

Determining originality

in

creative literary works

by

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Dedication

Dedicated to the loving memory of

Frederik Coenraad Conradie

(1919-1991)

My grandfather – a locomotive driver who read stacks and stacks of non-fiction books and checked our report cards at the end of each term.

I still hear him say: You children must learn!

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Sunelle Geyer

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Summary

Determining originality in creative literary works

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Originality is the most basic requirement for the copyrighting of a work and may be viewed as the mirror image of copyright infringement. In terms of section 2(3) of the Copyright Act, a work remains eligible for copyright even if the making thereof involved an infringement of copyright in some other work. However, a *certain aspect or a feature of a work* (relating to the “substantial part” requirement for copyright infringement; “substantial part” being understood from a hypertext rather than a linear point of view) cannot be infringing *and* original.

In this thesis, the South African legal understanding of the originality concept is determined from case law. Specific attention is given to the meaning of “skill” and “labour”; the protection afforded to mere labour in South Africa and certain selected other jurisdictions; how the subjective nature of the originality test is affected by the

“meritorious distinctiveness” requirement; and the degree of own skill and/or labour required for a work to be original and consequently protected.

The present literary concept of originality is derived from literary discussions that appeared in newspapers and other publications in the wake of six “plagiarism scandals” which each caused a furore in Afrikaans literary circles. Even though the terminology used by *littérateurs* differs from that used in legal circles, originality essentially means the same for *littérateurs* and lawyers. Skill and/or labour as required by law is reflected in the literary “crucial distance” concept. The fact that a *sufficient degree* of skill and/or labour is required is reflected in the fact that the literary standard of a work is determined on the basis of how “tightly woven” a work is.

Although a general protection of original ideas would negatively influence the free flow of information, measures for the protection of ideas are developing, particularly in the United States of America, where ideas (especially in the film industry) are a very valuable commodity. As Swarth proposes, applying the “novelty” and “concreteness” criteria in inverse ratio to each other could help to create an environment where idea purveyors and prospective buyers felt more free to negotiate and enter into agreements over original ideas.

Postmodernism, a contemporary interpretative strategy that reaches into nearly every aspect of modern society, is discussed with specific reference to its interaction with originality. The influences of two phenomena of postmodernism on the originality concept, namely hypertext and Chaos theory, are investigated.

Recommendations are made regarding measures aimed at the retention of talented authors and the original content of works in the wake of plagiarism scandals, while still holding the wrongdoer responsible for his actions. Certain suggestions are also made regarding the accessibility of courts and the supplementation of the few available precedents regarding originality in creative literary works.

Key Words:

Copyright

Originality

Literary works

Skill and labour

Meritorious distinctiveness

Copyright infringement

Plagiarism

Postmodernism

Literary originality

Crucial distance

Idea protection

Hypertext

Chaos theory

Opsomming

Die vasstelling van oorspronklikheid in kreatiewe letterkundige werke

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Oorspronklikheid is die mees basiese vereiste vir 'n werk om outeursreg te geniet en kan ook as die spieëlbeeld van inbreukmaking op outeursreg gesien word. In terme van artikel 2(3) van die Outeursregwet kan 'n werk outeursreg-beskerming geniet selfs waar die skepping daarvan op die outeursreg in 'n ander werk inbreuk gemaak het. 'n *Bepaalde aspek of kenmerk van 'n werk* (verwysende na die “wesentliche gedeelte” vereiste vir inbreukmaking op outeursreg; wesentliche gedeelte, soos verstaan vanuit 'n hipertekstuele eerder as 'n liniêre oogpunt) kan egter nie gelyktydig inbreukmakend én oorspronklik wees nie.

In hierdie proefskrif word die oorspronklikheidsbegrip in die Suid-Afrikaanse reg aan die hand van hofpresedente vasgestel. Besondere aandag word gegee aan die betekenis van “arbeid” en “vaardigheid”; die beskerming wat binne Suid-Afrika en in sekere geselekteerde ander jurisdiksies aan blote arbeid verleen word; hoe die subjektiewe aard van die oorspronklikheidstoets deur die vereiste van “verdienstelike onderskeidendheid” geraak word; en die graad van eie arbeid en/of vaardigheid wat vereis word alvorens ‘n werk beskerming geniet.

Die huidige letterkundige begrip van oorspronklikheid word afgelei uit letterkundige besprekings wat in koerante en ander publikasies verskyn het in die volgstroom van ses “plagiaatskandale” wat elk ‘n opskudding in Afrikaanse letterkundige kringe veroorsaak het. Alhoewel die letterkundiges se terminologie verskil van dít wat in regsringe gebruik word, word bevind dat letterkundiges en regsgeleerdes oorspronklikheid basies dieselfde verstaan. Arbeid en/of vaardigheid soos deur die reg vereis word weerspieël in die letterkundige “deurslaggewende afstand” konsep. Die feit dat ‘n *genoegsame graad* van arbeid en/of vaardigheid vereis word, word weerspieël in die feit dat die letterkundige standaard van ‘n werk bepaal word aan die hand van hoe “diggeweef” ‘n werk is.

Alhoewel ‘n algemene beskerming van oorspronklike idees die vrye vloei van inligting negatief sal beïnvloed, is ideebeskermingsmaatreëls aan die ontwikkel, in besonder in die Verenigde State van Amerika waar idees ‘n baie waardevolle handelsartikel in veral die filmindustrie is. Soos voorgestel deur Swarth, kan die toepassing van die vereistes van “nuutheid” en “stoflikheid” in ‘n omgekeerde verhouding tot mekaar ‘n omgewing help skep waar ideeverskaffers en voornemende kopers gemakliker kan voel om met betrekking tot oorspronklike idees te onderhandel en te kontrakteer.

Postmodernisme, ‘n eietydse verklarende benadering wat bykans elke aspek van die moderne samelewing raak, word bespreek met spesifieke verwysing na die wisselwerking tussen postmodernisme en oorspronklikheid. Die invloede van twee verskyningsvorme van postmodernisme, naamlik hiperteks en die Chaosteorie, op oorspronklikheid word ondersoek.

Aanbevelings word gemaak oor die behoud van talentvolle outeurs en die oorspronklike inhoud van werke in die nadraai van plagiaatskandale, terwyl die oortreder steeds aanspreeklik gehou word vir sy dade. Sekere voorstelle word ook gemaak wat betref die toeganklikheid van howe en rakende die aanvulling van die enkele beskikbare presedente wat handel met oorspronklikheid in kreatiewe letterkundige werke.

Sleutel terme:

Outeursreg

Oorspronklikheid

Letterkundige werke

Arbeid en vaardigheid

Verdienstelike onderskeidendheid

Inbreukmaking op outeursreg

Plagiaat

Postmodernisme

Letterkundige oorspronklikheid

Deurslaggewende afstand

Idee beskerming

Hiperteks

Chaos teorie

Clarification of terms

Unless the context indicates otherwise, the following words or phrases will mean as follows:

- Numbers of centuries refers to centuries AD.
- Act refers to the Copyright Act 98 of 1978.
- Chaos refers to chaos theory, described by Gleick as “the amazing science of the unpredictable”.¹
- Era refers to a historical or other period starting from a noteworthy event.
- Fixed text refers to spatially fixed, page-bound text created through print technology.
- Landow defines hypertext as “text composed of blocks of text... and the electronic links that join them”². Hypermedia is a form of hypertext that includes visual information, sound, animation and other forms of data³.
- LitNet refers to www.mweb.co.za/litnet. It is a multi-cultural, sosio-literary, interactive web site. The main medium is Afrikaans, but LitNet also has considerable English content as well as Dutch, Xhosa and Zulu sections.⁴
- Manuscript refers to handwritten manuscripts.

- Renaissance refers to the revival of art and literature under the influence of classical models between the 14th and 16th centuries.⁵
- Sê-Net refers to the correspondence section of LitNet at <http://www.mweb.co.za/litnet/senet>.

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