisfies one of the U.S. components of originality: independent creation and sufficient creativity. Thus, the Ghanaian position does not require sufficient creativity. Nonetheless, if one was to apply only the aspect of independent creation of the author, the *Work* would be denied copyright protection. In effect, the created work must exhibit something more qualitative and not be copied.

Conclusion

This essay has discussed, in the main, the test of originality in four different jurisdictions: the U.S., U.K., South Africa, and Ghana using the Academy logo as the basis. The U.S. requirements demand sufficient creativity of a work by its author. The U.K. and the South African approach lean towards skill, labour, and judgement of the author. Nonetheless, the European Court, in the *Infopaq* case, appears to have introduced a new requirement of author’s independent creativity: a requirement which the Ghanaian position seems to lean towards. In the light of these requirements, a claim for copyright protection for the *Work* would not stand under U.K., South African, and Ghanaian law. Thus, even if the work is an adaptation or derivative, trivial variations would not be sufficient to grant a copyright claim. It must bear sufficient skill, labour, and judgement of the author.

In *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd. and others*⁷⁵, the court quoted with approval the decision in *CCH Canadian Ltd. v Law Society of Upper Canada*⁷⁶ that “the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise”. Indeed in *Moneyweb v Media*,⁷⁷ the court observed as follows:

⁷¹ Ibid.

⁷² CFAO v Achibold [1964] GLR 718.

⁷³ Tie Rack plc v Tie Rack Stores Pty Ltd. [1989] (4) SA 427.

⁷⁴ See Section 1(2)(4) of Copyright Act 2005, Act 690.

⁷⁵ 2006 (4) SA 458 (SCA) at [35]-[37].

⁷⁶ 2004 1 SCR 339 at Para. 25.

⁷⁷ Moneyweb v Media [2016] ZAGPJHC 81 at p. 9.

The recognition by the SCA in *Haupt t/a Soft Copy* case of “*skill and judgment*” as the yardstick for originality removes consideration of the “*sweat of the brow*” approach, to elevate the latter above the former would result in the author being overcompensated for his or her work: for the author merely to show industriousness is not enough. The primary object of copyright is thus not to reward the labour of others”.

Thus, it would appear that the South African courts do not reward labour as opposed to the promotion of “the progress of science and useful arts” in the United States.

As intellectual property is more and more integrated in the overall development of Ghana and even as copyright as an intellectual property right gains more prominence in Ghana, we hope the court will get the opportunity to pronounce upon the test originality as understood in Copyright Law in Ghana.

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