

Chapter 1

1. Introduction

1.1 Background to research problem

An article in *Beeld* of 21 December 1999 sparked the interest that eventually led to this research. It is an essay written by Stephanie Niewoudt in the wake of Wilhelm du Plessis being accused of infringement of copyright. A reviewer had pointed out similarities between a short story by du Plessis and one by the American author Bernard Malamud⁶ which prompted Tafelberg publishers to withdraw the short story collection, *Die Mooiste Liefde is Verby*, from the market.

Du Plessis was one of seven M-Net bursary winners who contributed to the collection. The withdrawal was a severe setback for all seven authors. Etienne van Heerden, who compiled the collection and under whose guidance Du Plessis and the other contributors studied, reacted as follows: “My greatest concern at this time is Du Plessis. He has exceptional writing talent.”⁷ In a radio interview Du Plessis said he would not be writing again.

Niewoudt in her article quotes a number of remarks made by influential academics. The essay also lists various examples of (alleged) plagiarism by various well-known authors.

She refers to a narrative by Harry Kalmer on how he detected plagiarism in his own work in the last moments before publication, as well as making the general observation that many (more experienced) authors get away with what is perceived to be plagiarism.

The distinction between borrowing and stealing from copyrighted material is evidently not clear. Authors seem to regard copyright against the background of postmodernism.⁸ Do the courts take postmodernism into consideration as a factor when deciding copyright issues? In other words, do lawyers and *littérateurs* view copyright-related matters from the same perspective?

1.2 Problem statement, demarcation and methodology

Originality is the essence of all the above issues. Therefore the object of this study is to try to comprehend and document the legal meaning of originality in creative literary works and how the *boni mores* is reflected therein.⁹

Although a work can be copyrighted even if the making thereof involved an infringement of copyright in some other work,¹⁰ a certain aspect or feature of a work cannot simultaneously be infringing and original.¹¹ Originality is therefore not only the most basic requirement for a work to be copyrighted,¹² but can also be viewed as the mirror image of copyright infringement.

Strictly speaking, idea protection falls under the material form¹³ rather than the originality requirement for copyright protection. However, publishers and authors of creative literary works are not concerned with books only. A large part of their career is spent in search of *ideas* which can be utilised in creative literary works. This thesis therefore also offers some perspectives on the protection of ideas.

The initial object of this research was to fuse the views of all relevant parties into a single *test* that everyone, from the aspiring writer to the Appeal Court judge, could use to measure the originality of a work. From preliminary reading it soon became evident that originality does not lend itself well to empirical measurement. The object of the research was modified to aim at the compilation of a set of *guidelines* that anyone might use to measure and determine the originality of a work. It became clear that the nature of copyright is such that, even though two persons use the same guidelines to

measure the originality of a specific work, their decisions may still differ. There is thus a need for *adjudication* when it comes to the question of originality.

Towards the end of the preliminary study, modern-day Chaos Theory¹⁴ was investigated in the hope of finding solutions to the relevant legal problems through explorative research in other scientific spheres. This being an introduction, it suffices to indicate here that the application of Chaos to the present question underlines the need for guidelines and the importance of precedents.

The research problem may thus be formulated as follows: Determining originality as a requirement for copyright in creative literary works. The demarcation of the study is discussed by examining the meaning, for purposes of this research, of the words and phrases that combine to form the above problem statement.

“DETERMINING”

According to the Oxford Dictionary, “determine” means, inter alia, to:

1. “calculate precisely”, which relates to the initial aim of this study, namely to establish a test to determine whether a work is original or not, and
2. “decide”, “be a decisive factor in regard to”, “decide firmly” and “resolve”.

It is trite law that the measure of labour and/or skill contributed to a work by the author determines whether the work is original.¹⁵ Within the field of copyright law it is agreed that whether the author has contributed adequate labour and skill is a question of degree, depending on the facts of the specific case.¹⁶ However, judges and writers on copyright law are divided about various aspects of this seemingly straightforward test.

For instance:

- In *Waylite Diaries CC v First National Bank Ltd*¹⁷ a subjective test was applied to determine whether certain diary pages were original. On appeal¹⁸ the court

suggested¹⁹ that an objective element should form part of the test. Dean argues that there is no room for an objective test when testing for originality.²⁰

- The English case of *GA Cramps & Sons Ltd v Frank Smythson Ltd*,²¹ as discussed in the South African case *Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein*,²² clearly illustrates how a question of degree (such as the test for originality), depending on the facts of a specific case, leads to uncertainty. Although the judges of the court of first instance, the Appeal Court and the House of Lords judged the case by basically measuring the amount of work and skill expended on the tables included in the diary, the outcome of the test when applied by different judges was as follows:

Table 1 Originality rulings *GA Cramps & Sons Ltd v Frank Smythson Ltd*

Court	Judges ruling that tables in diary are original	Judges ruling that tables in diary are not original
Court of First Instance	-	1
Appeal Court	2	1
House of Lords	-	Unanimous

If originality is an uncertain concept within copyright law itself, it is even more so in the related fields of publishing and authoring. There is no formal test by which publishers measure the originality of manuscripts. Although in contracts issued by mainstream publishers in South Africa the author usually indemnifies the publisher against breach of copyright and plagiarism,²³ authors are not equipped to determine the line between borrowing and stealing (which is further clouded by the fact that copyright infringement may occur within the boundaries of an otherwise original work).²⁴ This situation is especially perilous in the present postmodern artistic environment. The row which erupted in literary circles when reviewer Petra Muller revealed the similarities between Du Plessis's story and one by Malamud illustrates the uncertainty that prevails amongst writers and littérateurs about the meaning of originality.

Although Tafelberg decided to withdraw all copies of *Die Mooiste Liefde is Verby* (the collection of short stories of which Du Plessis's work formed part), writers and littérateurs were deeply divided on whether or not Du Plessis had transgressed the invisible line.

The entity that has to decide whether a work is original may thus be an author, a publisher in the process of editing, a book reviewer, a reader, a conciliator, an arbitrator, a lawyer giving a legal opinion or representing a client, and a court. Even when they use the same guidelines, they tend to reach different conclusions. Even a single court may be divided, and different courts may reach different majority decisions. The word “determining” in the topic of this study therefore implies that research must provide answers to the following two questions:

1. What *guidelines* are to be observed when it has to be decided if enough skill and/or labour has been spent on a work to make it original and thus copyrighted, and
2. *Who* is the most appropriate entity to make a binding decision regarding the originality of a work?

To return to the Oxford Dictionary meaning of “determining”: For purposes of this thesis the word “determining” as part of the research problem therefore relates more to “deciding” and “resolving” than to “calculating precisely”.

“ORIGINALITY AS REQUIREMENT FOR COPYRIGHT”

Section 2(1) of the Copyright Act 98 of 1978, states the following:

Subject to the provisions of this Act, the following works, *if they are original*,²⁵ shall be eligible for copyright –

- a) literary works;
- b) musical works;
- c) artistic works;
- d) cinematograph films;
- e) sound recordings;
- f) broadcasts;
- g) programme-carrying signals;
- h) published editions;
- i) computer programs.

Originality is therefore the most basic requirement for eligibility for the copyrighting of a work. It is trite law that the measure of labour and/or skill contributed to the work by the author determines whether a work is original. The question is *what measure* of labour and/or skill has to be invested for a work to be original.²⁶

“CREATIVE LITERARY WORKS”

Section 1 of the Copyright Act 98 of 1978 defines “literary work” as follows:

‘literary work’ includes, irrespective of literary quality and in whatever mode or form expressed –

- j) novels, stories and poetical works;

- k) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- l) textbooks, treatises, histories, biographies, essays and articles;
- m) encyclopedias and dictionaries;
- n) letters, reports and memoranda;
- o) lectures, speeches and sermons; and
- p) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer;
- q) but shall not include a computer program.

The works listed in (a) and (b) of the Act's definition of "literary work" can be said to be creative in nature. The works listed in (c), as well as certain letters, speeches and sermons, may also be creative, depending on the specific work. Reports, memoranda, lectures, tables and compilations can be said to lie on the other end of the creativity spectrum, where little or no creativity is required.

It is interesting to note that translations of creative literary works may also call for a high degree of creativity, as is evident in, for example, Janie Oosthuysen's excellent translations of the Harry Potter novels from English into Afrikaans. She translates the surname of Professor Dumbledore, for instance, as "Dompeldorius" and Hermione Granger becomes "Hermien La Grange". Breyten Breytenbach's poem, as it appears without his permission in Metelerkamp's biography of Ingrid Jonker, is an example of a work that is *unoriginal* in its new context (infringing), though still *creative* in nature.²⁷

Perhaps Tritton succeeds best in describing the meaning of “creative literary works” in the context of the problem statement under review:

The nature and extent of copyright is complex and the potential subject-matter covered is vast. Copyright and its related rights encompass, for example, highly “authorial” works such as novels, plays, symphonies, paintings, and films, as well as less lofty subject-matter such as computer programs, sound recordings, performances, broadcasts, cable transmissions, typographical arrangements and databases.²⁸

It can therefore be said that the word “creative” was inserted into the problem statement in order to focus on the world of “highly authorial” literary works. In other words: literature. However, originality still being the most important concept dealt with in this thesis, the question of whether labour alone is protected by copyright had to be dealt with in order to provide a more comprehensive elucidation of originality, meaning that “less lofty subject-matter” like telephone directories had to be focused on for some part of Chapter 2.²⁹

South African copyright law does not require a “creative spark” for works to be original. However, whether a specific type of literary work belongs to a creative or scientific genre has certain ethical implications regarding originality. As Day explains:

[o]riginality in science has a deeper meaning than it does in other fields. A short story, for example, can reprint many times without violating ethical principles. A primary research paper, however, can be published in a primary journal only once. Dual publication can be legal if the appropriate copyright release has been obtained, but it is universally considered to be a cardinal sin against the ethics of science. ‘Repetitive publication of the same data or ideas for different journals, foreign or national, reflects scientific sterility and constitutes exploitation of what is considered an ethical medium for propagandizing one’s self.

Self-plagiarism signifies lack of scientific objectivity and modesty’.³⁰

In this work Afrikaans literature furnishes the practical examples which supplement the research. The reasons for this are the researcher's personal interest in Afrikaans literature, her efforts to ensure that the research is relevant within the South African context, the fact that NALN's³¹ services are restricted to Afrikaans newspaper extracts and an attempt to limit research material to manageable proportions.³²

The term "literary work" is used in the sense of section 1 of the Act and not as an indicator of literary value as it sometimes is in literary circles.

For the sake of completeness the course of the research that culminated in this work is set out at the end of this thesis under the heading "Research methodology".

1.3 Outline of remainder of thesis

Chapter 2 deals with the legal requirements for originality. The origins of the originality requirement in South African Law are traced to its earliest English roots and the current requirements for originality, as formulated by South African legal writers, are stated.

What the South African courts understand by originality is then set out in chronologically, tabulated format. Specific attention is given to the meaning of "own skill and/or labour".³³ Following a comparative approach, the question of whether a "creative spark"³⁴ should be required for originality is addressed, as well as whether "meritorious distinctiveness"³⁵ is a sound requirement for originality. Also in the form of a chronological table, the *degree* of skill and/or labour required by the South African courts is analysed.³⁶

Chapter 3 investigates the meaning of originality in the literary world. This is done by examining the literary debates that followed in the wake of plagiarism allegations regarding five Afrikaans publications. Of special significance is the case of "Die Redding van Vuyo Stofile" by Wilhelm du Plessis, which provides an excellent example of a work that qualifies as being simultaneously both original and infringing. Since the

*Paljas*³⁷ and *Jonker*³⁸ cases involve the protection of ideas, Chapter 3 includes a discussion of idea protection, with extensive reference to developments in the United States of America.

Chapter 4 aims to show that, over the course of time, the fixity as opposed to fluency of text varies as a result of cultural and technological factors. The meaning of originality in a postmodern society is scrutinised in an attempt to determine how the concept is affected by the culture of our age. As modernism, from which postmodernism originated, is said to have had its starting point in the (re)discovery of relativity, Chaos is investigated to determine whether it might supplement the prevailing legal and literary understandings of the originality concept.

Chapter 5 gives a summary of the thesis and states the conclusions arrived at. In Chaos terms, the ultimate goal of the inquiries undertaken is to determine to what extent the patterns visible in South African copyright law regarding originality agree with the patterns apparent in foreign copyright law and contemporary artistic philosophy. Determining such parallels is indispensable in order to make recommendations regarding the decision of whether a work is to be regarded as original or not.

Chapter 2

2. Legal requirements for originality

2.1 Introduction

This chapter examines a number of aspects. Firstly, it traces the historical origins of the originality requirement in South African law. Secondly, it states the requirements for originality, as formulated by South African legal writers. Thirdly, it follows the application and possible adjustment and development of these rules through the course of South African court precedents. How do the South African courts formulate the requirements of originality; what do the concepts “skill” and “labour” entail; and is our Commonwealth inheritance of protection of “sweat of the brow” and “meritorious distinctiveness” justifiable? What degree of skill and/or labour render a work original, and is the low degree required justifiable from a policy point of view? After determining the current state of the law in South Africa, the chapter considers the desirability of the current state of South African copyright law with reference to foreign law.

2.1.1 Origins of originality requirement in South African law

According to section 2(1) of Act 98 of 1978 certain works, if they are original, will be eligible for copyright.

Sections 3 and 4 of Copyright Act 63 of 1965 also state that copyright can only subsist in *original* works.

In terms of section 143 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916, the English Copyright Act of 1911, as set out in the Third Schedule of Act 9 of 1916, was declared to be in force in the Union, subject to the modifications and additions provided by Chapter IV of Act 9 of 1916.³⁹

English copyright was codified by the Copyright Act of 1911. This act repealed some 20 pieces of legislation spanning approximately 180 years.⁴⁰ According to Section 1(1) of the Act of 1911, only *original* works could be copyrighted. Before the Copyright Act of 1911, no general statutory requirement of originality for copyright works existed.⁴¹

It is thus clear that the originality requirement, as it appears in section 2(1) of Act 98 of 1978, originates in English law.

Under the Berne Convention, of which Great Britain (with its colonies and possessions) became a signatory on its inception on 5 December 1887, originality was not expressly a requirement for copyright protection,⁴² as is presently still the case.⁴³ The object of the Convention, however, was to protect authors in respect of their intellectual creations, implying that the product so created is the result of the individual's own intellectual efforts, and thus in a sense original to him.⁴⁴

Nationally, individual signatories of the Berne Convention require various degrees of originality for works to be protected. "The United Kingdom has, from before 1911, adopted a low threshold of originality as qualifying a work for protection."⁴⁵ In support of the aforesaid statement, Copinger & Skone James refer to the decision of the House of Lords in *Walter v Lane*⁴⁶ where it was held that a reporter was entitled to copyright in his verbatim report of a public speech.⁴⁷ The question arose whether the introduction of the requirement of originality under the 1911 Act required a higher degree of originality to accord copyright protection. The matter was resolved in *Express Newspapers Plc v News (U.K.) Ltd*,⁴⁸ which upheld *Walter v Lane*. The low threshold of originality which is evident in South African law is thus not a universal requirement, but clearly stems from the English influence on our copyright law.

I now turn to the English roots of the "skill and labour" requirement. Ulmer points to the traditional English emphasis on *work* rather than *inspiration*. In English law there still is a clear tendency to stress *effort* in contrast to the German *personality* approach – the idea that a work is an expression, indeed a part, of the author's inmost self – that emphasises *creativity*.⁴⁹

In line with the high standard of originality required during the eighteenth century, Young in that century did not regard the expenditure of skill and/or labour as conferring originality on a work: Whereas original composition “rises spontaneously from the vital root of Genius”, imitative composition is “wrought up” through, inter alia, skill and/or labour.⁵⁰

Young’s introduction (or rather re-introduction) of the notion of original genius to the discourse of authorship is based on the individuality of the author. The Lockean discourse of property was founded on a compatible principle, namely that every man has a property in his own *person*.⁵¹ The property and individuality approaches can therefore be described as being readily compatible.

Ulmer concludes that the originality tests applied in English/French and German copyright law differ little in terms of actual results.⁵²

Rose succeeds in reconciling the personality and labour approaches in a logical and easily intelligible manner: A work of literature belongs to an individual because it is an embodiment of that individual. The product of the imprint of the author’s personality on the common stock of the world is a “work of original authorship”. Rose then concludes that the basis of literary property is not just labour, but “personality”, and this reveals itself in “originality”.⁵³

After a lengthy investigation of the relationship between property, originality and personality, Rose concludes as follows:

Property, originality, personality: the construction of the discourse of literary property depended on a chain of deferrals. The distinctive property was said to reside in the particularity of the text – ‘the same conceptions, cloathed in the same words’ – and this was underwritten by the notion of originality, which was in turn guaranteed by the concept of personality. The sign of personality was the distinctiveness of the human face, but this was only the material face of the genius of the immaterial self, and this when examined dissolved completely into contingency and flux. The attempt to anchor

the notion of literary property in personality suggests the need to find a transcendent signifier, a category beyond the economic to warrant and ground the circulation of literary commodities. Thus the mystification of original genius...⁵⁴

The English and French emphasis on *work* may derive from John Locke. According to Ulmer, from the end of the seventeenth century onwards, numerous legal writers declared the unauthorised reproduction of the works of others to be an infringement of the author's natural rights. This coincided with the emergence and growth of Natural Law thinking in Europe. A strong argument in favour of the exclusive right of authors to reproduce their works was found in Locke's justification of private property, with reference to the owner's own work on the object of ownership.⁵⁵

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. (*Two Treatises* 305-306)⁵⁶

John Locke "demanded a copyright for authors which he justified by the time and effort expended in the writing of the work which should be rewarded like any other work".⁵⁷

In the light of Hirsh & Ballin's suggestion that the invention of the printing press slowed down the development of authors' rights,⁵⁸ it is only reasonable to deduce that the authorities' desire to protect the printing industry in the wake of the invention of the printing press is one of the main reasons why originality is measured in terms of labour and/or skill. What I suggest is that if the printing press had never been developed, or had been developed at a later stage in the development of authors' rights, originality would more probably have required a certain degree of creativity.

2.2 Requirements for originality as formulated by South African legal writers

Because of the authoritative position of these writers in South African copyright law, and because they have obviously taken pains to accurately reflect court precedents and legislation, the legal writers referred to below are quoted as closely as possible.

In *Northern Office Micro Computers (Pty) Ltd v Rosenstein*,⁵⁹ Marais AJ stated that in order for the suite of computer programs in question to qualify for copyright protection the court had “to be able to conclude that its production entails the expenditure of sufficient effort or skill *to give it a new and original character*” (my italics). Note that the *Northern Office* case had to be decided in accordance with the Act as it stood before 23 May 1980, when the Copyright Amendment Act 56 of 1980 came into force.⁶⁰ As Dean explains:

Section 2(2) originally contained a paragraph (a) which provided that a literary, musical or artistic work would not be eligible for copyright unless sufficient effort or skill had been employed in making the work to give it a new and original character. This provision was intended to give expression to the concept of ‘originality’ as a condition for the subsistence of copyright..., which had been given a clear meaning and interpretation in case law. However, by introducing the notion that a work was required to have a “new character”, an unwanted characteristic of the requirement of ‘novelty’ in patent and design law, which had not been part of copyright law hitherto, was introduced into the concept of ‘originality’. This innovation was correctly removed by subsec 2(b) of Act No 56 of 1980. At the same time the words ‘if they are original’ were inserted into s 2(1) of the Act by s 2(9) of Act No 56 of 1980. These amendments had the effect of restoring the traditional concept of ‘originality’ and of making it applicable to all the classes of works eligible for copyright.⁶¹

In the light of the above, the objective element in Copeling’s frequently quoted description of originality, published in 1978, is understandable. The rest of the

originality guidelines provided by Copeling, condensed in the following abstract from his authoritative work, still remain valid and valuable:

'Originality', for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill and labour in execution. All that is required is that the work should emanate from the author himself and not be copied. The position is well illustrated by the example of two authors who, working independently of one another, arrive at the same result. In each instance the author will obtain for his result the protection accorded to an original copyright work.

...

It is perfectly possible for an author to make use of existing material and still achieve originality in respect of the work which he produces. In that event, the work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill and labour. Precisely how much skill or labour he need contribute is difficult to say for much will depend upon the facts of each particular case. As a general rule the author will have to expend sufficient skill or labour *to impart to his work some quality or character which the material he uses does not possess and which substantially distinguishes the work from that material.*⁶²(My italics, indicating the objective element required for originality as dictated by the Act before its amendment in 1980.)

With reference to the Act and numerous court precedents, Dean outlines the originality requirement as follows:

It is a requirement for the subsistence of copyright in a work that the work be original. This does not mean that the work must be in any way unique or inventive, but merely that it should be the product of the author's or maker's own labours and endeavors and should not be copied from other sources. *Originality is a matter of degree depending on the amount of skill, judgment or labour involved in making the work.* A work can still be original, notwithstanding that it has been copied from a previous work provided

sufficient skill and effort have been embodied in creating the subsequent work. A work need not be novel.

A work can be substantially similar to an existing work and can nevertheless be original if it is created by individual effort and without reference to an existing work as its creation in these circumstances does not amount to copying but rather to creative effort. Where a work embodies existing subject matter the court must decide whether its author has expended sufficient independent skill and labour to justify a claim that the work is original. *The standard of originality required by the Act is a low one.*⁶³ (My italics.)

Smith's understanding of originality concisely appears from the following quotation of his 1995 explanation of the concept:

In considering whether a work has sufficient originality in order to be protected, the courts will consider the degree of skill and effort that the author has put into the making of the work concerned (*Kalamazoo Division (Pty) Ltd v Gay* 1978 2 SA 184 (C)).

In order to satisfy a court that copyright subsists in a particular work, it is therefore generally necessary to establish that the author used sufficient skill and effort in making the work to justify protection under copyright law. The court will have to consider each case on its merits and it is certainly not clear exactly when the sufficient amount of skill and effort has been put into the creation of a work...

[I]f sufficient skill and effort went into the creation of a particular work, the work may be protected by copyright in spite of the fact that it incorporates the whole or substantial parts of earlier works and constitutes an infringement of copyright in that earlier work. In that case, the work would be subject to copyright in the infringed work and the new work.⁶⁴

From the above statement of South African legal writers' views of originality, the following principles can be distilled:

1. The work must emanate from the author and not be copied.
2. A work need not be novel to be original.
3. It is not the thought/idea or the expression thereof that has to be original, but the skill and/or labour it took to make the work.⁶⁵
4. As originality is a matter of degree, it is impossible to say precisely how much skill and/or labour is sufficient to establish originality. Only a low degree is required and how much skill and/or labour is "sufficient" will depend upon the facts of each particular case.
5. It is not clear whether originality calls for a purely subjective enquiry or not.

2.3 Requirements for originality as formulated by South African courts

The following table lists the South African cases taken into consideration for purposes of this chapter. Cases are listed in chronological order in an effort to trace developments in the originality concept. Each date appearing in the left column is that of the year in which judgment was given, not the year in which the case was reported. Judgments given in the same year are arranged in alphabetical order. Judgments up until April 2005 were taken into consideration.

Please note that factors such as the large number of footnotes used made Tables 3, 4 and 5 very difficult to format. Despite considerable "skill and labour" (including time and money!) having been spent, it was unfortunately not possible to create exactly what the author envisioned.

Table 2 Chronological table of court cases dealing with originality

Key to table:

Supreme Court of Appeal

Transvaal Provincial Division

Cape Provincial Division

Natal Provincial Division; Durban and Coast Local Division

Witwatersrand Local Division

1919	<i>Natal Picture Framing Co Ltd v Levin</i> 1920 WLD 35
1971	<i>Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd</i> 1972 1 SA 471 (WLD)
1977	<i>Kalamazoo Division (Pty) Ltd v Gay</i> 1978 2 SA 184 (CPD)
1980	<i>Ehrenberg Engineering (Pty) Ltd v Topka t/a Topping Manufacturing and Engineering</i> 40 JOC (T) <i>Northern Office Micro Computers (Pty) Ltd v Rosenstein</i> 1981 4 SA 123 (CPD)
1983	<i>Econostat (Pty) Ltd v Lambrecht</i> 89 JOC (W) <i>Topka t/a Topping Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd</i> 71 JOC (A)
1984	<i>Barber-Greene Company & others v Crushquip (Pty) Ltd</i> 151 JOC (W) <i>Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd</i> 1985 4 SA 882 (CPD) <i>Fichtel & Sachs Aktiengesellschaft v Laco Parts (Pty) Ltd</i> 174 JOC (W) <i>Saunders Valve Co Ltd v Klep Valves (Pty) Ltd</i> 1985 1 SA 646 (TPD)
1985	<i>Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd</i> 195 JOC (C) <i>Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd</i> 202 JOC (N)
1986	<i>Erasmus v Galago Publishers (Pty) Ltd</i> 227 JOC (T) <i>Kambrook Distributing v Haz Products</i> 243 JOC (W) <i>Klep Valves (Pty) Ltd v Saunders Valve Co Ltd</i> 1987 2 SA 1 (AD)
1987	<i>Insamcor (Pty) Ltd v Maschinenfabrik Sidler Stalder AG t/a Sistag</i> 1987 4 SA 660 (WLD)
1988	<i>Galago Publishers (Pty) Ltd v Erasmus</i> 1989 1 SA 276 (AD)
1989	<i>Adonis Knitwear Holding Ltd v OK Bazaars (1929) Ltd</i> 335 JOC (W) <i>Lintvalve Electronic Systems v Instrotech</i> 346 JOC (W) <i>Tie Rack plc v Tie Rack Stores (Pty) Ltd</i> 1989 4 SA 427 (TPD)
1991	<i>Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd</i> 1991 2 SA 455 (WLD) <i>Harnischfeger Corporation v Appleton</i> 1993 4 SA 479 (WLD) <i>Juta & Company Ltd v De Koker</i> 1994 3 SA 499 (TPD) <i>Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd</i> 399 JOC (T)
1992	<i>Waylite Diaries CC v First National Bank Ltd</i> 1993 2 SA 128 (WLD)
1993	<i>Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd</i> 1993 4 SA 279 (AD) <i>Nintendo Co Ltd v Golden China TV-Game Centre</i> 488 JOC (T)
1995	<i>Payen Components SA Ltd v Bovic CC</i> 1994 2 SA 464 (WLD) <i>Appleton v Harnischfeger Corporation</i> 1995 2 SA 247 (AD) <i>Da Gama Textile Co Ltd v Vision Creations CC</i> 1995 1 SA 398 (D & CLD) <i>Waylite Diaries CC v First National Bank Ltd</i> 1995 1 SA 645 (AD)
1996	<i>Golden China TV Game Centre and others v Nintendo Co Ltd</i> 1997 1 SA 405 (AD) <i>Jacana Education (Pty) Ltd v Frandsen Publishers</i> 624 JOC (T)
1997	<i>Jacana Education (Pty) Ltd v Frandsen Publishers</i> 1998 2 SA 965 (SCA)
1998	<i>Accesso CC v Allforms (Pty) Ltd</i> 677 JOC (T) <i>Info Colour Pages v South African Tourism Board</i> 818 JOC (T) <i>Mixtec CC v Fluid Mixing Equipment CC</i> 811 JOC (W) <i>Pyromet (Pty) Ltd v Bateman Project Holdings Ltd</i> 699 JOC (W)
1999	<i>Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd</i> 1999 BIP 392 (TPD)
2000	<i>Metro Polis t/a Transactive (Pty) Ltd v Naidoo t/a African Products</i> 759 JOC (T) <i>Nel v Ladysmith Co-Operative Wine Makers and Distillers Ltd</i> 2000 3 All SA 367 (C)
2002	<i>Biotech Laboratories (Pty) Ltd v Beecham Group PLC</i> 2002 3 All SA 652 (T) <i>Dexion Europe Ltd v Universal Storage Systems</i> 2002 4 All SA 67 (SCA)
2003	<i>Human Sciences Research Council v Dictum Publishers (Pty) Ltd</i> 804 JOC (T)
2005	<i>Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd</i> 2005 1 SA 398 (C)

The legal “test” for originality, as formulated by the courts, is set out below in the format of the above Chronological Table of Court Cases Dealing with Originality. The status of the judges is as it was when the judgments were given.

Table 3 The legal “test” for originality, as formulated by the courts⁶⁶

1919	<p><i>Natal Picture Framing Co Ltd v Levin</i></p> <p>Bristowe J found the applicant’s pictorial representation of the Nationalist Deputation to the 1919 Peace Conference sailing from Cape Town to be original. The court gave no reasons for this finding, but did remark that “[I]t is difficult to define ‘original artistic work’”.⁶⁷</p>
1971	<p><i>Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd</i></p> <p>In this case Boshoff J found that a technical drawing by a director of Pan African Engineers, although amended in several aspects at the suggestion of a director of Hydro Tube, was an original work and that Pan African Engineers was entitled to the copyright subsisting in it.⁶⁸</p> <p>Regarding originality, the following guidelines were provided:</p> <p style="padding-left: 40px;">The word ‘original’ in this connection does not mean that the work must be the expression of an original or inventive thought, because copyright acts are not concerned with the originality of ideas, but with the expression of thoughts... The work must therefore be original in the sense that it was not copied from another work, but originated from the author.⁶⁹</p> <p>From this case it is clear that only the skill and labour involved in representing or creating or giving effect to ideas is to be taken into account.⁷⁰</p>
1977	<p><i>Kalamazoo Division (Pty) Ltd v Gay</i></p> <p>De Kock J reached the conclusion that forms compiled by Kalamazoo Division were original.⁷¹ The judge explained his understanding of the law on the subject as follows:</p> <p style="padding-left: 40px;">It is a basic principle that a literary work (which includes compilations such as the applicant’s forms) must be original in character to be the subject of copyright. Originality in this regard refers to original skill or labour in execution, not to original thought or expression of thought. What is required is not that the expression of thought must be in an original or novel form, but that the work must emanate from the author himself and not be copied from another work. The question that then arises is what degree of labour or skill will suffice to create copyright in an original work. It is clear that it must be shown that some labour, skill or judgment has been brought to bear on the work before copyright can be claimed successfully for such work. The amount of such labour, skill or judgment is a question of fact and degree in every case.⁷²</p>
1980	<p><i>Ehrenberg Engineering (Pty) Ltd v Topka t/a Topring Manufacturing and Engineering</i></p> <p>Van Dijkhorst J pronounced on a factual dispute regarding originality.⁷³ Since the defendant’s version had to be rejected as untrustworthy, the plaintiff’s allegation that the defendant copied his drawings was accepted.⁷⁴ It was concluded that Ehrenberg</p>

	<p>Engineering owned the copyright⁷⁵ and the contents of the originality concept were therefore not discussed.</p>
	<p><i>Northern Office Micro Computers (Pty) Ltd v Rosenstein</i></p> <p>Marais AJ explained the concept of originality as follows:</p> <p style="padding-left: 40px;">While originality is a <i>sine qua non</i>, if a work is to be eligible for copyright protection, this does not mean that only truly inventive works are protected. There need be nothing original in the idea or thought which is father to the deed.⁷⁶</p> <p>The court then quoted from <i>Kalamazoo Division (Pty) Ltd v Gay</i>, as quoted above.⁷⁷</p> <p>Because this case was decided in accordance with the Act as it stood before 23 May 1980 when the Copyright Amendment Act 56 of 1980 came into force,⁷⁸ the court had to be able to conclude that the production of the work entailed the expenditure of sufficient effort or skill to give it a new and original character.⁷⁹</p> <p>It was found that (as between the parties) the suite of programs was entitled to copyright protection.⁸⁰</p>
<p>1983</p>	<p><i>Econostat (Pty) Ltd v Lambrecht</i></p> <p>Ackermann J found that “‘raw data’, in its wholly untreated, uninterpreted, and uncorrelated form”, cannot be original.⁸¹ The judge had no doubt, however, that “any analysis or derivation from this ‘raw data’... are ‘original’ for the purpose of vesting copyright in their material expression.”⁸²</p> <p>In his discussion of what originality entails, Ackermann J referred to:</p> <ul style="list-style-type: none"> • <i>Kalamazoo Division (Pty) Ltd v Gay</i> at 190A-D, as quoted above, • <i>G A Cramp & Sons Ltd v Frank Smythson Ltd</i>⁸³ and • Copeling’s formulation of the test for originality:⁸⁴ ... as a general rule he will have to expend sufficient skill or labour to import to his work some quality or character which the material he uses does not possess and which substantially distinguishes the work from that material. <p>It must be remembered that the above test was taken from a 1969 publication. The Act of 1965 required a work to be original for it to enjoy copyright protection, but did not qualify originality in any way, as did the 1978 Act before it was amended in 1980. The court’s reference to the quoted passage from Copeling’s book is therefore not to be construed as a precedent for the argument that there is an objective angle to the originality test in South African law.</p>
	<p><i>Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd</i></p> <p>Galgut AJA gave judgment in this case, with which the other four judges concurred. In the words of Galgut AJA:</p> <p style="padding-left: 40px;">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.⁸⁵</p> <p>He further referred to the case of <i>G A Cramp and Sons Ltd</i>, in which⁸⁶ reference was made to a judgment of the Judicial Committee, in which the following appears:</p>

	<p>What is the precise amount of knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms.⁸⁷ In every case it must depend largely on the special facts of that case, and must in every case be very much a question of degree.⁸⁸</p> <p>The court found that, since “a lot of skill, labour, effort and time” were expended on the drawings in question, they were original artistic works.</p>
<p>1984</p>	<p><i>Barber-Greene Company & others v Crushquip (Pty) Ltd</i></p> <p>The respondents were alleged to have infringed applicants’ copyright by converting applicants’ drawings into three-dimensional form.⁸⁹ The applicants needed to show that they <i>owned</i> the copyright in the engineering drawings on which they relied. One of the aspects they had to prove in order to prove ownership, was that the works were <i>original</i>. It was within this context that Coetzee J, with reference to Copeling,⁹⁰ stated the following:</p> <p style="padding-left: 40px;">‘Original’ for this purpose means no more than that the work was not a slavish copy of another work but that it must be the product of original skill or labour emanating from the author himself.⁹¹</p>
	<p><i>Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd</i>⁹²</p> <p>The plaintiff claimed that the defendant had infringed its copyright in respect of certain drawings relating to motor vehicle exhaust systems. The legal question was whether the originality essential to the subsistence of copyright went into the making of the prototype or the making of a drawing from the prototype.⁹³ In reaching his decision that the plaintiff had failed to prove the subsistence of copyright in the drawings⁹⁴ (plaintiff did not claim copyright in the prototype), Burger J referred to “skill”,⁹⁵ “effort and originality”⁹⁶ and “skill and originality”⁹⁷ as criteria of originality. Although “skill” and “effort” were thus clearly regarded as indicators that originality was present, use of “originality” to measure originality is an unfortunate choice of words. It is possible that the judge thereby meant a certain degree of novelty in expression.</p> <p>In deciding whether plaintiff had copyright in its parts numbering system, Burger J attached high value to the <i>effort</i> expended:</p> <p style="padding-left: 40px;">It was further argued that there was no ‘originality’ displayed in compiling the list of numbers in the plaintiff’s price list. It may not have required a great deal of judgment to develop and list all the parts, but it certainly required a great deal of effort to compile the list of numbers, in the same way as compiling a street directory. Such work and effort the Courts will protect. Copeling <i>Copyright Law</i> at 68-69.⁹⁸</p>
	<p><i>Fichtel & Sachs Aktiengesellschaft v Laco Parts (Pty) Ltd</i></p> <p>This case concerned engineering drawings of component parts of motor vehicles. Each drawing formed part of a series, following on earlier versions by the same person, or other employees of the applicant. In his reasoning preceding his conclusion that the drawings in question were original,⁹⁹ Weyers J referred to the English case of <i>British Northrop Ltd v Texteam Blackburn Ltd</i>.¹⁰⁰ In the said case Megarry J considered to what extent the simplicity of a work can exclude originality. En route to his conclusion on the simplicity issue, Megarry J propounded his concept of what originality entails:</p> <p style="padding-left: 40px;">Copyright is concerned not with any originality of ideas but with their form of expression, and it is in that expression that originality is requisite. The expression need not be original or novel in form, but it must originate from</p>

	<p>the author and not be copied from another work¹⁰¹ ... A drawing which is simply traced from another drawing is not an original artistic work; a drawing which is made without any copying from anything originates from the artist.¹⁰²</p> <p>Weyers J also referred to another English case, <i>L B (Plastics) Ltd v Swish Products Ltd</i>,¹⁰³ where Whitford J stated as follows:</p> <p>If in relation to any work, be it literary, dramatic, musical or artistic, the question being asked is, 'is this an original work', the answer must depend on whether sufficient skill or labour or talent has gone into it to merit protection under the Act. It is always a question of degree.¹⁰⁴</p> <p>According to Weyers J, the definition of originality is most clearly stated in Webster's Universal Dictionary International:</p> <p>Original: 3 (are products of human minds) created, made, invented, constructed for the first time not derived or copied from, not suggested by something or someone else, first hand, new.¹⁰⁵</p>
	<p><i>Saunders Valve Co Ltd v Klep Valves (Pty) Ltd</i></p> <p>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.¹⁰⁶ The court adopted the following statement from Laddie, Prescott and Vitoria <i>The Modern Law of Copyright</i>:¹⁰⁷</p> <p>Originality does not mean novelty or uniqueness, nor does it necessarily involve inventiveness. On the other hand the author of an original artistic work will have expended in its creation a substantial amount of his own skill or useful labour. What is substantial is a question of fact and degree, that is, it is a value judgment that has to be made in order to decide whether the work deserves to be protected. Since 'prima facie what is worth copying is worth protecting' it is unusual for a copyright action to fail on the ground that the work in question is not sufficiently original and so is not entitled to copyright at all. Indeed, in the case of artistic works it is thought that no such event has occurred in modern times.¹⁰⁸</p>
<p>1985</p>	<p><i>Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd</i></p> <p>Burger J ruled that drawings of two hinges were indeed original. In reaching the said conclusion, the judge himself described the concept as follows:</p> <p>The originality required for purposes of copyright is not that the idea or concept must be new, but that the expression of any concept or idea must be in an original concrete form either by way of a drawing or as a model or prototype. It is this expression which, if there was time, labour or thought expended upon the formulation on that expression, enjoys copyright.¹⁰⁹</p> <p>Burger J also quoted Copeling¹¹⁰ on the subject:</p> <p>To be original a work need not be the vehicle for new or inventive thought. Nor is it necessary that such thoughts as the work may contain be expressed in a form that is novel or without precedent. 'Originality', for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution. Basically, therefore, all that is required is that the work should emanate from the</p>

	<p>author himself and not be copied.¹¹¹</p>
	<p><i>Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd</i></p> <p>This was an application for the grant of an interim interdict pending the determination of an action to be instituted against the respondent. It concerned drawings of an item used for the suspension of overhead electric lines.</p> <p>For purposes of the application it was conceded that drawings 1, 2 & 3 were original, which concession the court extended to drawing 4.¹¹² With reference to <i>The Law of South Africa</i>,¹¹³ Kumleben J held that originality refers “not to originality of thought or the expression of thought, but to original skill or labour in execution”. The court further stated that whether sufficient labour or skill has created copyright in a particular original work is a question of fact.</p> <p>Kumleben was of the opinion that the skill and labour involved in the design of drawings 4 & 5 were of a low order.¹¹⁴ Since applicant had not established that he had <i>locus standi</i> to claim copyright in drawing 5, the court did not say in so many words whether drawing 5 was original or not. Regarding drawing 6, the judge doubted whether at the trial it could be shown that its design had the necessary originality for it to be protected by copyright.¹¹⁵</p>
<p>1986</p>	<p><i>Erasmus v Galago Publishers (Pty) Ltd</i></p> <p>Harms J had to decide whether the book entitled “Selous Scouts – Rhodesian War – A Pictorial Account” was an infringement of the copyright in “Selous Scouts Top Secret War”. The originality of “Top Secret War” was not disputed.</p>
	<p><i>Kambrook Distributing v Haz Products</i></p> <p>Kriegler J explained that “breach of copyright is concerned with reproduction or adaptation of the outwardly perceptible form, the physical features of the original”. Pirating an idea is distinct from copying a form and, against the factual backdrop of this case, belonged to the framework of patent infringement.¹¹⁶</p>
	<p><i>Klep Valves (Pty) Ltd v Saunders Valve Co Ltd</i></p> <p>This case concerned weir diaphragm valves and straight through diaphragm valves. Grosskopf JA based his finding that the drawings of the valves in question were indeed original on Copeling’s explanation of the concept.¹¹⁷ The Appeal Court in the Topka case applied the same principles.¹¹⁸</p> <p>Grosskopf JA quoted extensively from Copeling:</p> <p style="padding-left: 40px;">To be original a work need not be the vehicle for new or inventive thought. Nor is it necessary that such thoughts as the work may contain be expressed in a form that is novel or without precedent. ‘Originality’, for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution. All that is required is that the work should emanate from the author himself and not be copied...¹¹⁹</p> <p>The requirement that the work should emanate from the author himself and not be copied must not be interpreted as meaning that a work will be regarded as original only where it is made without reference to existing subject matter. Indeed, was this so the great majority of works would be denied the benefit of copyright protection. It is perfectly possible for an</p>

	<p>author to make use of existing material and still achieve originality in respect of the work that he produces. In that event, the work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill or labour. Precisely how much skill and labour he need contribute is difficult to say for much will depend on the facts of each particular case.¹²⁰</p>
1987	<p><i>Insamcor (Pty) Ltd v Maschinenfabriek Sidler Stalder AG t/a Sistag</i></p> <p>This interlocutory application did not call for testing for originality. It is relevant because it holds that, as the originality of the drawing forming part of a series must be established with reference to that series, not only the <i>series</i> of drawings claimed to be original must be identified by the party claiming originality, but also the <i>parts</i> of the drawings for which originality is claimed.</p>
1988	<p><i>Galago Publishers (Pty) Ltd v Erasmus</i></p> <p>Corbett JA found that “[i]n producing <i>Pictorial Account</i> the author availed himself unlawfully of a great deal of the skill and industry that went into the writing of <i>Top Secret War</i>”.¹²¹</p> <p>Although <i>Pictorial Account</i> differed from <i>Top Secret War</i> in certain respects, the differences were found to be “largely cosmetic” and the court had no doubt that the second appellant wrote <i>Pictorial Account</i> with <i>Top Secret War</i> at his elbow (author’s emphasis).¹²² The “abridgement” was therefore found to constitute an infringement of the copyright in <i>Top Secret War</i>.¹²³ The court did not discuss the issue of originality <i>per se</i>.</p>
1989	<p><i>Adonis Knitwear Holding Ltd v OK Bazaars (1929) Ltd</i></p> <p>In this case, a picture was created from a photograph of a man’s jersey, which picture resulted in the creation of a range of knitwear sold under the Christian Dior label.</p> <p>Levy AJ found that the applicant’s managing director had “embarked on the task of creating a picture from the photograph in the course of which he applied his expert knowledge of fabrics, colours and patterns, his experience in and his knowledge of the knitwear industry and the parameters of manufacture”.¹²⁴ The court was convinced that “he applied a sufficient degree of labour, skill and expertise to the creation of his picture, from the photograph, to make it an original work entitled to the protection of the Act”.¹²⁵</p> <p>The finding was based on Copeling as quoted by Grosskopf JA in <i>Klep Valves</i>.¹²⁶</p> <p>The court also referred with approval to Grosskopf JA ‘s statement that “[a]n original work is protected even though the author may have borrowed extensively from others”.¹²⁷</p>
	<p><i>Lintvalve Electronic Systems v Instrotech</i></p> <p>In this case the respondent was accused of having engineered a clone of applicant’s acoustic steam leak detection device.¹²⁸ Although the court did not formally test for originality, Van Schalkwyk J confirmed that originality could indeed be claimed in respect of a device manufactured from components that were freely available.¹²⁹</p>
	<p><i>Tie Rack plc v Tie Rack Stores (Pty) Ltd</i></p> <p>It was conceded that applicant held copyright in its “Tie Rack” logo, an artistic work.¹³⁰ Originality was therefore not in dispute. Respondent’s logo was found to be an infringement of that copyright¹³¹ on the basis that respondent “adopted the substance of applicant’s logo</p>

	<p>upon which its design artist’s skill and labour had been expended”.¹³²</p>
<p>1991</p>	<p><i>Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd</i></p> <p>After having seen a photograph of the “M”-shaped sofa manufactured in the United States of America by Preview Furniture Corporation, Bress decided to create a new model “M”-shaped lounge suite, which would be called the Fendi.¹³³ Applicant’s council argued that the Fendi was an original artistic work, despite applicant’s use of the Preview photograph.¹³⁴</p> <p>In deciding that the Fendi was indeed original, Van Dijkhorst J stated the following:</p> <p style="padding-left: 40px;">We are not concerned with the question whether the Fendi incorporates a novel idea or is a novel piece of furniture. In the context of the Copyright Act, what is required is that the work must emanate from the author himself. Labour, skill or judgment are required.¹³⁵</p>
	<p><i>Harnischfeger Corporation v Appleton</i></p> <p>Respondents’ counsel argued that, because drawing X was proclaimed to be “similar to drawing Y”, X was a copy of Y. Flemming DJP disagreed:</p> <p style="padding-left: 40px;">If identical twins at the same time sketch Table Mountain from the same point, the one sketch may be very similar to the other. Both sketches are original. A sketch by the second sister made not directly from the mountain but from her sister’s sketch (or a photo thereof) may be ‘original’ even if it is similar to that of the other sister, provided there is <i>adequate own insight and own effort aimed at own creation</i>¹³⁶ in contrast with trying to merely duplicate the first sketch.¹³⁷</p>
	<p><i>Juta & Company Ltd v De Koker</i></p> <p>This case dealt with the alleged infringement of a copyright work entitled <i>Silke on South African Income Tax</i>. The court highlighted the following aspects of originality.</p> <p>Firstly, where the subject matter of the competing works is the same, similarities do not necessarily imply copying. Both works may thus be original. As McCreath J explained:</p> <p style="padding-left: 40px;">The subject-matter of the works is a common one, viz the income tax law of South Africa. That in turn is governed and regulated by the provisions of the Income Tax Act. The act is common property to all who may wish to write a treatise thereon and the legal principles therein embodied. Similarity in the competing works, in the sequence of corresponding topics and the use of identical terms and phrases, cannot be dubbed as copying if they are but following the sequence and wording of the Income Tax Act. Nor can similarity in the choice of quotations from decided cases dealing with the provisions, or in the paraphrasing of the provisions themselves, or even a coincidence in the submissions made by the authors necessarily constitute an infringement of copyright by the author whose creative product has found its way onto the market subsequent to that of his fellow writer.¹³⁸</p> <p>Secondly, the court quoted from two English decisions which shed considerable light upon the concept that <i>own labour</i> needs to be expended in order to acquire copyright in a work.</p> <p>From <i>Harman Pictures NV v Osborne</i>.¹³⁹</p> <p style="padding-left: 40px;">In the case of works not original in the proper sense of the term, but composed of, or compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from</p>

	<p>anyone else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by Hall VC in <i>Hogg v Scott</i>, 'the true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour of which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or, in other words, his property'.¹⁴⁰</p> <p>From <i>Moffat & Paige Ltd v George Gill & Sons Ltd and Marshal</i>.¹⁴¹</p> <p>No doubt he says: 'I am a very well-informed man; I have given, in fact, the greater part of my attention to these works, and I have no doubt I could have evolved the whole of these quotations from researches which I could have made: I know not only where those quotations come from, but I know the authors who have named them as appropriate to the particular matters, and I could tell you who they were.' But, unfortunately, <i>he did not go through that process himself</i>;¹⁴² he has adopted the work of another man who may or may not have gone through it; but, whether he did or not, the defendant did not. He simply took what another man had done.¹⁴³</p>
	<p><i>Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd</i></p> <p>The urgency of the matter in this case led Eloff J to give judgment soon after argument, admitting that he would have preferred to have been allowed more time to deal with some of the interesting issues debated.¹⁴⁴</p> <p>Without formally formulating his view of the test for originality, the court concluded that the "effort and ideas" invested in the relevant screens and printouts by a Pastel employee created copyright in them.¹⁴⁵</p> <p>It is submitted that the court actually meant to say "effort and <i>skill</i>" rather than "effort and <i>ideas</i>". This submission is made firstly on the basis of the time limits within which the judgment had to be drafted. Secondly, the sections the judge quoted from the employee's memorandum¹⁴⁶ and from Pastel's replying affidavit,¹⁴⁷ upon which the court's decision regarding this aspect was based, both referred to "skill and effort(s)".</p>
<p>1992</p>	<p><i>Waylite Diaries CC v First National Bank Ltd</i></p> <p>On the question of what constitutes originality, the court summarised¹⁴⁸ the situation as follows:</p> <p>The relevant points for present purposes are, first, that the enquiry as to 'originality' for the purposes of copyright is not essentially an enquiry as to novelty of intellectual content; secondly, that what is sought for purposes of originality is that the work should have its origin in the author's knowledge, skill, labour and judgment, and that it should not be a mere copy; and thirdly, that there is a distinction between copying (which negatives originality), and the use by an author of already existing material or of knowledge common to himself and others (which does not). The last-mentioned distinction is illustrated by the fact that a reporter who uses his own skill, knowledge and labour to take a shorthand note of a speech delivered in public, and then to transcribe and publish the speech word for word as it was delivered, thereby becomes the author of a literary work which, for the purposes of copyright, has the necessary originality, notwithstanding that the intellectual content was provided entirely by the speechmaker: <i>Walter v Lane</i> [1900] AC 539 (HL). However, that situation must be distinguished from one in which the author of a literary work uses another as his amanuensis. The amanuensis does not then become an author of the resultant literary work.¹⁴⁹</p>

	<p>The court further accepted applicant’s reference to the case of <i>G A Cramp & Sons Ltd v Frank Smythson Ltd</i>,¹⁵⁰ in which Lord MacMillan required an objective element (“meritorious distinctiveness”) for copyright protection.¹⁵¹</p>
<p>1993</p>	<p><i>Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd</i></p> <p>Corbett CJ held that the get-up of the blank TDK cassettes in question did contain subject matter for copyright protection.¹⁵² In discussing whether these constituted original artistic and literary works, the court referred to two aspects when dealing with originality: design and drafting skill¹⁵³ and the fact that the work should emanate from the author himself and not be copied.¹⁵⁴</p>
	<p><i>Nintendo Co Ltd v Golden China TV-Game Centre</i></p> <p>Hartzenberg J set out the principles relating to originality with reference to the <i>Klep Valves</i> case, quoting exactly the same section of Copeling as had Grosskopf J in that case.¹⁵⁵ In the <i>Nintendo</i> case the court found that sufficient skill and labour had been employed for the applicant’s games to be original. As far as certain games based on earlier arcade games were concerned the court found that, since the applicant was also the creator of the arcade games, the applicant owned the copyright in the video games. The principle involved was that an author cannot be denied copyright in a new edition on the basis that it lacks originality.¹⁵⁶</p>
	<p><i>Payen Components SA Ltd v Bovic CC</i></p> <p>The applicant sought an order interdicting the respondents from infringing the applicant’s copyright in its catalogue, price list and identifying code system as used by it in the sale of gaskets.¹⁵⁷ Because the applicant failed to identify the “written compilation” which it alleged to be the literary work protected by copyright,¹⁵⁸ there was no need for the court to address the question of originality.</p>
<p>1995</p>	<p><i>Appleton v Harnischfeger Corporation</i></p> <p>Corbett CJ stated with reference to <i>Klep Valves (Pty) Ltd v Saunders Valve Co Ltd</i>¹⁵⁹:</p> <p>[O]riginality in this context does not require that the work should embody a new or inventive thought or should express a thought in a new or inventive form. Originality refers to original skill or labour in execution: it demands that the work should emanate from the author himself and not be copied. This does not mean that a work will be regarded as original only where it is made without reference to existing subject matter. An author may make use of existing material and yet achieve originality in respect of the work, which he produces. In that event the produced work must be more than a slavish copy: it must in some measure be due to the application of the author’s own skill or labour. Precisely how much skill or labour he need contribute will depend upon the facts of each particular case.¹⁶⁰</p>
	<p><i>Da Gama Textile Co Ltd v Vision Creations CC</i></p> <p>The plaintiff commissioned a freelance designer to compose a textile pattern. In order to illustrate the type of pattern required, plaintiff gave her some cloth decorated in the Jacobean style that it had obtained from the United States of America. She then used the American pattern as an example and a guide to design her own pattern. The court found that many differences, especially regarding detail, were clearly noticeable. Similarities were</p>

	<p>attributed to the Jacobean characteristics common to both designs.¹⁶¹</p> <p>Regarding the test for originality, Didcott J stated the following:</p> <p style="padding-left: 40px;">...I am satisfied that the designer’s drawing passed muster as an original work. It had enough features to warrant such a rating, in my opinion, enough that were not imitations but innovations, enough that were proved to have been the distinctive products of her personal creativity, imagination, skill and labour.¹⁶²</p>
	<p><i>Waylite Diaries CC v First National Bank Ltd</i></p> <p>Harms JA concluded that the appellant had failed to establish that the appointment pages of the diary were either artistic or literary works for the purposes of the Act. It was therefore unnecessary to consider whether they were original.¹⁶³</p> <p>However, in an <i>obiter dictum</i> the court expressed the view that there is an objective side to the test for originality:¹⁶⁴ “While it is true that the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original”.¹⁶⁵</p>
<p>1996</p>	<p><i>Golden China TV Game Centre v Nintendo</i></p> <p>This case turned on the question of whether video games enjoy copyright protection as “cinematograph films”.¹⁶⁶ Appellant did not dispute that Nintendo had established that the video games were original¹⁶⁷ and Harms JA therefore did not discuss the requirements for originality.</p>
	<p><i>Jacana Education (Pty) Ltd v Frandsen Publishers</i></p> <p>In its application for an interdict to restrain alleged copyright infringement of a map of the Kruger National Park, Jacana described the time and effort expended on the preparation of the map. Although “thousands of hours of work” had apparently been spent on it, Van Dijkhorst J decided that, despite the time and effort invested, a map correctly showing the physical features (road, rivers, koppies, camps, etc.) of the Kruger National Park had no originality.¹⁶⁸</p> <p>The only way in which originality might possibly be achieved in a “skeleton” of a map would be if it were the first one, based on a survey and photographs made of the Park.¹⁶⁹ The applicant had used existing maps as a basis for its work. Applicant’s base or skeleton was thus not original. It was a copy of existing material upon which the applicant superimposed much of its own data.</p> <p>When dealing with the information appearing on the “skeleton” Van Dijkhorst J, as in the <i>Ehrenberg Engineering</i> case, illustrated the relative value of differences and similarities between two works when deciding about originality. The fact that in certain details respondent’s map differed from other maps of the Park in the same way as did applicant’s map, did not necessarily indicate copying.</p> <p>Respondent, while rightfully using existing maps to create its work, had noticed that applicant’s map differed from other existing maps of the area. Park officials were approached, who confirmed that applicant’s map was correct. Since there is no copyright in information and ideas, the court saw nothing wrong in a cartographer checking his work against all available information and maps.</p> <p>It seems that the court’s judgment on originality may be summarised as follows:</p> <p>Certain things, such as the physical features of the Kruger National Park (its roads, rivers, koppies, camps, etc.) cannot acquire copyright. A map showing the location of these</p>

	<p>correctly has no originality, irrespective of the amount of time and effort expended, except perhaps if it is the first map of the region.</p> <p>Regarding the information that appears on the map, skill and effort do seem to play a role, for the judge stated: “I see nothing wrong in a <i>cartographer</i> checking his <i>own work</i> against all available information and maps.”¹⁷⁰ (My italics.)</p>
<p>1997</p>	<p><i>Jacana Education (Pty) Ltd v Frandsen Publishers</i></p> <p>Although Schutz JA did not lay down a test for originality, and the judgment mainly deals with infringement, important principles regarding originality can be derived from this judgement.</p> <p>The closest the court came to articulating an originality test was in the form of a quotation from a decision of the High Court of Australia:¹⁷¹</p> <p style="padding-left: 40px;"><i>He had unquestionably prepared it by taking the common stock of information in Australia and, by applying to it personal, that is, independent, intellectual effort in the exercise of judgement and discrimination, had produced a map that was new in the sense that, in respect of its size and outlines, its contents and arrangement and its general appearance, it presented both in its totality and in specific parts distinct differences from other existing maps.</i>¹⁷²</p> <p>Schutz JA seems to have distinguished between “truly original works” and works that have a common source. In this regard reference was made to <i>Loubscher v Vos and Others</i>¹⁷³ where it was observed (in the context of infringement) that –</p> <p style="padding-left: 40px;">...in the case of truly original artistic works a mere comparison usually provides a ready answer, whereas the answer may not be so readily reached if the copyright and the alleged infringing works may have a common source.¹⁷⁴</p> <p>Within the context of originality, the court stated that the existence of prior material tended to –</p> <ul style="list-style-type: none"> (a) limit the scope for originality and (b) require more exacting proof of originality’s existence than was the case with “truly original” works.¹⁷⁵
<p>1998</p>	<p><i>Accesso CC v Allforms (Pty) Ltd</i></p> <p>Le Roux J had to decide whether a certain medical account form was an original literary work and thus entitled to copyright protection.¹⁷⁶ The court concluded that the <i>headings and typographical material</i> on the form were <i>commonplace</i> and would not attract copyright, but that sufficient <i>skill, judgment and labour</i> had been expended on the <i>layout</i> to merit its protection.¹⁷⁷</p> <p>In building up to this conclusion, the court referred to numerous judgments addressing originality.</p> <p>In the English case of <i>Ladbroke v William Hill Ltd</i>¹⁷⁸ the following was said — Lord Reid:¹⁷⁹</p> <p style="padding-left: 40px;">It is not disputed that, as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation.</p> <p>Lord Hodson:¹⁸⁰</p>

The coupons are compilations, being derived from various sources. Thus commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection will not be entitled to copyright.

Lord Pears:¹⁸¹

The word “original” does not demand original or inventive thought, but only that the work should not be copied and should originate from the author... In deciding therefore whether a work in the nature of a compilation is original, it is wrong to start by considering individual parts of it apart from the whole, as the appellants in their arguments sought to do. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original... In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. So the protection given such copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to involve it by his own labours.¹⁸²

Le Roux J also referred to De Kock J as quoted under *Kalamazoo Division* above.¹⁸³

With reference to the Appeal Court case of *Waylite Diaries*, on the questions whether a work was created and, if so, whether it was original Le Roux J stated:

A court therefore has to exercise a value judgment on whether the material in which copyright is claimed constitutes a “work” or is too trivial to merit protection. Once it has been decided that the work has been created the further enquiry is whether it is of so commonplace a nature that it does not attract copyright. This is an objective test but the court must also consider what the consequences would be of awarding copyright to a particular work.¹⁸⁴

As to the meaning of the word “commonplace” the court in *Accesso* quoted Laddie J from the case of *Ocular Sciences Ltd v Aspect Vision Care Ltd*¹⁸⁵:

Any design which is trite, trivial, common-or-garden, hackneyed or of the type which would excite no particular attention in those of the relevant art is likely to be commonplace. This does not mean that a design made up of features, which, individually are commonplace is necessarily itself commonplace. A new and exciting design can be produced from the tritest of ingredients. But to secure protection a combination must itself not be commonplace.¹⁸⁶

Before reaching a conclusion regarding the matter of originality, Le Roux J summarised the law regarding originality of compilations as follows:

[A] work may be original even if the author has drawn on knowledge common to himself and others or has used already existing material (without slavishly copying such material) provided he spent skill, labour and judgment on it. The standard of originality required by the Act is a low one... A work need not be ‘novel’ where the author has produced his result without reference to an existing work, even if someone else has produced a similar work, then he does not copy but creates... Where he does make use of existing subject matter the question to be decided is whether he has expended sufficient independent labour to justify copyright protection.¹⁸⁷

Info Colour Pages v South African Tourism Board

This case dealt with alleged infringement of copyright in a desk calendar produced by the South African Tourism Board. The court simultaneously dealt with the work and originality requirements in finding the calendar not to be copyrighted protected:

...in essence it remains a calendar, thus of necessity constituting a layout of the most common, and rather literally, everyday information.

...

It is the layout of the type of information which can carry countless variations (eg tea break and coffee break and reminders to take medication) without getting away from what is commonplace, being of any real use or providing scope for any real originality.

The fact that it will have a ring-binder and will stand on boards is an expensive non-essential and barely original manner of display. The fact that it is to be adorned with expensive and handsome reproductions of photographs which have nothing to do with the essential purpose of a calendar is nothing new, regarding calendars in general, many of which are eye-catching because of eg representations of classic trucks, motorcars or examples of the female species.

...

I think from a common sense point of view it would be strained to categorise the... calendar as a drawing (artistic work) or as tables and compilations (literary work) or to ascribe to it the requisite originality.

From the same point of view and as a matter of policy I think it would be dangerous to ascribe to it the protection of copyright, thus creating a monopoly in something which is really mundane, is essentially of limited scope and originality and will, as it were, have to re-invent itself every year and by doing so, with the adaptations at the whim of the author, perpetuate the monopoly.

...

True, it has nowhere been decided that copyright cannot vest in a diary but Mr Plewman had been unable to refer to any decision where copyright on the facts of the case have in fact been found to exist in a diary.¹⁸⁸

Mixtec CC v Fluid Mixing Equipment CC

Applicant alleged the existence and infringement of copyright in its aerofoil impeller systems.¹⁸⁹ Respondents did not challenge the fact that the impeller systems under consideration are “artistic works” for purposes of the Act. They did however challenge the originality of the applicant’s works.¹⁹⁰

The respondents allege that the basic design of impeller systems are to be found in text books on the subject and variations thereto are dictated by the requirements of the application, ie depend on the nature of the fluid or substance to be mixed.¹⁹¹

The respondents further alleged that their designs reflect their own process, knowledge and interpretation of the application and that the systems are also always designed specifically to customers’ requirements.¹⁹²

The court stated that “[f]or a work to be the subject of copyright it must be original in character, as section 2(1) of the Act specifies that ‘works’ shall be eligible for copyright ‘if they are original’.”¹⁹³ It was held that the applicant failed to make out a case against the respondents for the relief contended for.¹⁹⁴

	<p><i>Pyromet (Pty) Ltd v Bateman Project Holdings Ltd</i></p> <p>Applicant alleged that it was the proprietor of the copyright in 240 drawings and that respondents had copied the drawings. In his affidavit, Pyromet's supervising engineer stated that he had supervised the making of each of the drawings. He said that each drawing was original and that it was the product of each author's personal skill, knowledge and labour and was not copied from any other drawing.¹⁹⁵</p> <p>Goldstein J found that, as the drawings contained considerable detail, it was difficult to believe that each drawing was the product of its author's personal skill, knowledge and labour. Because the supervising engineer failed to explain how each of the authors had been able to produce his or her drawing without reference to any other drawing, the court held it to be overwhelmingly probable that copying was involved in the production of at least a portion of the drawings. On the facts before the court it was impossible to determine which portions of the 240 drawings were the subject of copyright and which were not.</p> <p>In order to substantiate its finding, the court then referred to Dean <i>Handbook of South African Copyright Law</i>: The abstract quoted dealt with the principle that a work can still be original, even though it has been copied from a previous work, provided sufficient skill and effort have been expended in creating the subsequent work.¹⁹⁶</p>
1999	<p><i>Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd</i></p> <p>In this case it was alleged that no real independent labour or skill was involved in the preparation or compilation of the design of the Atrium and Corynthe Michel Herbelin watches in question.¹⁹⁷</p> <p>With reference to <i>The Law of South Africa</i>¹⁹⁸ and Dean's <i>Handbook of South African Copyright Law</i>¹⁹⁹, Majapelo J defined the requirement of originality as follows:</p> <p style="padding-left: 40px;">This requirement does not mean that the work must be unique or inventive, but rather that it should be the product of the author's or maker's own labour and endeavours and should not be copied from other sources.²⁰⁰</p> <p>The court continued as follows:</p> <p style="padding-left: 40px;">Precisely how much labour and skill should be involved to qualify the work for copyright protection depends on the circumstances of each case. It is trite law, however, that the amount of skill and labour or creativity required is not great but must be more than trivial or minimal.²⁰¹</p> <p>In this regard the court quoted from <i>Copinger and Skone James on Copyright</i>²⁰²:</p> <p style="padding-left: 40px;">What is required is the expenditure of more than trivial effort and the relevant skill in the creation of the work, but it is almost impossible to define in any precise terms the amount of knowledge, labour, judgment or literary skill or taste which the author of a work must bestow on its composition in order for it to acquire copyright. It is here that the real difficulty lies. <u>There is no guiding principle as to the quantum of skill or judgment. It has to be determined on the facts of a particular case. Simplicity, as such, is not enough to prevent a copyright subsisting unless extreme, such as a straight line or a circle.</u>²⁰³ (Court's underlining)</p> <p>With reference to English copyright law²⁰⁴ (Mojapelo AJ explicitly stated that the South African law of copyright is based on the English law of copyright), it was stated that the court must be loath to deny copyright protection based simply on alleged insufficient originality in the present circumstances.²⁰⁵</p>

	<p>After an evaluation of the relevant facts as well as the law on the subject, the court held that the independent labour, skill and creativity applied by the design team of the watch models was sufficient to qualify the works as original artistic works.²⁰⁶</p>
<p>2000</p>	<p><i>Nel v Ladysmith Co-Operative Wine Makers and Distillers Ltd</i></p> <p>Comrie J had to decide whether a wine bottle label developed by the applicant “has sufficient originality (not meaning artistic quality) to constitute an artistic work deserving of copyright protection”.²⁰⁷</p> <p>In holding that the work was indeed original, the court stated the following:</p> <p style="padding-left: 40px;">In my opinion that label required some special skill and labour to create and the result was most distinctive. I do not see why a particular configuration of colours (e.g. the national flag) should be incapable in principle of such originality as will sustain copyright.²⁰⁸</p>
<p>2002</p>	<p><i>Biotech Laboratories (Pty) Ltd v Beecham Group PLC and another</i></p> <p>On the facts of the case, the court held the package insert for the medicine in question to be a compilation within the definition of “literary work” in the Act.²⁰⁹</p> <p>Applicant argued that respondent had failed to identify those parts of the work for which originality was claimed.²¹⁰ The court explained that the inquiry was not whether <i>parts</i> of the work were original, but whether the compilation as a <i>whole</i> was original.²¹¹</p> <p>Applicant further relied on a passage from the judgement of the Appellate Division in <i>Jacana Education v Frandsen Publishers</i>. In the said case it was “pointed out that the existence of prior material tends to limit the scope of originality and requires more proof of its existence than would be the case with truly original works”.²¹² The court distinguished between the facts in the <i>Jacana</i> and the <i>Biotech</i> cases. In <i>Jacana</i> it was not the “work” (as in <i>Biotech</i>) that had been copied, but “parts that are primarily commonplace” that were taken. The principle laid down in <i>Jacana</i> therefore did not apply in the <i>Biotech</i> case. In this regard the court stated that, had Biotech copied only parts of the document, the position might have been different.²¹³</p> <p>The court then disposed of the <i>Jacana</i> argument by means of an extract from <i>Ladbroke (Football) Ltd v William Hill (Football) Ltd</i>.²¹⁴ The test for originality in compilations, as it appears from the extract quoted by Harms JA, was summarised as follows by Lord Reid:</p> <p style="padding-left: 40px;">... To my mind, it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognized that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.²¹⁵</p> <p>Apart from his reference to <i>skill</i> and <i>judgment</i>, Lord Reid also mentioned that a substantially similar result, when reached through independent <i>work</i>, did not amount to copying.²¹⁶</p>
	<p><i>Dexion Europe Ltd v Universal Storage Systems</i></p> <p>Dexion’s copyright in the four technical drawings reflecting different parts of its Speedlock racking system was not disputed and the issue was consequently limited to that of copying.²¹⁷</p>

<p>2003</p>	<p><i>Human Sciences Research Council v Dictum Publishers (Pty) Ltd</i></p> <p>The applicant claims copyright in a literary work and published edition known as “Prodder”. It is a compilation of, including postal addresses, physical addresses, telephone numbers, telefaxnumbers, email addresses, so-called key people, organisations including more than 2500 development-related organizations, national government and diplomatic missions based in South Africa and various non-governmental organizations. In addition the applicant claims copyright in a literary work contained in a compact disk in which the information referred to is contained...²¹⁸</p> <p>The court found that the above publication qualifies as an original “literary work”:²¹⁹</p> <p>Sufficient evidence was placed before me indicating the labour and skill and time spent in obtaining and compiling the information to warrant a finding that the work here under consideration is in fact original in the sense of copyright law.²²⁰</p>
<p>2005</p>	<p><i>Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd</i></p> <p>After considering the position in the United States as laid down in <i>Feist Publications Ltd v Rural Telephone Service Company Inc</i> 449 US 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”.²²¹ As to the meaning of originality the court referred to Dean <i>Handbook</i> 1-15:</p> <p>This does not mean that the work must be in any way unique or inventive, but merely that it should be the product of the author’s or maker’s own labours and endeavors and should not be copied from other sources. Originality is a matter of degree depending on the amount of skill, judgment or labour involved in making the work.²²²</p>

2.3.1 Requirement of own skill and/or labour

2.3.1.1 Content

In *Juta & Company Ltd v De Koker* the court relied on two English decisions to support the fact that *own labour* needs to be expended in order to acquire copyright in a work.

The one was *Harman Pictures NV v Osborne*.²²³

In the case of works not original in the proper sense of the term, but composed of, or compiled or prepared from materials which are open to all, the fact that one man has

produced such a work does not take away from anyone else the right to produce another work of the same kind, and in doing so to use all the materials open to him.

But, as the law is concisely stated by Hall VC in *Hogg v Scott*, ‘the true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man’s labour, or, in other words, his property’.²²⁴

The other was *Moffat & Paige Ltd v George Gill & Sons Ltd and Marshall*:²²⁵

No doubt he says: ‘I am a very well-informed man; I have given, in fact, the greater part of my attention to these works, and I have no doubt I could have evolved the whole of these quotations from researches which I could have made: I know not only where those quotations come from, but I know the authors who have named them as appropriate to the particular matters, and I could tell you who they were’. But, unfortunately, *he did not go through that process himself*;²²⁶ he has adopted the work of another man who may or may not have gone through it; but, whether he did or not, the defendant did not. He simply took what another man had done.²²⁷

2.3.1.2 The meaning of skill and/or labour

In *Preformed Line Products (SA) Pty Ltd v Hardware Assemblies (Pty) Ltd*,²²⁸ Kumleben J quoted from *The Modern Law of Copyright*, in which Laddie, Prescott & Vitoria stated that originality depends on whether a “sufficient amount of independent skill, labour and so on” is represented.²²⁹

This “and so on” part of the originality test is explored in the next table.

There is a definite connection between the nature of the work and the specific aspects of skill and/or labour (the *and so on* part of the test) taken into account to determine

whether a work is original. A good example in this regard is *Da Gama Textile Co Ltd v Vision Creations CC*²³⁰ that dealt with the originality of a fabric pattern in the Jacobean style. The court took into account not only the *skill* and *labour* invested by the designer, but also the *creativity* and *imagination* expended.

Since many factors may be categorised under either “skill” or “labour”, the term “aspects of skill and labour” is appropriate. Expertise, knowledge, thought, insight, creativity, imagination, ingenuity, talent, taste and judgment are all aspects of “skill”. Effort is an aspect of “labour” and thought contains elements of both skill and labour. In appropriate circumstances time and money expended can be taken into account as skill and/or labour involved in bringing into existence an original work.²³¹

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Table 4 Aspects of skill and labour

Examples of cases taking aspects of expended skill and labour into account	Different aspects of skill and labour												
	Effort	Knowledge Expertise	Thought	Insight	Creativity	Imagination	Innovation	Talent	Taste	Judgement	Discrimination	Time	Money
<i>Kalamazoo Division (Pty) Ltd v Gay</i> 1978 2 SA 184 (CPD)		• ²³²								• ²³³		• ²³⁴	
<i>Northern Office Micro Computers (Pty) Ltd v Rosenstein</i> 1981 4 SA 123 (CPD)	• ²³⁵	• ²³⁶							• ²³⁷	• ²³⁸			
<i>Econostat (Pty) Ltd v Lambrecht</i> 89 JOC (W)		• ²³⁹							• ²⁴⁰	• ²⁴¹		• ²⁴²	• ²⁴³
<i>Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd</i> 71 JOC (A)	• ²⁴⁴	• ²⁴⁵							• ²⁴⁶	• ²⁴⁷		• ²⁴⁸	
<i>Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd</i> 1985 4 SA 882 (CPD)	• ²⁴⁹												
<i>Fichtel & Sachs Aktiengesellschaft v Laco Parts (Pty) Ltd</i> 174 JOC (W)								• ²⁵⁰					
<i>Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd</i> 195 JOC (C)			• ²⁵¹									• ²⁵²	

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<i>Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd</i> 202 JOC (N)		•253							•254	•255		
<i>Adonis Knitwear Holding Ltd v OK Bazaars (1929) Ltd</i> 335 JOC (W)		•256										
<i>Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd</i> 1991 2 SA 455 (WLD)										•257		
<i>Harnischfeger Corporation v Appleton</i> 1993 4 SA 479 (WLD)	•258			•259								
<i>Waylite Diaries CC v First National Bank Ltd</i> 1993 2 SA 128 (WLD)		•260								•261		•262
<i>Nintendo Co Ltd v Golden China TV-Game Centre</i> 488 JOC (T)												•263
<i>Da Gama Textile Co Ltd v Vision Creations CC</i> 1995 1 SA 398 (D&CLD)					•264	•265	•266					
<i>Waylite Diaries CC v First National Bank Ltd</i> 1995 1 SA 645 (AD)	•267											•268
<i>Jacana Education (Pty) Ltd v Frandsen Publishers</i> 624 JOC (T)	•269											•270
<i>Jacana Education (Pty) Ltd v Frandsen Publishers</i> 1998 2 SA 965 (SCA)	•271									•272	•273	

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<i>Pyromet (Pty) Ltd v Bateman Project Holdings Ltd 699 JOC (W)</i>	•274												
<i>Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd 1999 BIP 392 (TPD)</i>	•275	•276			•277				•278	•279			
<i>Metro Polis t/a Transactive (Pty) Ltd v Naidoo t/a African Products 759 JOC (T)</i>	•280												
<i>Biotech Laboratories (Pty) Ltd v Beecham Group PLC 2002 3 All SA 652 (TPD)</i>										•281			
<i>Human Sciences Research Council v Dictum Publishers (Pty) Ltd 804 JOC (T)</i>												282	

In the Canadian case *CCH Canadian Ltd v Law Society of Upper Canada*,²⁸³ Linden JA discussed the role the above “aspects of originality”²⁸⁴ have to play in deciding whether a work is original or not:

“It is widely accepted that an "original" work must be independently produced and not copied. In attempts to further explain this cornerstone of copyright law, different judges and commentators have described the word "original" with a host of words and phrases mentioned above, including various combinations of the terms "labour", "judgment", "skill", "work", "industry", "effort", "taste" or "discretion" (see for example *Ladbroke Football, supra* and *Slumber-Magic, supra*).

To me, these are all possible ingredients in the recipe for originality, which may be altered to suit the flavour of the work at issue. Each term may help to determine whether a work is, in fact, original, but it is a mistake to treat any of these words as if they were statutory requirements. These are not, in themselves, prerequisites to copyright protection, but rather evidence of the sole prerequisite, originality. To determine whether or not the materials in issue are "original" works, a principled and reasoned approach based upon evidence is required, not reliance on a particular word or phrase that merely seeks to explain the concept of originality.”²⁸⁵

Linden JA described that which I call “aspects of originality” as words or phrases that merely seek to explain the concept of originality. Such words or phrases are to be regarded as *evidence* of originality rather than prerequisites for copyright protection. A principled and reasoned approach based upon evidence is what is required to determine whether or not the materials in issue are original works. The court further regarded *intellectual effort*, whether in the form of skill, judgment and/or labour or creativity, as the equivalent of *independent production*, and the question of *originality* therefore resting on whether the work was *more than a mere copy*.

A mere copy would not have required any intellectual effort (skill and/or labour), and could therefore not be original.²⁸⁶

2.3.1.3 “Creative spark” versus “sweat of the brow” (“industrious collection”)

a) United States of America

The watershed judgement in this regard is *Feist Publications Inc v Rural Telephone Service Co Inc*.²⁸⁷ Because *Feist* was decided as early as 1991, and because copyright forms part of the federal law of the United States of America, it was extensively discussed by many lawyers from various states.

As pointed out by Halpern, Nard & Port, the United States Congress alone has the power to regulate copyright. The power derives from Article I, section 8 of the United States Constitution:

The Congress shall have power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries²⁸⁸.

The conceptual basis for copyright is thus to promote the public interest.²⁸⁹

There is no common law of copyright. The Copyright Act of 1976 is the sole source for the granting and regulation of copyright. It abolished any common law or state law copyright. The Act (and the power of Congress) therefore completely preempts any state-created rights that are equivalent to any of the exclusive rights of a copyright owner provided by the Act “in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright”.²⁹⁰

The importance of *Feist* in the battle between “creative spark” and “sweat of the brow” is aptly summarised by Halpern, Nard & Port:

...the United States Supreme Court, in *Feist*..., firmly put to rest the notion that effort, ‘sweat of the brow’, such as an alphabetical listing of names and telephone numbers in a telephone directory, can render copyrightable a compilation that is otherwise lacking in originality.²⁹¹

In support of this conclusion Halpern, Nard & Port²⁹² refer to the following passage by O'Connor J :

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. [T]his is not 'some unforeseen byproduct of a statutory scheme.' ... It is, rather, 'the essence of copyright,' ... and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and Useful Arts.' Art. I, § 8, cl. 8. ... To this end, copyright assures authors the right to their original expressions, but encourages others to build freely upon the ideas and information conveyed by a work.²⁹³

In essence then, copyright law in the United States of America is founded on the principle of the promotion of public interest, which is not furthered through the protection of labour alone. This strong policy consideration probably explains the constant weighing of interests that permeates the US copyright precedents and legal literature.

Although it may not seem so at first glance, the *Feist* approach marks a move towards postmodernism rather than a reversion to the Romantic conception of authorship that the originality requirement stems from.²⁹⁴ The modern-day author is not perceived as the creator of something unquestioningly sublime as in the Romanticism.²⁹⁵ Apart from the "Romantic subjectivism" which is still required for copyright protection,²⁹⁶ creativity is now also required. The purpose of the last said requirement is to protect the public domain.²⁹⁷

Furthermore, in the absence of "Romantic subjectivism" there would be no author and consequently no copyright. In order for copyright to "survive", originality therefore needs to remain rooted in Romanticism. The *Feist* creativity requirement is in line with the necessity for copyright to maintain its foothold in the Romantic domain (through Romantic Subjectivity), while at the same time adapting to contemporary conceptions of authorship (through the originality requirement).

It is important to note that, as Strasser points out,²⁹⁸ the narrow American creativity-based approach is balanced by the aspect of broad actions that indirectly protect

labour and effort, such as one relating to unfair competition, which in some states includes the misappropriation doctrine.²⁹⁹ Furthermore, four different US bills that provide *sui generis* protection to databases based on the model of the EU Database Directive have been drafted since 1996, none of which have been enacted into law as yet.³⁰⁰

b) United Kingdom

In the United Kingdom, the “sweat of the brow” concept lives on, subject to competition (anti-trust) law.³⁰¹

... cases on street directories, lists of railway stations, and so on, show that inventive ingenuity is not an essential ingredient of an original literary work. Nevertheless there is present a creative input, for the compiler has been at the trouble of ascertaining snippets of information from numerous sources and assembling them together, albeit the operation requires no act of imagination and no intellectual skill beyond that of knowing how to read and write. What is lacking in skill and taste, however, is made up for by hard work – by creative labour.³⁰²

Laddie, Prescott & Vitoria then elaborate on the meaning of “creative labour” by distinguishing between *relevant* and mere collateral labour. The labour must be of a literary, dramatic or musical character, anything else being irrelevant as regards originality. It must be kept in mind, however, that tables and compilations are literary works, so labour expended in assembling the data may be part of the “literary” task. One of the examples offered by Laddie, Prescott & Vitoria to illustrate that the expended labour must be relevant is that of a mountaineer ascertaining the exact height of a previously unconquered peak. The undoubted skill and effort involved do not justify his claiming copyright in a short sentence merely recording the height, for it was not skill and effort of a literary character, but of a mountaineering kind. It would be different if he had recorded the height of a large number of mountains, for that would be a compilation.³⁰³

In certain cases the preliminary labour is so intimately connected with the end result that the courts have refused to draw a line between the two. An example of this principle is the case of *Ladbroke (Football) v William Hill (Football) Ltd*³⁰⁴, where the

majority regarded the skill that went into the working out the odds and its embodiment in football coupons as inseparable. Copying portions of such a coupon is therefore impermissible. Laddie, Prescott & Vitoria submit that “where the work is a compilation of the sort where the real creative input consists in the ‘leg work’ needed to ascertain the information to be assembled together, as in the case of a street directory or map, such preliminary work ought to be regarded as an element in the originality of the work”.³⁰⁵

To the relevance of the “sweat of the brow” in order to establish originality must be added the perspective that labour merely expended in the process of copying cannot confer originality.³⁰⁶

It should also be noted that the European Union Database Directive was transposed into the national law of the United Kingdom.³⁰⁷

c) Australia

In Australia protection of the effort expended to create fact-based work depends on copyright law alone.³⁰⁸

In *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*³⁰⁹ the Full Federal Court of Australia unanimously upheld a decision by a single judge of the Court that copyright subsists in telephone directories produced by Telstra Corporation Ltd.

Telstra Corporation Ltd (“Telstra”) alleged that Desktop Marketing Systems Pty Ltd (“Desktop”) had infringed its copyright in the 1996-1999 White Page Directories for all 55 Australian Telstra directory regions, the 1997-1999 Yellow Page Directories for those regions and two Headings Books: the 1997-1998 Metropolitan Directories and the 1997-1998 Regional & Local Directories. The White and the Yellow Pages Directories included information pages as well as directory sections. The Yellow Pages Directories also included graphics, enhancements and advertisements.³¹⁰

Desktop did not copy any of the information pages, graphics, enhancements or advertisements. What were copied were the data contained in the directory sections

of the White and the Yellow Pages, which two bodies of data were then separately stored in databases. Since Desktop did not have access to Telstra's Heading Books, it copied headings from the Yellow Pages and used them as descriptions of the lines of business of subscribers whose details it took from those directories.³¹¹

After reviewing, in chronological sequence, the numerous English and Australian cases (since 1806) that the Judges were referred to, the court arrived at the following conclusion:

...there is no principle that the labour and expense of collecting, verifying, recording and assembling (albeit routinely) data to be compiled are irrelevant to, or are incapable of themselves establishing origination, and therefore originality; on the contrary, the authorities strongly suggest that labour of that kind may do so.³¹²

Before going on to the second issue, Lindgren J stated as follows:

The making of accessible whole-of-universe compilations³¹³ is arguably to be encouraged by the giving of copyright protection on account of the industrious collection, verification, recording and assembly necessarily undertaken for the purpose. But ultimately the weighing of the competing policy considerations is a matter for the legislature.³¹⁴

The current Australian policy, as derived from English and Australian court precedents, is to protect the first compiler's "industrious collection" and to thereby encourage research by would-be first compilers. The problem with this policy is that others cannot build on the first compiler's work, without first having to repeat the work independently.³¹⁵ As Lindgren J points out, the Australian legislature is at any stage free to change the common law in order for copyright law to be in favour of the second author in this respect.

Black CJ agreed with the reasoning of the other two judges, but added certain observations that are of great value to the current discussion. Since the existence of a "spark of creativity", as required in the US case of *Feist Publications Inc v Rural Telephone Service Co Inc*,³¹⁶ was not accepted by the Australian court as the test of

originality, *Desktop* changed the question put before the court to whether a *particular form of labour*³¹⁷ is determinative in attracting copyright protection. To this question Black J replied that not even the *Feist* case itself provided ground for concluding that Telstra's various forms of labour should not suffice to attract copyright protection.³¹⁸ Although in most, if not all, of Australian and English case law concerning industrious collection the effort and expense include effort and expense in the *collection* of the data,³¹⁹ these cases do not turn upon the the circumstance that the effort and expense applied were in the collection, rather than receipt, of data. "*In general, they turn upon a reluctance of the Courts to allow unfair advantage to be taken of the outlays of another in originating a work*" (my italics).³²⁰

It may therefore be said that the issue is not the *type* of labour, but whether *own* labour was expended. The underlying reasoning with regard to the relevance of labour for originality purposes therefore has a strong competition-law character in English and Australian jurisprudence.

On 20 June 2003 Desktop applied to the High Court of Australia for special leave to appeal. Hayne J and Callinan J presided. The dialogue between counsel for the appellant, counsel for the respondent and Hayne J – and the consequent conclusion of the court – leaves little doubt about the official Australian standpoint on the copyright protection of labour as such.

Hayne J narrowed down the question presented to the court to whether *Feist Publications Inc v Rural Telephone Service Co Inc* should be introduced into the Australian law or not. Counsel for the appellant agreed, because what *Feist* did was to identify the fault of the industrious collection test as being that it effectively eroded the principle that no one could have copyright in facts. Hayne J then challenged counsel for the appellant by stating his understanding to be that the generally accepted view in the UK was that *Feist* did not represent the law in the UK. In the light of the number of cases in the UK that had adopted this approach, counsel for the appellant had to agree with the judge on this point. Appellant's counsel attributed the UK courts' anti-*Feist* standpoint to their perception that what is worth copying is worth protecting.

With reference to a line of cases tracing back to *Sands & McDougall Pty Ltd v Robinson* (1917),³²¹ counsel for the respondent submitted that the purpose served by the word “original” had been settled in Australia for a great many years, being a requirement that the work should originate in the author and that it should not be a copy of other work.

Appellant’s counsel argued that these were two separate requirements. As origination could not be doubted in this case, the question was what the content of the requirement was that the work should not be a copy of other material. On the point of compilations, how could something that did not involve intellectual effort be anything other than a copy of other material? Where the courts had gone wrong, argued counsel for the appellant, was in saying that mere industrious collection would suffice: “There is nothing by way of intellectual effort to distinguish the material in the compilation of such a case from the underlying information. That is the error that the US Supreme Court identified and corrected and it is the error which has been fallen into here.”

It was nonetheless held that an appeal would enjoy insufficient prospects of success to warrant a grant of special leave in this matter. Accordingly, special leave was refused with costs.³²²

d) Canada

In the recent case of *CCH Canadian Ltd v Law Society of Upper Canada*³²³ Linden JA, with reference to Canadian jurisprudence on the debate about “creativity” as a requirement for copyright protection, came to certain interesting conclusions. Anglo-Canadian copyright law does not require creativity for a work to be original.³²⁴

The classic Anglo-Canadian precondition of copyright is that a work must be independently produced and not copied from another person. Producing a work that is not, in essence, a copy of existing material will require *effort* that is most often referred to as skill, judgment or labour. “Sweat of the brow” refers to the *effort* (skill, judgement or labour) required to distinguish an original work from a mere copy. Sweating to produce what is, in essence, a copy can therefore not be rewarded with copyright protection.

According to Linden JA, distinguishing "sweat of the brow" from "creativity" has to do with the fact that "creativity" refers to "novelty". Since copyright law is not concerned with novelty, the term "creativity" is avoided and "sweat of the brow" is substituted.³²⁵

Linden JA also pointed out that the lack of objectivity implicit in a requirement of "creativity" made a coherent application of such a standard impossible. Should there be policy reasons for imposing a higher standard, the public interest would be better served "through the avenues of Parliament" (i.e. a fair interpretation of user rights) than "through the imposition of an arbitrary and subjective standard of 'creative spark' or 'imagination'".³²⁶

e) South Africa

From the judgment in *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd*³²⁷ it emerges that South African copyright law does protect mere "sweat of the brow". In deciding whether plaintiff had copyright in its parts numbering system, Burger J, with reference to Copeling,³²⁸ attached high value to the *effort* expended:

It was further argued that there was no 'originality' displayed in compiling the list of numbers in the plaintiff's price list. It may not have required a great deal of judgment to develop and list all the parts, but it certainly required a great deal of effort to compile the list of numbers, in the same way as compiling a street directory. *Such work and effort the courts will protect.*" (My italics)

f) Germany

Only "personal intellectual creations" can constitute works for purposes of the German Copyright Act. This means that they must be a human creation and copyright can therefore only originate from a natural person.³²⁹

The so-called "creative level" is relatively low, however, so that even address books have been considered protectable. Beier, Schricker & Fikentscher provide the example that although a title of a work could theoretically enjoy copyright, for

purposes of practicality it usually enjoys protection only against competition from confusing titles.³³⁰

g) The Netherlands³³¹

“Bloed, zweet en tranen”³³² is basically irrelevant for purposes of copyright originality in the Netherlands.³³³ Although not mentioned in the *Auteurswet* of 1912, the originality requirement for copyright protection has evolved through case law. It entails that the work must have its own, original character and must carry the personal stamp of its maker. A creative performance by the author must find expression in the work; his subjective, personal character must be carried therein. Objective, technical inventiveness is not regarded as being creative for copyright purposes.

Section 10(1)(1) of the *Auteurswet* lists *geschriften* as works that can qualify for copyright protection. Non-original *geschriften* – factual compilations with no own original character and destined to be made public – such as theatre programmes, catalogues and phone directories, are protected by *geschriftenbescherming*. Alongside, or in the place of, *geschriftenbescherming*, the Netherlands must provide for database protection in line with Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996.

h) European Union

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 provides for the legal protection of databases. The directive “rewards precisely the ‘sweat of the brow’ that Feist eliminated”.³³⁴ Original databases remain protected under copyright and non-original databases through a *sui generis* regime.

The most important articles of Directive 96/9/EC for current purposes read as follows:

CHAPTER II

COPYRIGHT

Article 3

Object of protection

1. In accordance with this directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

...

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

1. Member states shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

...

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

The object of this *sui generis* right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right (15 years)³³⁵; such investment may consist in the development of financial resources and/or the expending of time, effort and energy.³³⁶ The protection provided relates to databases in which works, data or materials have been arranged systematically or methodically, where it is not necessary for those materials to have been physically stored in an organised manner³³⁷ (for example an alphabetic listing of names in a telephone directory). Works protected by copyright and subject matter protected by related rights, which are incorporated into a database, nevertheless remain protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the right holder or his successor in title.³³⁸

The drafters of the directive provide an example of the working of copyright protection and the *sui generis* right:

Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the *sui generis* right.³³⁹

In the light of the directive itself, together with the reasoning behind its adoption, it may be said that, since “originality” is the standard for copyright protection, “substantial investment of finances and/or time, effort and energy in either the obtaining, verification or presentation of the contents” is the standard required for a database to be protected under the *sui generis* right.³⁴⁰ The *sui generis* right thus protects the “sweat of the brow”, the “industrious collection” by the author of a

database, which is not protected by copyright. The author of a database is defined by Article 4(1) as the natural person or group of natural persons who created the base and is described in the reasons for adopting the Directive as “the person who takes the initiative and the risk of investing”.³⁴¹

...

i) Norway

Unlike Finland, Denmark and Sweden, Norway is not a member state of the EU. However, in accordance with their respective bilateral agreements with the EU, neighbouring countries such as Norway and Iceland have to implement Directive 96/9/EC.³⁴²

Although Powell points out that the *sui generis* right provided by Directive 96/9/EC, which protects unoriginal databases, bears many similarities to the publisher’s right in the published edition under UK law³⁴³, it was inspired by the so-called “Nordic Catalogue Rule”.³⁴⁴ The (pre-Directive 96/9/EU) copyright acts of Denmark, Finland, Iceland, Norway and Sweden all contain provisions expressly protecting unoriginal compilations of data such as catalogues, tables and similar compilations, provided they comprise a large number of items.³⁴⁵

The Nordic Catalogue Rule dates back to the 1940s. In a 1949 joint Nordic legislative proposal it formed part of a text prohibiting the imitation of “forms, programmes, catalogues and similar works that are not protected by copyright/authors’ rights”. In somewhat varied form and extent, Norway, Denmark, Sweden and Finland brought the rule into their Copyright Acts during 1960/61. Iceland had its own rule. At that stage the protection concerned “a catalogue, a table or another similar product in which a large number of information items have been compiled”.³⁴⁶

Karnell gives two reasons for the development of the catalogue rule. The most basic reason was to provide protection for substantial investment of capital and amounts of working effort in collecting and arranging catalogue materials. From case law the

conclusion may be drawn that the easier the compilation, the more investment in capital and/or labour will be required to qualify.

“The catalogue rule has always been a competition law rule in copyright disguise”.³⁴⁷ The fact that Sweden (Karnell’s home) did not have any general unfair competition clause may have contributed to the competition law character of the rule. Karnell does acknowledge, however, that other legislative measures and related court decisions have tended to close the gap.

The second reason is that “it was feared that the courts would unduly lower the bar for the protection of literary and artistic works so as to accommodate the needs for protection of catalogue products”, i.e. protection was given to a catalogue of ironware and a list of Danish family names by the Swedish and Danish courts. It was widely considered that such works did not reach the required level of originality and the catalogue rule put an end to such lowering of the standard of creativeness. “The prevailing idea at the time when the catalogue rule was conceived and started to develop towards the EC directive was to keep copyright bright and shiny for literature and art and to direct other matter to separate kinds of protection.”³⁴⁸

j) Conclusion

It is concluded that mere labour is indeed protected in all nine jurisdictions discussed above, although not necessarily through copyright law. In the Commonwealth tradition own, relevant labour is protected through copyright law, subject to competition law. In the United States of America and Europe sweat of the brow is not protected through copyright law – creativity is required – but this gap is filled by broad actions such as those relating to unlawful competition.

Worldwide attention is being given to the development of *sui generis* protection of the time, money and labour invested in databases. The *sui generis* approach meets the need for sweat of the brow protection, without compromising the principles of artistic theory that underlie copyright law. However, as Lipton points out, the creation of such *sui generis* protection for databases is not without its growing pains. It may even be preferable not to create such new intellectual property protection at all.³⁴⁹

The EU Database Directive and the US Bills (with the possible exception of the most recent one) have been criticised for two reasons. Firstly, they are modelled too closely on copyright law. Secondly, “database” is defined too broadly, with much emphasis on that which is not permitted. Such exceptions fail to compensate for the fact that the prohibited conduct is ill defined in the first place.³⁵⁰

The above criticism of the developing *sui generis* database protection supports the conclusion ultimately reached by this research. Pinpointing the type of subject matter and the copyright (and/or other legal) rules that govern that specific type of work is crucial in the development of the concept of originality and copyright law in general.

2.3.1.4 “Meritorious distinctiveness”

a) Section 2 requirements for copyright protection

Section 2 of the Act sets four different requirements for copyright protection. They are:

- material form (fixation)
- work
- categories of works protected
- originality.

These requirements are now discussed *seriatum*.

(i) Material form (fixation)

Section 2(2) provides that a work, except a broadcast or programme-carrying signal, is not eligible for copyright protection unless the work has been written down,

recorded, represented in digital data or signals or otherwise reduced to material form. There are basically two schools of thought on the role of the material form requirement.

On the one hand there is the view that the true legal object of copyright lies in the idea rather than the expression of that idea.³⁵¹ Copinger submits that the embodiment of the idea must result in its *communication* to the mind of some interested party, not necessarily in a physical form such as writing.³⁵² It follows that, if communication to the mind of an outside party can be proven, then the purpose of the fixation requirement is met and copyright is established.

On the other hand there are those who view fixation as an integral part of the object of copyright. Dean describes the object of copyright protection as the “material form of expression of the idea”.³⁵³ Laddie, Prescott & Vitoria regard the ideas, thoughts and facts existing in a man’s brain as the object of protection, on condition that they have been reduced to material form.³⁵⁴

Copinger & Skone James strike a compromise between the above two schools of thought. In line with Copinger’s views, Copinger & Skone James acknowledge that the reasons for the fixation principle are practical. It serves to provide certainty on what the subject matter is, limits the monopoly and defines the moment when the work comes into existence. However, in line with Dean and Laddie, Prescott & Vitoria, Copinger & Skone James do not take the further step that Copinger does of regarding the fixation requirement as being overridable.³⁵⁵

The view of Copinger & Skone James is to be preferred. It is submitted that the object of the legislature is to grant the author copyright in his ideas only in so far as those ideas are reduced to material form. An author who wishes to protect the fruits of his mind need only take the simple and inexpensive step of fixing them in material form. Interpreting section 2(2) in a wider sense so as also to protect ideas communicated to others in a non-material way would unjustly benefit “authors” to the detriment of the free flow of information in society. Such a wide interpretation is especially not to be recommended within the prevailing Third Wave culture (see 4.3.2.2). Certain exceptions to the rule, such as the protection of broadcasts and programme-carrying signals, are, however, justifiable.

(ii) *Work*

“Work” is defined in section 1 as “a work contemplated in section 2”. As Dean explains, the definition was inserted into the Act in 1992 in order to clarify and emphasise that only works or categories of works specified in section 2 of the Act are eligible for copyright.³⁵⁶ Garnett, James & Davies explain that fixation and the requirement relating to the form of a work are definitely to be distinguished from one another.³⁵⁷ Although work may not qualify as a requirement for copyright protection to the same extent that material form does, the “work requirement” has an important role to play in its own right.

At the onset of a copyright enquiry it must first be established that one is dealing with a “work”: that the subject matter in question has sufficient substance to warrant being the subject of protection under the Act.³⁵⁸ The first role of the work requirement is thus to ensure that copyright is not awarded to subject matter of too commonplace a nature, which would place undue restrictions on others. Not being too commonplace is thus the test for qualifying as a “work”. In *Waylite Diary CC v First National Bank Ltd*³⁵⁹ the Appellate Division found that the diary appointment pages in question were too commonplace to qualify as either artistic or literary works for purposes of the Act, and that it was therefore unnecessary to consider whether they were original.³⁶⁰

The second important role of the “work requirement” is the identification of what it is that copyright is claimed for. From the judgment of Van Schalkwyk J in the case of *Insamcor (Pty) Ltd v Maschinenfabrik Sidler Stalder AG t/a Sistag*³⁶¹ it is evident that the “work” copyright is claimed for must be not only identified in terms of the whole of which it forms part, but also pinpointed as finely as possible.³⁶² This slots in perfectly with a hypertext view of the “work requirement” – seeing the “work” in which copyright is claimed as a node within a network of references. In the case of *Insamcor* the parts of the drawing are the specific nodes and the series the drawing belongs to is the *neighbouring* information network. The neighbouring network (the series) is where the court draws the identification line. The series, for its part, forms a node within the network of technical information, and technical information is a node within the ever-expanding information network as a whole.

In this respect it should also be mentioned that the *work* which has to be original for copyright purposes is the mirror image of the *part* that should be substantial for infringement purposes.

(iii) *Categories of works protected*

To know whether the subject matter falls within one of the categories listed in section 2(1) is essential in order to determine whether the Act is applicable and if so, which parts of the Act, with reference to aspects such as the nature of the rights therein and the exceptions to copyright in different works.

(iv) *Originality*

Section 2(1) also states the originality requirement – the one true *sine qua non* for copyright protection. Whereas “work” is closely linked with the material form requirement and the protected categories of subject matter, and whereas the “work” and “originality” requirements notoriously overlap despite efforts to keep the two apart, an interesting debate on whether originality calls for a subjective or objective enquiry has developed in the wake of the *Waylite Diaries* cases.

b) Principles established by Waylite Diaries cases

In the first *Waylite Diaries* case,³⁶³ reported in 1993, the court accepted the applicant’s reference to the English case of *G A Cramp & Sons Ltd v Frank Smythson Ltd*³⁶⁴ in which³⁶⁵ Lord MacMillan used the phrase “meritorious distinctiveness”. After assuming that the “work” requirement was satisfied,³⁶⁶ the court moved on to the question of originality. The quality of “meritorious distinctiveness” which established *originality* in the sense required for the purpose of copyright was described (on the facts of the case) as follows: it was the aesthetic appeal of the diary pages which distinguished them from the commonplace, and which could not be accomplished by anyone lacking the skill and experience which the creator brought to bear when formulating the pages.³⁶⁷

In an *obiter dictum* the Appellate Division in the *Waylite Diaries* case clearly expressed the view that there was an objective side to the test for originality:

While it is true that the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original.³⁶⁸

... whether an alleged work is proper subject-matter for copyright protection involves an objective test, both in respect of originality and ‘work’; also that the two enquiries can become entwined...³⁶⁹

c) *The purely subjective approach*³⁷⁰

Dean formulates the test for originality as being purely subjective, criticising the *Waylite Diaries* cases as contaminating the purely subjective South African originality test with an objective element. Because it is a *dictum* that suggests that more is required than that the work should be the result of the owner’s own independent effort, applying his personal knowledge and skills, Dean finds “meritorious distinctiveness” open to criticism. Dean refers to the fact that the Appellate Division in *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd*,³⁷¹ to which the court *a quo* in the *Waylite Diaries* case did not refer, laid down no such qualification. Furthermore, in the later (1995) Appellate Division case of *Appleton v Harnischfeger Corporation* the court reiterated the test for originality set out in the *Klep Valves* case, confirming that originality refers to original skill or labour in execution. It is not required that the work should embody a new or inventive thought or should express a thought in a new or inventive form.³⁷²

It is therefore Dean’s submission that it is inappropriate to introduce any element of objectivity into the test for originality. The question of whether a work is original calls for a *purely subjective test*.³⁷³ An objective approach is appropriate when determining whether subject matter qualifies as a “work”, which inquiry precedes the question of whether the work is original. The amount of subjective effort expended on the subject matter may be taken into account when deciding if it qualifies as a work:

[W]hile an element of subjectivity can be imported into the test as to whether subject matter qualifies as a ‘work’,³⁷⁴ it is not appropriate for an element of objectivity to be introduced into the test for the ‘originality’ of a work.³⁷⁵

Whereas copyright is a personality-based right; and whereas “independent origins is a complete defense to copyright infringement”; and whereas copyright does not constitute a monopoly against the whole world such as a patent,³⁷⁶ Dean’s view that originality is essentially a subjective inquiry has to be supported. Apart from the fact that the work must be distinguished by its individuality from the mass of ordinary objects (“work” requirement), “the author must *subjectively* (i.e. from his own point of view) create something new” (my italics).³⁷⁷ The subjective approach means that, practically speaking, the author is asked to explain what it required of him in terms of skill and/or labour (including time and money) to create the work in question. The attention is therefore diverted from the work (having established that it does indeed qualify as a “work” for copyright purposes) to the author.

d) The originality/infringement dichotomy

Testing for originality and testing for copyright infringement are essentially two sides of the same coin. “Insofar as the second work consists of copied material it is not original and may infringe another copyright, but insofar as it contains new matter it is original and eligible for copyright.”³⁷⁸ Applied to the facts of *Erasmus v Gallago Publishers*³⁷⁹ this means that, as to the parts of “A Pictorial Account” that do not infringe on “Top Secret War”, there can thus be said to exist a (rebuttable) presumption that they are indeed original. On the other hand, the parts of “A Pictorial Account” that do infringe on “Top Secret War”, cannot be said to be original.

*Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited*³⁸⁰ makes it clear that originality is not only an essential element if a work is to be protected by copyright, but also an important aspect of infringement. “The reason is that the notion of a ‘substantial part’ of a work, reproduction of which, without licence of the copyright owner, is a form of infringement of the copyright in the work... is regarded as referring, generally speaking, to the original aspects or features of the work.” Lindgren J concluded that there is thus an element of artificiality in discussing

subsistence of copyright and infringement separately, but that he would “do so for convenience”.³⁸¹

e) Skill and/or labour reflected in “special features” of a work

From the basis established by the Supreme Court of Appeal in *Jacana Education (Pty) Ltd v Frandsen Publishers*³⁸² it is proposed that the following valuable principle regarding the originality test can be deduced from this judgment:

As in the objective part of the infringement test, works need to be objectively compared in order to establish whether a “work” in terms of the Act has come into existence. The higher the degree of prior existing materials, the more detailed the search for “special features” when establishing whether a work has been created. The pinpointing of such features lays the foundation for the subsequent, subjective test for originality, as the focus of the originality test will be whether *such features* are the result of the investment of a sufficient degree of labour and skill to justify copyright protection.

The true question is whether the “special features” originated through the expenditure of a sufficient degree of own labour and/or skill to justify copyright protection. This is in line with the most basic definition of intellectual property: property originating from intangible, spiritual labour and creativeness.

It can easily happen that the (skill and/or) labour invested amounts to more than is reflected in the “special features” of the work. On the other hand, through the ingenuity of the human mind, it is also possible for the “special features” to be much more than the (skill and/or labour) invested in them – a “creative spark” in the true sense of the word.

Only such skill and/or labour as is reflected in the “special features” of a work may be taken into account when establishing originality. It is only logical that not *all* skill and/or labour can be taken into account. Obviously the many years it takes an author to learn to read and write in a specific language cannot be taken into account when asking whether a novel is original. The skill and/or labour must be *relevant*.

The relevant skill and/or labour is the skill and/or labour that is reflected in creating those parts of the “work” that amount to more than copying – the “special features”.

f) Consideration of consequences of finding work original

In both *Accesso CC v Allforms (Pty) Ltd*³⁸³ and *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd*³⁸⁴ the court took into account the *consequences* of finding a work original. Rather than regarding these findings as evidence of the importation of an objective element into the originality test, one should remember that “ultimately the weighing of competing policy considerations is a matter for the legislature”.³⁸⁵ The same may be said with regard to taking into account the *consequences* of finding subject matter to constitute a “work”.³⁸⁶

g) Conclusions and proposals

The conclusion that only skill and/or labour as reflected in the “special features” of a work is relevant contradicts neither Dean nor the South African law as it stands.³⁸⁷ Originality remains an *essentially subjective* enquiry, separate from the objective enquiry into whether a work has come into existence as required by section 1(2) of the Act. The conclusion is also in accordance with Lindgren J’s observation that it is only for convenience that originality and “substantial part” are discussed as two separate issues. Last but not least, Dean implies a degree of meritorious distinctiveness into his rendition of the originality requirement when he states that sufficient skill and effort must have been *embodied* (my italics) in creating an original subsequent work from previous work. “Expended” would have been more in line with the subjective approach.

The enquiry into originality therefore is an essentially subjective one, measuring whether adequate *relevant* skill and/or labour has been invested. In essence Dean is correct in stating that originality is a subjective enquiry. However, rather than concluding that the *Waylite Diaries* cases have introduced an objective requirement into the originality test, “meritorious distinctiveness” as applied in the said cases must preferably be viewed as a mere logical demarcation of the boundaries of the subjective enquiry as to whether adequate skill and/or labour is present.

2.3.2 Degree of own skill and/or labour required to render a work original

The standard of originality required by the Act is a low one.³⁸⁸ The degree of skill and/or labour required, as measured by the South African courts on the facts of many different cases, is examined below in the format of a Chronological Table of Court Cases Dealing with Originality. Although decisions are inevitably *ad hoc*, the overview provided below is aimed at communicating what degree of own skill and/or labour is regarded as substantial for copyright purposes. The only case that clearly deviates from the accepted norm is *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd*, where an exceptionally high standard was required in order to avoid certain consequences that the granting of copyright protection would entail. See 2.3.1.4(f) for criticism of such an approach.

Table 5 The degree of skill and/or labour required

<p>1919</p>	<p><i>Natal Picture Framing Co Ltd v Levin</i></p> <p>Applicant held the copyright in a picture representing the Nationalist Deputation to the Peace Conference (Versailles) sailing from Cape Town. The question was whether respondent's picture on the same subject was an infringement of applicant's copyright in the former picture.³⁸⁹</p> <p>The court's finding on the subjective part of the infringement inquiry is useful for purposes of determining originality. The respondent's artist adopted the applicant's combination of ideas, reproducing them in their main particulars with merely slight differences of detail. The court consequently found the second picture to be a colourable imitation of the first.³⁹⁰</p> <p>It can therefore be deduced that the application of skill and labour in order to reproduce, even with slight differences, is of too low a degree to render a work original.</p> <p>Suppose an art teacher, as part of testing her students' painting skills, gives each of them the assignment of producing as accurate a reproduction of the Mona Lisa as possible. The student who obtains the highest mark has created such an accurate reproduction that only an art expert would be able to determine that it was not the original work itself. Although this student has invested a tremendous degree of artistic/painting skill and labour, the skill and labour expended is inadequate to render his painting original. Ironically, the student who obtains the lowest mark (due to the expenditure of the lowest degree of skill) stands the best chance of having created an "original work".</p>
<p>1971</p>	<p><i>Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd</i></p> <p>A director of the applicant, Magnussen, designed the technical drawing in question.³⁹¹ Although Schmid, an employee of the respondent, inserted the sizes on the drawing,³⁹² Magnussen's employer was the copyright holder.³⁹³ It can therefore be deduced that the degree of skill and labour required to insert sizes on a drawing, after measuring it with a ruler from the drawing itself,³⁹⁴ is inadequate to provide respondent with copyright protection.</p>
<p>1977</p>	<p><i>Kalamazoo Division (Pty) Ltd v Gay</i></p> <p>In his founding affidavit the managing director of the applicant, Mr. Barr, stated that the compilation of the forms comprising an office system known as the "copy-writer pay system", was the product of his original work. He then set out the steps involved in the development of the system. He familiarised himself with the relevant legislation, consulted staff members of the Departments of Labour and Inland Revenue, devoted considerable time and thought to the methods commonly used by employers in the Republic, and spent a great deal of time and thought in incorporating all this information into the applicant's forms. To his affidavit Mr Barr attached a brochure used by the applicant that explains how the system is to be used. With reference to the said brochure, Mr Barr made comments regarding the skill and labour invested in certain aspects of the forms, as for example that the content and layout of the upper portion of the employee's earnings record was in only very minor particulars dictated by statutory requirements.³⁹⁵</p> <p>The court found that Mr Barr's work involved a "good deal of skill, labour, time and judgment",³⁹⁶ sufficient to justify copyright.³⁹⁷</p>
	<p><i>Northern Office Micro Computers (Pty) Ltd v Rosenstein</i></p> <p>Since this case was decided in accordance with the Act as it stood before 23 May 1980, when the Copyright Amendment Act 56 of 1980 came into force,³⁹⁸ the court had to be able to conclude that the production of the work entailed the expenditure of sufficient effort or skill to give it a new and original character.³⁹⁹ Even though the current</p>

standard of originality differs from that in the *Northern Office* case, the judgment remains valuable. Because the degree of originality required by the Act was higher before 23 May 1980 than it is today, and because the court found the degree of effort and skill expended to have been sufficient⁴⁰⁰ to meet the higher standard of the Act as it was then, the court would have come to the same conclusion if the case had been decided under the Act as it currently stands.

The *Northern Office* case provides a lengthy discussion of different opinions on what degree of effort and skill would suffice for copyright protection to be granted.

Marais AJ stated that the amount of effort or skill expended on the development of a computer program that did no more than produce the multiplication tables or the alphabet would be insufficient to give it a “new and original character”. On the other hand, considerable effort and perhaps skill would have to be expended in order to compile a computer program that provided a general medical practitioner with the trade names of all drugs and medicines appropriate for the treatment of particular complaints.⁴⁰¹ The court then pinpointed the heart of the matter:

But there is a grey area between these two extremes and the dividing line between the effort or skill which is sufficient to justify copyright protection, and that which is not, is sometimes difficult to draw.

The court then referred to *G A Cramps & Sons Ltd v Frank Smythson Ltd*⁴⁰² to illustrate how opinions may differ.⁴⁰³ The publisher of a pocket diary claimed protection for various tables such as inland postal rates, Empire and foreign postage rates, equivalents of metric and imperial weights and measures, sunset table, percentage table and the like. Although the judges of the court *a quo*, the Appeal Court and the House of Lords judged the case basically by measuring the amount of work and skill expended on the tables included in the diary, the outcome of the test when applied by different judges was as follows:

Court	Judges ruling that tables in diary are original	Judges ruling that tables in diary are not original
Court of First instance	-	1
Appeal Court	2	1
House of Lords	-	Unanimous

In the words of Lord Porter:

Whether enough work, labour and skill is involved, and what its value is, must always be a question of degree. Different minds will differ...⁴⁰⁴

Marais AJ stated that, as there was very little detailed information in the affidavits about the contents of the suite of programs, he was unable to judge for himself whether it was the product of sufficient effort and skill.⁴⁰⁵ On the basis that the parties concurred that the research and development necessary to produce a suite of programs like this would take months, the court found that its production entailed the expenditure of effort and some degree of skill.⁴⁰⁶ The court also took into account the applicant’s assertion that the suite of programs was highly confidential and a trade secret.⁴⁰⁷

1983 *Econostat (Pty) Ltd v Lambrecht*

• Originality of “raw data” extracted from government and other published documents
In the court’s opinion, applying the standard for originality as phrased by Copeling in 1969, the skill and labour required to extract the “raw data” was insufficient to render it original.⁴⁰⁸ Since very little, if anything, was put before the court about the skill required to extract the “raw data” from published sources,⁴⁰⁹ it is impossible to say whether the court would have found the skill and labour expended to be adequate if the lower post-23 May 1980 standard had been applied.

The other basis for the court’s conclusion is that there is no copyright in information or ideas, but only in the manner of expressing them. With reference to two English cases, the court made the point that the skill and labour devoted to making a selection is to be distinguished from the skill and labour employed to bring the work into existence.⁴¹⁰

	<p>It is not clear from the judgment whether Ackermann J was of the opinion that skill and labour in <i>selecting</i> should be disregarded for originality purposes, or just that it should not overlap with the skill and labour involved in <i>compiling</i> the work.</p> <ul style="list-style-type: none"> • Originality of storing of “raw data” The “grey” area in this case was whether storing “raw data” in the computer on disk or tape or printouts involved sufficient skill and labour to render such a product original. The court stated that, although a great deal of skill and labour may be necessary to store the contents of a novel on computer, mere storing can obviously not make that which is stored original. Based on this example, as well as Copeling’s 1969 book, Ackermann J concluded as follows: <p style="padding-left: 40px;">It is not the skill or labour of the emanuensis or computer technologist in transcribing to which the authorities refer, but the skill and labour in imparting to the work ‘some quality or character which the material he uses does not possess and which substantially distinguishes the work from that maerial.’...⁴¹¹</p> <p>The court was adamant that whatever skill and knowledge was required to store an existing work in another format was insufficient to render the product of such skill and knowledge original.</p> <ul style="list-style-type: none"> • Originality of analysis or derivation from the “raw data” Any analysis or derivation from the “raw data” would involve <i>sophisticated economic and statistical techniques</i>. In addition, any computer program designed on the strength of such raw data would involve <i>sophisticated computer skills</i>. In the light of the required skills, the court concluded that any analysis or derivation from the raw data would be original.⁴¹²
	<p><i>Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd</i></p> <p>Ehrenberg Engineering bore the <i>onus</i> of proving that drawings in question were original.⁴¹³ One Kuhlman, while in the employ of Ehrenberg Engineering, authored the drawings in question.⁴¹⁴ The skill and labour expended on the drawings by its author entailed the following:</p> <ul style="list-style-type: none"> • Kuhlman was in regular contact with Asea, the firm wanting a quotation from Ehrenberg Erngineering for bins; • Kuhlman obtained from Asea a brochure depicting “the Swedish bin”; • Kuhlman made a working drawing from the Swedish bin as depicted in the brochure; • Kuhlman and Mr Von Ehrenberg discussed changes that Mr Von Ehrenberg wanted made; • Kuhlman made cardboard models; • Kuhlman made the drawings in question. <p>Within the context of originality, the court referred to two aspects that are <i>objective</i> criteria. Firstly, it referred to the fact that Dr Greenfield testified that the drawings constituted a <i>substantial improvement</i> on the Swedish bin. Secondly, the court spoke of the <i>differences</i> between Kuhlman’s design and the Swedish bin as being evidence of the amount of skill and labour expended.⁴¹⁵</p> <p>Based on the above the court held the drawings to be original artistic works.⁴¹⁶</p>
1984	<p><i>Barber-Greene Company & others v Crushquip (Pty) Ltd</i></p> <p>The amount of skill, effort and time required to make up originality in the drawings in question was not discussed.</p>
	<p><i>Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd</i></p> <p>The plaintiff claimed copyright in respect of the engineering drawings depicting and describing the exhaust systems for the Peugeot 305 and the Leyland Mini motor car</p>

respectively⁴¹⁷. On the facts of this case the court held that the copyright subsisted in the prototype and not the drawings.⁴¹⁸

...the skill required to make a drawing of an exhaust system that is already physically in existence as a model before the draughtsman is comparatively small. It is the skill common to all engineering draughtsmen and it is the skill necessary in order to make a good drawing, but this skill in making drawings is completely independent of the skill in making an effective exhaust system.⁴¹⁹

Clearly in this case an exceptionally high standard was required in order to render the drawings original. Instead of finding both the prototypes and the drawings to constitute original works, the court compared the skill involved in the making of the different types of works. Consequently the skill needed to make the drawings was found to be relatively low.

The unusually high standard required for originality in the Bosal case can be attributed to the fact that the judge took into account the *consequences* of a judgment to the effect that a two-dimensional drawing from a three-dimensional part can be original. As a judgement to the said effect would have sanctioned reverse engineering,⁴²⁰ it can be deduced that the court determined the standard for originality on the facts of the case with regard to the *consequences* of awarding copyright to the drawing.⁴²¹

The plaintiff further claimed that its copyright in its part numbering system had been infringed.⁴²² Defendant argued that no originality was displayed in compiling the list of numbers in the plaintiff's price list. To this the court (with reference to Copeling *Copyright Law* at 68-69) answered as follows:

It may not have required a great deal of judgment to develop and list all the parts, but it certainly required a great deal of effort to compile the list of numbers, in the same way as compiling a street directory. Such work and effort the Courts will protect.⁴²³

Fichtel & Sachs Aktiengesellschaft v Laco Parts (Pty) Ltd

From its analysis of the evidence the court was satisfied that the "work was original and required skill and effort and time in the production thereof".⁴²⁴ In their various affidavits, applicant's employees commented on the degree of skill and labour involved in the production of the drawings.

In relation to the progression of design, Mr. Fadler stated unequivocally that all improvements, modifications and alterations required the expenditure of time and skilled effort.⁴²⁵ Mr. Barthel's affidavit covered his updating of certain earlier drawings, testifying that all of them took a *substantial* period of time and required *specialised* skill as a draftsman.⁴²⁶ Mr. Ziegler, Mr. Lindner and Mr. Brünnhuber confirmed that their drawings were original in that they took a *substantial* period of time and required *specialised* skill.⁴²⁷ Mr. Ludwig testified that his drawings were original in that they were not copied from anything else and each took *several hours* to complete. Mrs Glemser confirmed that her drawing was not a copy, but an original design that took *several hours* to complete. Mr. Schneider, Manager of the clutch work preparation department, testified that the drawings made by Mr. Nürnberger, Mr Czepany, Mr. Mack, Mr. Brunnhuber and Mr. Schubert "were all original either in the sense that they were first originals or embodied improvements on the original designs which are originals in their own right".⁴²⁸

Saunders Valve Co Ltd v Klep Valves (Pty) Ltd

From the fact that certain types of Saunders valves were marketed in South Africa prior to the date of execution of the works in question, and the fact that patents were taken out by the applicant's predecessor in title in the early 1930s, respondent deduced that there must have been earlier drawings than the eleven relied on and that the latter were therefore not original.⁴²⁹

	<p>The court was of the opinion that the respondent's case rested on the false premise that the Copyright Act was concerned with novelty of design.⁴³⁰ The court then referred to a passage from Laddie, Presscott and Vitoria <i>The Modern Law of Copyright</i>, quoted above, in which the low standard required was emphasized.⁴³¹</p> <p>In the light of the fact that two of the three authors were deceased, the court found that the allegations contained in the answering affidavits did nothing to rebut the presumption of originality provided by section 26(4)⁴³² of the Act⁴³³.</p>
<p>1985</p>	<p><i>Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd</i></p> <p>Applicant claimed copyright in respect of certain drawings of two hinges referred to as the 22 and 402 hinges. The judgment provided limited details with regard to the evidence provided of the degree of skill and labour expended on the drawings.⁴³⁴</p> <p>(a) The 22 hinge The 22 hinge was composed of the end caps and a flap or tongue:</p> <ul style="list-style-type: none"> • End caps of the 22 hinge These were designed by Mr Nelson-Esch Senior in about 1955 and had been used and produced as a hinge since then. The respondent denied that there was any copyright whatsoever in the end caps of the 22 hinge. According to respondent the idea of a pedestal hinge and the basic shape for such a hinge did not emanate from applicant's company, but "has been known and used on the open market for many years without any suggestion that it is proprietary to anyone". • Flap or tongue of the 22 hinge This part was designed and developed by Mr Nelson-Esch Junior, incorporating the 22 hinge with a slight modification. He himself made the first drawing in 1977 and then caused a fuller drawing to be made by a draughtsman in the applicant's employ. Although the court mentioned that Mr Nelson-Esch Junior "describes in detail" the considerations which caused him to adopt the various dimensions and how the flap was developed, the court did not reiterate these considerations. Respondent contended that, even if the design for the flap did originate from the applicant company, "to say that the drawings for this component are original is to clothe an activity in the field of engineering drawing, which involves no more than mechanical draughtsmanship, with the appearance of original design". <p>(b) The 402 hinge This hinge was developed and a drawing of it made in about 1966-1967 and it was subsequently copied in other drawings. Respondent suggests that no original thought or design whatever was involved in the drawing of this component.</p> <p>The court found that the contention that the applicant had not proved originality was largely based upon the assumption that applicant had to show that the ideas embodied in its drawings were new. With reference to Copeling and Copinger and Skone James, the court then made much ado about the fact that copyright is concerned with the protection of the <i>outward physical form</i> by means of which ideas are presented; the original <i>expression</i> of thought or information in some <i>concrete form</i>.⁴³⁵</p> <p>The court found that the drawings were the result of original work done on behalf of the applicant and that applicant was entitled to copyright in the flap of the 22 hinge and in the 402 hinge. Respondent's contention that he or any other person with the technical knowledge or experience could have developed the hinges only served to show that skill and knowledge is required.</p> <p>The court gave no precise reason for not granting copyright in the end caps of the 22 hinge. From the evidence referred to by the court with regard to the end caps it appears that the end caps were so commonplace that no originality could be attributed to them in applicant's favour.</p>
	<p><i>Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd</i></p> <p>With reference to the drawings of the bolt and U strap, the court expressed its finding as</p>

	<p>follows:</p> <p>The skill and labour involved in their design appears to me to be of a low order. Each is a standard or commonplace manufactured product. Moreover what they represent, the bolt and U strap, are by far the least significant components of the suspension unit as a whole. If it were to be shown that respondent copied no more than these two components, I doubt that any infringement of copyright would be held to have taken place. For, as Laddie <i>The Modern Law of Copyright</i> at para 2.63 points out:</p> <p>‘Although a work be original, the copyright is not infringed unless a substantial part is taken. Substantiality depends primarily on the quality of what is taken, namely its degree of originality. This in turn depends on whether it represents a sufficient amount of independent skill, labour and so on, of a literary, musical, or artistic character (as the case may be). Consequently, when the ideas which have been copied are of an insubstantial or hackneyed character, even taken collectively, there will be no infringement.’⁴³⁶</p> <p>The court was thus of the opinion that <i>that which was being represented</i> (in this case a bolt and a U strap respectively) by the work (in this case drawings nos 5 and 6 respectively) should not be “standard” or “commonplace”. This emphasis on the standard of originality to which the <i>idea</i> needs to adhere confirms the contention that copyright is essentially aimed at protecting the idea and that the protection offered to its <i>expression</i> only serves as a probative standard.</p>
<p>1986</p>	<p><i>Erasmus v Galago Publishers (Pty) Ltd</i></p> <p>Since the originality of “Top Secret War” was not disputed, the degree of skill and labour required to render a work original was not discussed.</p>
	<p><i>Kambrook Distributing v Haz Products</i></p> <p>Infringement of copyright in a work of technical craftsmanship – a plastic jug kettle cum food-warmer and egg-cooker, known as the K10 – was alleged.</p> <p>The applicant company was founded by Mr. Bannigan in Australia in 1969. SA Housewares imported a range of some nineteen Kambrook appliances, including the K10. The range went on sale in about December 1983. By October 1985 some 26 000 K10 units had been sold.⁴³⁷</p> <p>In July 1984 the Haz Combi Kettle, manufactured by Haz Products, was introduced to the South African market. Like the K10, it was a plastic jug kettle incorporating a food warming and egg cooking device.</p> <p>Although the court focused on the matter of infringement and concluded that Kambrook had failed to establish a <i>prima facie</i> case of infringement,⁴³⁸ it was implied that both the K10 and the Combi Kettle were original works. Regarding the K10 the court found that Mr. Bannigan had made sketches, that working drawings had been prepared, wooden models hand made, mock-ups made, and moulds meticulously designed and made.⁴³⁹ The respondents asserted that the Combi Kettle had come into existence independently of the K10.⁴⁴⁰ Independent skill and labour, involving drawings and moulds etc, with the Haden jug kettle and the Bosch egg boiling device rather than the K10 as points of reference, were expended on the Combi Kettle.⁴⁴¹</p> <p>Because the court described the prerequisites for copyright as “minimal”, the abovesaid skill and labour could be said to be more than adequate to justify copyright protection. With regard to this minimal standard for copyright protection the court quoted from a judgment by Browning J⁴⁴² in which it was stated that unlike a patent, a copyright gives no exclusive right to the art disclosed. Protection is only given to the <i>expression</i> of the idea, not the idea itself and therefore the prerequisites for copyright are minimal.⁴⁴³</p>

	<p><i>Klep Valves (Pty) Ltd v Saunders Valve Co Ltd</i></p> <p>A twofold attack was launched on the contention that the drawings in question were the draughtsmen’s original works. Firstly, the development and design of the valves as represented in the drawings were team efforts involving a number of people in addition to the draughtsmen. Secondly, as it was common cause that the drawings in question represented developments of earlier valves, it was possible that the drawings had been copied from earlier ones, perhaps with insignificant changes.⁴⁴⁴</p> <p>The court referred to the respondent’s evidence on how engineering drawings are made. Although a draughtsman usually works in co-operation with a design engineer, the draughtsman exercises a <i>great deal of independent skill and labour</i> when converting the design engineer’s ideas into detailed specifications for manufacture. Similar skill and labour are required to modify an existing design. The skill and labour expended by the draughtsmen include the following:</p> <ul style="list-style-type: none"> • Calculating the suitability of the components in a design • Planning the inter-relationship between the part to be manufactured with other inter-connecting parts • Having regard, <i>inter alia</i>, to the method of manufacture, the materials to be used, the tolerances to be allowed, national or international standards to be applied and the degree of rationalisation required by the manufacturer. <p>Furthermore the appellant failed to dispute the respondent’s evidence that there were substantial differences between the drawings in issue and earlier drawings. The court therefore concluded that the draughtsmen had contributed sufficient skill and labour to render the drawings original.⁴⁴⁵</p>
1987	<p><i>Insamcor (Pty) Ltd v Maschinenfabriek Sidler Stalder AG t/a Sistag</i></p> <p>The degree of skill and labour required to render a work original was not discussed in this judgment.</p>
1988	<p><i>Galago Publishers (Pty) Ltd v Erasmus</i></p> <p>It was not disputed that <i>Top Secret War</i> was an original literary work in that it represented the product of the co-authors’ own skill and labour.⁴⁴⁶</p> <ul style="list-style-type: none"> • The degree of skill and labour invested in <i>Top Secret War</i> by Reid Daly <p><i>Top Secret War</i> was the brainchild of Lt Col Ron Reid Daly, commanding officer of the Selous Scouts from its formation until shortly before its disbandment.⁴⁴⁷ Reid Daly smuggled a large number of secret documents relating to the activities of the Selous Scouts out of Zimbabwe. Using these records, together with his unique knowledge, as commanding officer, of what had occurred, it took him about four months of concentrated, continuous work to produce a manuscript of 357 typed pages.⁴⁴⁸ From the Scouts’ 65 to 70 external operations he selected 22 for description in <i>Top Secret War</i>. Very few of the internal operations were selected. He also determined the sequence in which they were to be recounted and -</p> <p style="padding-left: 40px;">... the manner in which the story of each operation was to be told – what details were to be emphasised, the sequence of events, the dialogue (often invented), the individuals to be mentioned, the character portrayal, local colour and so on.⁴⁴⁹</p> <p>Reid Daly also invented pseudonyms for the individual Scouts mentioned which concealed their identities from the authorities in Zimbabwe, while being sufficiently similar to the real names to enable former Selous Scouts to identify the individuals concerned. Occasionally Reid Daly exaggerated or embellished a true story to add colour to it.⁴⁵⁰</p> <p>Reid Daly took the finished manuscript to a Mr Munnion, a so-called “ghost-writer” who had to put the manuscript into proper book form. Although the work was offered to various overseas publishers, none was interested in publishing it.</p>

Reid Daly then approached Peter Stiff, managing director of Galago Publishers.⁴⁵¹

- The degree of skill and labour invested in *Top Secret War* by Peter Stiff Peter Stiff expressed the opinion that the manuscript did not do justice to the story, whereupon he was commissioned by the syndicate to rewrite and publish the book. Stiff utilised additional information obtained from documents and photographs provided by Reid Daly. He also had discussions with Reid Daly and interviewed former Selous Scouts and other persons who were able to furnish relevant information. Using the manuscript as a basis and utilising additional information gleaned from the other sources mentioned, Stiff produced *Top Secret War* that was subsequently published by Galago Publishers.⁴⁵²

- The degree of skill and labour invested by Peter Stiff in *Pictorial Account*, the subsequent “coffee table book”

That a degree of skill and labour was indeed invested by Stiff is apparent from verbs used by the court to describe the making of *Pictorial Account*:

- changing the sequence of the episodes⁴⁵³
- abridgement⁴⁵⁴
- paraphrasing⁴⁵⁵
- gleaning⁴⁵⁶
- re-working⁴⁵⁷
- adding⁴⁵⁸
- colourable alteration⁴⁵⁹

Although the court acknowledged the positive skill and labour expended by Stiff, it nevertheless also referred to the detailed reproduction of facts,⁴⁶⁰ selection of the same operations,⁴⁶¹ telling the story in the same way⁴⁶² and considerable language copying.⁴⁶³

The Appellate Division held that the Court *a quo* had been correct in finding that *Pictorial Account* constituted an infringement of the copyright in *Top Secret War*.⁴⁶⁴

Although the originality of *Pictorial Account* was not discussed by the court, it may be said that, as Stiff invested a certain degree of skill and/or labour into the creation of *Pictorial Account*, *Pictorial Account* may have been not only infringing, but original as well.⁴⁶⁵

The court stated that, in producing *Pictorial Account*, Peter Stiff had unlawfully availed himself of a great deal of skill and industry that had gone into the writing of *Top Secret War*.⁴⁶⁶ This statement by the court emphasises the principle that *own* skill and labour is required for originality.

The court made it clear that skill and labour are protected not only in relation to the language used, but also to selection and compilation.⁴⁶⁷ “Cosmetic” language changes therefore do not suffice as adequate skill and labour rendering a work original. In this regard the court quoted extensively from Laddie, Prescott and Vitoria *The Modern Law of Copyright*:

...(I)n the case of a book the ideas it contains are necessarily expressed in words. Hence, if it were really true that the copyright is confined to the form of expression, one would expect to find that anyone was at liberty to borrow the contents of the book provided he took care not to employ the same or similar language. This is not so, of course...

Ideas, thoughts and facts merely existing in a man’s brain are not “works”, and in that form are not within the Copyright Act; but once reduced to writing or other material form the result may be a work susceptible of protection. Given that there exists a good copyright in the work, the law does not protect a general idea or concept which underlies the work, nor any one fact or piece of information contained therein. However, a more detailed collection of ideas, or pattern of incidents, or compilation of information may amount to such a substantial part of the work that to take it would be an infringement of the copyright, although expressed in different language or other form, it being a matter of fact and degree whether the dividing line has been impermissibly crossed.⁴⁶⁸

<p>1989</p>	<p><i>Adonis Knitwear Holding Ltd v OK Bazaars (1929) Ltd</i></p> <p>Applicant’s Managing Director, Joseph Bencen, obtained a photograph of a man’s jersey from a magazine he found in a shop in Zurich, Switzerland.⁴⁶⁹ From this photograph Bencen created a picture which applicant claimed to be an original artistic work.⁴⁷⁰</p> <p>The creation of the picture involved the drawing of the outlines of an abstract picture on a matrix Bencen created for that purpose on a sheet of graph-lined paper. Approximately three days were spent inserting the details of the picture. The creation of the picture required intense concentration and use of the experience, skill and knowledge acquired during Bencen’s years of involvement in the industry. When deciding to use the design depicted in the photograph, Bencen had to make a number of decisions based on his experience. Was the design suited to the South African market? Which knitting gauge had to be used and did Adonis have suitable machines? What would the correct proportions (length and width) be? What colour and yarn texture had to be used?⁴⁷¹</p> <p>The court was of the opinion that sufficient labour, skill and expertise have been expended to render the picture original.⁴⁷²</p>
	<p><i>Lintvalve Electronic Systems v Instrotech</i></p> <p>The question to be decided was whether Instrotech had devised an acoustic steam leak detection system by slavishly copying Lintvalve Electronic Systems’ design, or whether this was accomplished through Instrotech’s own research and development.⁴⁷³</p> <p>Applicant alleged that, through the exercise of considerable effort, application and skill over a period of ten years, the 90° angle of the Lintvalve system was developed. Applicant explained in technical detail why precisely this configuration gave the Lintvalve system and its listening port in particular its efficacy and advantage over competing systems.⁴⁷⁴</p> <p>The court observed that the originality of a device is not affected by the fact that it is manufactured from freely available components.⁴⁷⁵</p> <p>This being an application for an interdict based on copyright infringement, Van Schaikwyk J referred the matter to trial without going further into the matter.⁴⁷⁶</p>
	<p><i>Tie Rack plc v Tie Rack Stores (Pty) Ltd</i></p> <p>The court stated that the applicant’s “Tie Rack” logo was an artistic work in which the applicant held copyright.⁴⁷⁷ Applicant alleged copyright infringement by respondent.</p> <p>From the evidence before the court it appeared that Goldman and Ferguson of the respondent company had approached an independent graphics designer to design a label and a logo for the first respondent.⁴⁷⁸ A plastic carrier bag on which applicant’s logo appeared had been given to the designer “to indicate to him what he should not design”,⁴⁷⁹ merely serving as an example of the concept that applicant was seeking to achieve.⁴⁸⁰ The designer had submitted ten designs, from which the directors of respondent company chose the one that, after various modifications, became the logo used.⁴⁸¹</p> <p>The court found respondent’s logo to be a copy of that of the applicant. It can therefore be said that respondent’s logo was found to be unoriginal because of an insufficient degree of skill and labour expended on it. The court explained its decision as follows:</p> <p style="padding-left: 40px;">Out of many tens of thousands of type-set styles they came up with the twin brother of applicant’s. Out of the infinite number of colours and combinations at their disposal, they came up with virtually the identical combination used by applicant. The one and only stylised device appearing on applicant’s logo, the collar-and-tie resembling a capital T and performing that role in applicant’s logo, <i>mirabile dictu</i>, reappears in first respondent’s logo. Admittedly it does not serve as a capital T, but it</p>

	<p>certainly forms as prominent and striking a feature of the ensemble as it does in applicant’s logo... By copying, first respondent obtained virtually the same image. It makes the same impression on the observer. It looks like it. Put side by side they are virtually interchangeable and such differences as there are fade into insignificance.⁴⁸²</p>
1991	<p><i>Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd</i></p> <p>After seeing a picture of a three-seater sofa manufactured in the United States of America, Mr. Bress decided to create a new model lounge suite to be called the Fendi. A qualified furniture frame-maker in the employ of the applicant proceeded to make a full-size two-seater prototype model of the lounge suite in wood. Approximately four models had to be made before an acceptable one was achieved. Since applicant did not have access to the hardwoods used in the United States of America, a metal frame was produced by an engineering company on the applicant’s instructions, using the wooden prototype frame. The metal frame was, however, not a “carbon copy” of the wooden frame.</p> <p>The further skill and labour expended on the Fendi after the metal frame was achieved, as set out in Mr. Bress’s affidavit, was described by the court as follows:</p> <p style="padding-left: 40px;">The applicant pop-riveted plywood to the metal frame in order to receive the attached leather or fabric covering. Elastic webbing was used on both the seat and arms of the sofa frame. The webbing creates the springing mechanism for support and comfort. A specific density and thickness of foam in the covering, a specific type of stitching for the fabric and a specific angle of rake (being the angle between the seat and the back of the sofa) were used. The preparation of the patterns which are used to cut the fabric for covering the sofa was a lengthy process⁴⁸³ and, after much trial and error over a period of approximately six weeks, the applicant eventually achieved patterns that were found acceptable. These were drawn onto cardboard templates and then the patterns were cut by a cutter in the employ of the applicant according to the drawing. In the cutting process no real skill is involved. Once the material was cut and stitched it was filled with foam and polyester and, according to Bress, much skill is required to determine the density and thickness of the foam and polyester, which determines the aesthetic contours and lines of the sofa. Thereafter the fabric cover was attached to the plywood frame by means of staples. A completed two-seater sofa was thus created.⁴⁸⁴</p> <p>The court found that sufficient labour, skill and judgment had been expended to satisfy the originality requirement.⁴⁸⁵</p>
	<p><i>Harnischfeger Corporation v Appleton</i></p> <p>In this judgement Flemming DJP stressed the subjective nature of the originality requirement.</p> <p>Indicating similarity between two works does not sufficiently refute originality. The court contrasted <i>own</i> skill and labour with skill and labour expended in an effort to <i>merely duplicate</i> an existing work. A similar work might be original in its own right if adequate <i>own</i> insight, effort and creation were invested.⁴⁸⁶</p> <p>This approach stretches the subjective inquiry as far as <i>intent</i>: If an intention to merely duplicate can be proven, then the similar work cannot be said to be original.</p>
	<p><i>Juta & Company Ltd v De Koker</i></p> <p>It was not disputed that the applicant’s work enjoyed copyright.⁴⁸⁷ As to the applicants’ fears that the respondents’ work would contain reproductions of substantial parts of the</p>

	<p>copyright work,⁴⁸⁸ respondents replied that there was no intention of copying all or any part of applicants' work.⁴⁸⁹</p> <p>Although the author of a compilation cannot prevent another from using the same sources as he did, the second author may not avail himself of the first author's labour in order to produce his work. That would be to steal another person's labour – his property.⁴⁹⁰ Are the commonalities between the works ascribable to the fact that the second author used the copyright work as a basis for the second work, making some alterations and additions? Or did the second author work independently to create something that "from the nature of things" has much in common with the copyright work?⁴⁹¹</p> <p>The only way in which infringement can be "cured" through cosmetic changes, is if the changes are effected by having recourse to original sources. Thus (in order to establish originality) the author has to go through the research process himself, not simply taking what another has done.⁴⁹²</p> <p>What was emphasised in this judgment by McCreath J was the concept of <i>own</i> labour. Although stealing may require a great deal of skill and labour, the law does not recognise such skill and labour, since it is aimed at acquiring another person's labour – his property. Just as there is no legal objection to someone having the same DVD player as his neighbour, as long as they both acquired it independently through the expenditure of their own skill and labour, there is no legal objection to similar works that were created independently through <i>own</i> skill and labour.</p>
	<p><i>Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd</i></p> <p>In the relevant agreement between Pastel (the author) and Pink (the publisher), Pastel's copyright in the program was acknowledged and Pink was bound not to modify the software in any way without Pastel's consent.⁴⁹³</p> <p>Mr. Katz, the Pastel employee who created the TurboCASH program, first drew his screen formats on layout sheets and recorded his ideas in manuals.⁴⁹⁴ These manuals were then converted into reproductions in the form of screens and printouts.⁴⁹⁵</p> <p>It is common cause that Pastel's source code was never available to Pink. In terms of the agreement Pastel provided Pink with screens and printouts only. The court was not concerned with the skill and labour it took Pink to produce what Pastel had supplied to them, on a computer screen. The relevant skill and labour was what Katz had invested in the copyright works. The court consequently concluded that Pink's program constituted an amendment to Pastel's software and that Pink had thus acted in breach of the agreement.⁴⁹⁶ The skill and labour expended by Pink was therefore not relevant to originality in a work.</p> <p>Pink argued that there was nothing wrong in visually examining the images generated by Pastel's program on the screen and then writing a program to generate identical ones, because what Pink created was not a copy or reproduction of anything. The court responded as follows:</p> <p style="padding-left: 40px;">"There is everything wrong in someone examining the reproductions and imitating them. An imitation is a copy of a reproduction of the screen image in which Pastel enjoys copyright."⁴⁹⁷</p> <p>The skill or effort need not be <i>exclusive</i> to the author of a work. If I understand Eloff J correctly, it was the way in which the fundamental accounting concepts (ideas) had been reduced to material form, by having been written down by Katz, that formed the basis of Pastel's copyright.⁴⁹⁸</p>
	<p><i>Waylite Diaries CC v First National Bank Ltd</i></p> <p>Mr. Cianfanelli described how, as an employee of Waylite Diaries CC, he spent some twelve hours developing a sketch for a suitable format and layout for a bank manager's</p>

	<p>“field diary”: a pocket diary to be used by bank managers when not at their desks.⁴⁹⁹ The court responded as follows:</p> <p>[O]riginality requires an input by the author which cannot be determined merely by having regard to the time which he may have spent on the work. The application of his knowledge, skill and labour must produce a result which is not merely commonplace. It must have a quality of individuality not necessarily requiring intellectual novelty or innovation but which is at least sufficient to distinguish the work from the mere commonplace. It must be apparent from the work itself that the author has made such a contribution. The standard required is not high, and it is not capable of precise definition. It is a matter for judgment according to the facts of the particular case.⁵⁰⁰</p> <p>In other words, <i>own</i> skill and labour – which does not have to be of a high standard, but which must be apparent from the <i>work itself</i> – satisfy the originality prerequisite for copyright. Note that it is not “work” in the sense of literary and/or artistic work that needs to have the quality of distinctiveness, but “work” in the sense of labour (and skill):</p> <p>I come to the conclusion that the work of Mr Cianfanelli in designing, drawing, and composing the pages in which copyright is claimed does not have the quality of meritorious distinctiveness, low though the test may be, which is necessary in order to be able to recognise the originality that is required and without which copyright cannot subsist.⁵⁰¹</p>
1993	<p><i>Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd</i></p> <p>The court did not discuss the degree of skill and labour necessary to render a work original. Corbett CJ was “satisfied that considerable design and drafting skill has gone into the production of the wrapper” (of the blank TDK audio recording tapes).⁵⁰²</p>
	<p><i>Nintendo Co Ltd v Golden China TV-Game Centre</i></p> <p>Hartzenberg J discussed the stages in the creation, design and development of Nintendo’s video games in great detail.⁵⁰³ It usually takes a team of skilled persons well in excess of six months to create a single game.⁵⁰⁴</p> <p>The applicant claimed copyright in some forty video games.⁵⁰⁵ The time spent in creating each game “<i>and the examples of drawings and charts annexed to the papers in each game</i> establish that there was sufficient originality”⁵⁰⁶ (my italics). The court therefore introduced an objective element into the originality test.</p> <p>The game “Tetris”, which was allegedly completed in three months,⁵⁰⁷ was based (under licence) on a game of the same name by another author. Nintendo made major changes to details of the visual aspects and the program. New music and background sounds, some new visual display and a computer program were added. The court found that Nintendo had used “sufficient original skill and labour” in the creation of the game to justify copyright protection.</p> <p>The background field of Nintendo’s “Soccer” was the standard design of another company, of which Nintendo made licensed use. Nintendo designed the players and the game play. The court saw no reason not to find that sufficient skill and labour were employed to render the work original.⁵⁰⁸</p>
	<p><i>Payen Components SA Ltd v Bovio CC</i></p> <p>Because the applicant failed to identify the “written compilation” which it alleged to be the literary work protected by copyright,⁵⁰⁹ there was no need for the court to address the question of originality.</p>

1993	<p><i>Appleton v Harnischfeger Corporation</i></p> <p>On drawing 4J84 there appeared a small block in which was printed “Similar to 4J71”. Respondents succeeded in proving originality in drawing 4J84 through Price’s affidavits stating that Miss Dennison had created drawing 4J84 under his supervision and instructions and in accordance with parameters and other relevant information supplied by him, and that drawing 4J84 was not a copy of 4J71.</p> <p>The same line of argument was used to convince the court that drawing 1N1110 (“Similar to 1J87”) was an original work.⁵¹⁰</p>
	<p><i>Da Gama Textile Co Ltd v Vision Creations CC</i></p> <p>Didcott J found that the designer’s drawing possessed enough innovative features that were the distinctive products of the designer’s personal creativity, imagination, skill and labour to be original.⁵¹¹</p>
	<p><i>Waylite Diaries CC v First National Bank Ltd</i></p> <p>Mr. Cianfanelli stated that, as far as he could remember, he had taken about twelve hours to arrive at the preferred layout and format. He prepared a sketch on tracing paper, erasing and adding <i>indicia</i> to try out various formats and layouts. He claimed not to have based his design on any existing diary and that he had utilised only his own skill, knowledge and expertise.⁵¹²</p> <p>Harms JA referred to <i>Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Lt and others</i>,⁵¹³ which concerned copyright in the song title “The Man Who Broke the Bank at Monte Carlo”, because the title had been used by the defendants as the name of a film. Lord Wright stated that, although generally speaking a title does not involve literary composition, and is not sufficiently substantial to claim protection, it is possible for a title to enjoy copyright protection. If in a particular case a title is “on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied”, it may have a justifiable claim for protection.</p> <p>On the facts of this case, however, their Lordships found that the degree of originality was insufficient to justify copyright protection of the song title:</p> <p style="padding-left: 40px;">There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To ‘break a bank’ is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants’ claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to constitute an infringement, especially when used in so different a connection.⁵¹⁴</p> <p>From the above judgment Harms JA derived three principles:</p> <ol style="list-style-type: none"> 1. Whether an alleged work is proper subject matter for copyright protection involves an objective test, both in respect of originality and ‘work’. 2. The originality and “work” enquiries can become entwined. In assessing whether a work is entitled to protection, it is permissible to have regard to the consequences of the recognition of copyright in a work of doubtful substance.⁵¹⁵
1996	<p><i>Golden China TV Game Centre v Nintendo</i></p> <p>Harms JA’s discussion of the skill and labour required to create a video game (which is brief in comparison with that of Hartzenberg J in the court <i>a quo</i>), makes it clear why in this case originality was not disputed on the basis of inadequate skill and labour having</p>

	<p>been spent:</p> <p>The creation of a video game goes through various stages. After the determination of the basic concept and its evaluation, the game is designed and developed. This requires the drawing of the visual aspects of the game, namely game characters, backgrounds and other game items. The screen text and sound effects are prepared. So, too, the game's play sequence – it defines, in an unencoded form, the content and story of each game and its play sequence by indicating how the various component works are to be integrated in a sequential progression to constitute a game.</p> <p>Once this stage is reached, the video game is programmed. That involves the writing of a computer program for the video game. The program controls the visual display and allows the player to manipulate the characters. Integrated circuits are then manufactured. In the one (named by Nintendo a 'CH-ROM'), all the visual elements of the game are stored in an encoded form. They are the background, the characters, the text and the other items in all their different poses, positions and configurations. The other (the so-called 'P-ROM') contains the audioelements of the game and also a program that operates the functioning and display of the game, i e it dictates the game's play sequence.⁵¹⁶</p>
	<p><i>Jacana Education (Pty) Ltd v Frandsen Publishers</i></p> <p>Because the court assumed for the purpose of this judgment that the applicant was the owner of the copyright works in question,⁵¹⁷ the principles of establishing originality were not discussed. Van Dijkhorst J did, however, with reference to the facts of the matter, make certain remarks regarding the standard of skill and labour required to render a work original.</p> <p>It is submitted that the purport of the judge's remarks in this regard is that the <i>skeleton</i> of a map showing the location of the physical features of a region <i>correctly</i> cannot be original, regardless of the amount of (skilled) time and effort expended.⁵¹⁸ It can thus be said that the <i>mechanical</i> fixation of facts through skill and labour cannot render a work original.</p> <p>Note that it is the <i>skeleton</i> of the map that is in question.⁵¹⁹ Copyright in the features of the map, such as whether the Kruger Park is portrayed over one or four pages and the colouring of different parts of the Park and symbols used for certain features such a water holes, is a wholly different matter.</p> <p>Van Dijkhorst J left a window open in that he acknowledged that the <i>first</i> map of a region may be susceptible to copyright protection.⁵²⁰ <i>Prima facie</i> this statement creates a contradiction.</p> <p>The principle that can be derived from this judgment is that, supposing ten different cartography firms are given an assignment to map the Kruger National Park, and supposing all ten firms work entirely independently and without reference to existing maps, then the resemblances between the ten final products as far as the "skeletons" of the maps are concerned, will not be copyrighted. Only the features that are the products of <i>own</i> skill and labour and therefore are likely to differ from their counterparts in the other nine maps, are susceptible to copyright protection.</p>
1997	<p><i>Jacana Education (Pty) Ltd v Frandsen Publishers</i></p> <p>Whereas the court <i>a quo</i> provided valuable guidelines regarding the skeleton of a map and the principles associated with it, the Supreme Court of Appeal provided guidelines regarding the "general appearance" of the map through a quotation from the <i>Sands & McDougall</i>⁵²¹ case:</p> <p style="padding-left: 40px;">It is true that the appellants changed the colours of the political divisions, corrected the Balkan boundaries, introduced some places</p>

	<p>that had then acquired recent prominence, and cut out some places that were interfered with by some further features of arrangement of their own map. Their map was not a mere copy in the ordinary sense of the term, but it was clearly a reproduction of a substantial part of the respondent's map in a material form, which necessarily violated the respondent's copyright in his work be protected by the Act. Notwithstanding all the differences referred to, there still remained in respect of size, of draftsmanship, of style, of printing type, and geographical selection and general appearance, a manifest wholesale adoption of the individual work which the respondent had bestow upon his map, and which had given to it its distinct characteristics and individuality.⁵²²</p> <p>For the above reasons the High Court of Australia found the appellant's work to be an infringement of the plaintiff's copyright.⁵²³ Appellant's work was thus not original.</p>
<p>1998</p>	<p><i>Accesso CC v Allforms (Pty) Ltd</i></p> <p>The court found Ms Barr to be the author of the forms in question.⁵²⁴ Regarding originality, Le Roux J concluded that although the headings and typographical material on form VH2 were commonplace and would not attract copyright, their layout had required skill, judgement and labour on the part of the author and did merit copyright protection⁵²⁵ (even though the amount of skill involved is described as "negligible"⁵²⁶). The court set out how in answering affidavits Ms Barr, supported by Walshe, described how she designed vorm VH2:</p> <p style="padding-left: 40px;">She says that during November 1989 Roy presented her with a rough sketch (DGW3) and requested her to design a medical account form Mass CC. This was not a difficult task. She used the basic format for business forms commonly used at the time and added those headings required by the Medical Industry. She knew that most medical practices used the Epson FX80-printer which could accommodate 8.5 inches of print. At 16 characters per inch this would allow for 136 characters across the page. It turned out, however, that medical practices served by Roy could generally not utilize more than 8 inch forms in their printers and the total spread had to be reduced to 128 characters. Her form bore no resemblance to Roy's rough sketch (DGW3) which was at most his instructions in graphic form. The design of the form required almost no skill as examples of medical account forms were readily available and she simply copied these on to a spacing chart in producing VH2 and adapted it to Roy's needs as reflected on DGW3.⁵²⁷</p>
	<p><i>Pyromet (Pty) Ltd v Bateman Project Holdings Ltd</i></p> <p>This judgment does not provide guidelines regarding the degree of skill and labour required.</p>
<p>1999</p>	<p><i>Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd</i></p> <p>... it is originality of the work which qualifies it for copyright protection. It is the final product that qualifies for copyright protection as artistic work and not the process which may or may not entail arrangement and the presentation of some existing features.⁵²⁸</p> <p>The <i>work</i> rather than the <i>process</i> was the focus of the originality enquiry. The court described the degree of skill and labour expended on the works in question as follows:</p> <p style="padding-left: 40px;">The fact of the matter is that the design with which we have to deal in this case is, on the uncontroverted evidence placed before court under oath, the result of teamwork of designers of watches that included an expert of more than 30 years' experience. It is certainly by far much more than the simplicity of either a straight line or a circle. The informal</p>

	<p>design drawings placed before the Court are evidence of mental creativity and labour and skill which were employed and the product becomes evidently a piece of art as presented by the blueprint.⁵²⁹</p> <p>The court is satisfied that the independent labour, skill and creativity applied by the design team of the Atrium and Corynthe watch models was sufficient to qualify the works as original artistic works.⁵³⁰</p>
	<p><i>Metro Polis t/a Transactive (Pty) Ltd v Naidoo t/a African Products</i></p> <p>The applicant states that extensive independent effort and labour had gone into the compilation of the 1999/2000 edition of the <i>Auto Data Digest</i> as was the case with the compilation of the 2000 edition. Although the 1999/2000 edition was used as a primary source therefore all the information contained in the previous editions was again checked and revised for purposes of compilation of the new publication. For instance independent research and confirmation were undertaken to establish which model vehicles were still regularly available in South Africa. A large number of the vehicle models contained in the 1999/2000 edition were omitted from the 2000 edition.⁵³¹</p> <p>The court held that “the applicant has established copyright subsistence and proprietorship of the copyrights in the two publications.”⁵³²</p>
<p>2000</p>	<p><i>Nel v Ladysmith Co-Operative Wine Makers and Distillers Ltd</i></p> <p>The court discussed neither the degree nor the nature of the skill and labour expended on the wine bottle label in question before finding the label to have required “some special skill and labour to create”.⁵³³</p>
<p>2002</p>	<p><i>Biotech Laboratories (Pty) Ltd v Beecham Group PLC</i></p> <p>The court emphasised that it was the “work” that needed to be original in terms of the Act.⁵³⁴ It concluded that the copyright in the insert vested in Smith-Kline Beecham.⁵³⁵ The skill and labour expended on the work were described as follows:</p> <p>The first respondent (“Beecham”) is Smith-Kline Beecham’s parent company and, presumably, the inventor of Augmentin. It prepared a master data sheet relating to Augmentin and also a uniform data base sheet for use by its subsidiaries in different countries. This was done in order to ensure standardization in relation to the content of package inserts. At a later date Beecham prepared a further data base sheet comprising additional data that had been generated. Dr Kritzinger, Smith-Kline Beecham’s erstwhile medical director and the person responsible for the registration of medicines, made copious use of these documents in preparing the different inserts, first by compiling summaries and then by preparing synopses that ultimately comprised the insert, sometimes taking extracts verbatim from them. Drafts were also sent to other entities for comments and those received were incorporated.⁵³⁶</p>

Chapter 3

3. Requirements for originality as formulated by *littérateurs* in the wake of plagiarism allegations in Afrikaans literature

3.1 Introduction

Plagiarism is a problematic term. Butcher, for instance, says that plagiarism means “unfairly using another person’s ideas or structures, as against copying directly, word for word.”⁵³⁷ Van Gorp interprets plagiarism more widely, incorporating direct copying:

Het gebruiken van de persoonlijke ideeën, werkwijze, vormgeving e.d. van iemand anders, zonder de bron te vermelden. Men geeft aldus de schijn er de schepper van te zijn. Plagiaat is dus een vorm van wederrechtelijke toeëigening van andermans werk, m.a.w. literaire diefstal.⁵³⁸

To others, such as Vermaak, plagiarism means the same as infringement of copyright law.⁵³⁹ However, it must be noted that the concept of plagiarism did exist even in historical times, long before copyright law. What made plagiarism so contemptible was the *immorality* of purloining the work of another, passing it off as one’s own and in so doing unjustly acquiring fame and honour. Although the development of copyright has succeeded in addressing many of the concerns about plagiarism that reach back to antiquity,⁵⁴⁰ the two concepts still do not completely overlap.

3.2 Klein Grys Telegramme van die Wêreld - DPM Botes (1969)⁵⁴¹

D.P.M. Botes made his debute with *Wat is 'n gewone man* in 1965, for which he became the first Afrikaans recipient of the Ingrid Jonker prize. This was followed in

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1967 by *Klein gryns telegramme van die wêreld*. Some of Botes's poems also appeared with those of P.A. de W. Venter and Menno Stenvert in *Klawer* in 1966.⁵⁴²

In the wake of the publication of a “poem” by Botes in *Wurm 1* in 1966, Peter Horn accused Botes of rewriting from Hans Magnus Enzensberger's works. Horn agrees with Brecht that a poet may take over an entire work by another poet as long as the main lines, the whole of the work and the long breath thereof is his own, for that cannot be stolen. Horn states that, if Botes could have transformed what he had stolen, he (Horn) would have remained silent.⁵⁴³

In 1969 R Schutte pointed out Botes's plagiarism of poems by Tomas Tranströmer and Sandro Key-Aberg. Schutte's comparison shows a near word-for-word translation by Botes of the Swedish works into Afrikaans. The title of Botes's 1967 publication is also a direct translation of the last line of one of Tranströmer's poems.⁵⁴⁴

Despite at least one article that appeared in his defence at that time, accusations of plagiarism destroyed Botes's career as a poet. In a cryptic footnote in *Standpunte* of August 1969, Botes bade poetry farewell and, despite *Psalms van Dawid* that appeared in 1973, Botes never published another volume of poetry,⁵⁴⁵ although over the years many of his poems have appeared in magazines.⁵⁴⁶ Nevertheless he admits to writing poetry on a daily basis.⁵⁴⁷

Van Vuuren agrees with Horn. Botes did not acknowledge his sources, the “new” work brought nothing new, was not incorporated into a new whole and did not have any other meaning. And in his short review of Botes's oeuvre Kannemeyer more than once refers to the plagiaristic nature of Botes's work.⁵⁴⁸ Cecile Cilliers disagrees. In 1980, in her thesis entitled *Die verhouding bron: kunswerk*, Cilliers concluded that in Botes's case an unfair, non-literary judgment was passed. Furthermore, three of Botes's works were included in the 2001 reprint of *Groot Verseboek*. The compiler, André P. Brink, states therein that “literary amnesty” has been granted to D.P.M. Botes.⁵⁴⁹

Botes was/is a *Sestigdigter* (“Sixties poet”) who creates rhymeless, free verse.⁵⁵⁰ According to Botes, Uys Krige wrote to him (in the 1960’s, at some stage after he had received the Ingrid Jonker prize), stating how few there were like them who could truly create free verse.⁵⁵¹ It is a great pity that an author with so much potential, because of a certain degree of carelessness to which he himself admits,⁵⁵² for all practical purposes became lost to literature at the inception of his career.

In 1995 Botes retired as head of public relations and marketing promotion at the Maize Board where, amongst other responsibilities, he attended to several publications and since his retirement he has been doing a fair amount of language practitioner’s work.⁵⁵³

3.3 Die Metafoor in die Afrikaanse Taal en Literatuurwetenskap⁵⁵⁴ – J Verster (1975)

The discrepancy between plagiarism and infringement of copyright becomes apparent in a study of newspaper clippings from 1975 regarding Professor J.R. Verster, then a senior lecturer in literature at the University of the Orange Free State.⁵⁵⁵ Miss Ina Gräbe, then junior lecturer in general literary theory at the University of Port Elizabeth,⁵⁵⁶ concluded that only 6 of the 136 pages of Verster’s doctoral thesis,⁵⁵⁷ which was also published as a textbook for students, were his own work. In an article published in the literary magazine *Standpunte* she systematically uncovers Verster’s continuous use of direct translations from the works of well-known researchers and authors, without acknowledging his sources.

The statutes of the University of the Orange Free State expressly stated that a thesis must make an original contribution to the existing knowledge of the subject.⁵⁵⁸ On submission of the thesis, Verster had to declare that it was his own original work.⁵⁵⁹ In the wake of Gräbe’s allegations, Verster referred to the beginning of his work where he explicitly stated that the book was a compilation of the development of the world’s greatest thinkers on the subject. His contribution lay in the “selection and compilation with cross references, of a vast forest of material”.⁵⁶⁰ He pointed

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out that although his method of reference left much to be desired, his sources were referred to in the preface and the list of sources at the end.⁵⁶¹

Professor Louw Odendaal, then of the Drama Department at the University of Pretoria and external examiner in the Verster case, told *Volksblad* that his report on the thesis in question had been rather negative,⁵⁶² but that he also thought it could serve as a useful reference work. It did not strike him as transcription.⁵⁶³ Linguists and littérateurs consulted by the *Vaderland* concurred that, although a résumé of others' work can produce something new that makes a genuine contribution to the field, the impression must not be created that someone else's words are those of the author.⁵⁶⁴

The row ended in Professor Verster's resignation from his post as lecturer and the forfeiture of his doctor's degree,⁵⁶⁵ although he was apparently not required to do so by the University. For a period of time thereafter he worked at the (Rhodesian) Zimbabwean University in Harare,⁵⁶⁶ which he left to again pursue the wandering life he had led before his academic career.⁵⁶⁷ Charles Malan, who worked closely with Verster during his employment at the Free State University, said that he was unaware of anything published by Verster after the plagiarism row.⁵⁶⁸

From the Verster incident it is thus evident that administrative and moral law may require a higher degree of originality than does copyright law. From an administrative law perspective, if the reasonable promoter had had Gräbe's assessment on the table when Verster's thesis was evaluated, he or she would probably not have recommended that Verster be awarded a doctoral degree on the work as it stood. From a moral law (plagiarism) standpoint, a reasonable author should not through careless referencing create the impression that he himself might have contributed more to the work than he actually did.

Regarding the thesis itself, it can thus be concluded that Verster did indeed commit plagiarism. Furthermore, from an administrative law standpoint, the University of the Orange Free State would have been right, in terms of its statutes, not to grant a doctoral degree on the merits of the work as it then stood. However, the thesis and

the book publication would still qualify as original literary works and be entitled to copyright protection.⁵⁶⁹

3.4 *Paljas* – Chris Barnard (1997)

In the first week of January, 1973, a group of artist friends were enjoying a meal and each other's company on Jans Rautenbach's small farm, "Oulap", outside Outshoorn. Trix Pienaar and Braam de Vries were among the guests. Rautenbach suggested that each should earn his bread at the table by coming up with a creative idea for a story. De Vries, a native of the region, said that he had a story about the *bondeldraers* (vagabonds) of the Klein Karoo; strangers appearing and disappearing in one's life. He then started to tell a story of a clown arriving at a small station on a circus train.

De Vries states that he does not know where he got the story from. He says he made it up as he was sitting there at the table. Katinka Heyns alleges that, when later travelling in the Klein Karoo looking for a suitable place to shoot the film, one of the farmers of the region told her that elements of the script were based on fact.

In the early 1990s De Vries wrote the story down and kept it in a drawer. About 1990 Pienaar was looking for someone to turn De Vries's Oulap story into a movie. The SABC was not interested. She then turned to her old friends Chris Barnard and Katinka Heyns. Heyns had just finished shooting *Die Storie van Klara Viljee*, for which Barnard had written the script. In two minutes Pienaar told Barnard the Oulap story, which De Vries had given to her "to do something with".

In 1997 De Vries published *Nag van die Clown* in his volume of short stories *Skaduwees tussen Skaduwees*, which differed a good deal from the Oulap story. Pienaar wanted to know why De Vries had distorted the beautiful old story (of 1973) in this way. De Vries admitted that he couldn't remember that story well, and stated that Pienaar was free to write it down as she chose. In 1994 De Vries even faxed three paragraphs from the manuscript to Barnard and there was an oral agreement

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that, should the idea become a movie, the contribution of Pienaar and De Vries would be recognised.

According to Barnard, a movie requires at least one hundred minutes of story. It obviously needed a great deal of skill and labour to create characters and conflict – a whole drama. Barnard says that when he finished he was “far away” from where the story began. What he had created was something different. It is interesting that Barnard uses the words “far away” to defend the originality of his script. It clearly reflects the “crucial/critical distance” concept that is a recurring theme in littérateurs’ discussions on originality.⁵⁷⁰

The names of De Vries and Pienaar are nowhere to be seen in any of the press articles reporting the making of *Paljas*, which got under way in 1996. De Vries expressed his dissatisfaction with Barnard and Heyns in letters to *Die Burger*. Pienaar was upset because she had set her heart on playing the main role, a character which turned out to be that of a husband and father named Hendrik MacDonald. The Oscar nomination of the film by Anant Singh and the possible involvement of Disney exacerbated the situation.

According to Barnard, he and Heyns have never denied that the story had its origin with De Vries and Pienaar. They have always been willing to recognise them and to compensate them. The end title of *Paljas* does in fact state: “Elemente van die verhaal is ingegee deur ‘n mondelinge anekdote van Abraham de Vries en Trix Pienaar.” However, De Vries insisted that this should appear at the beginning, and the four of them could also not reach a final agreement about appropriate compensation.

The upshot of all this was that friends and colleagues in a relatively small artistic community were alienated from one another through a process in which the media played an important role. In January 1998, when the article from which most of the above information was taken, appeared in *De Kat*,⁵⁷¹ a mutual friend of the antagonists was acting as mediator, trying to mend the broken relationships.

The originality of Barnard's script is not disputed. In terms of Section 2(3) of the Act the same work can, however, be original as well as infringing copyright at the same time.⁵⁷² De Vries's manuscript also enjoys copyright protection. The question is whether the idea, as reflected in the oral communications of De Vries and Pienaar to Barnard, is protected. Furthermore, do De Vries and Pienaar have a moral right to be recognised as authors of the story from which the cinematograph film originated?

3.4.1 “There is no copyright in ideas”

In the words of Laddie, Prescott & Vitoria: “Like all pithy catchphrases, this is liable to lead to confusion.” These authors credit the origins of this concept of copyright being confined to the form of expression to the “habit of incautiously citing cases decided under previous legislation”. The authorities relevant in this case are those antedating the 1911 Act, when copyright protection was narrower than it is today. As demonstrated by several examples referred to by the authors, a mere change of medium would suffice for a court to find that there had been no copyright infringement.

In *Toole v Young*,⁵⁷³ it was held that it is not an infringement to perform a novel as a play. In *Hanfstaengl v Empire Place*,⁵⁷⁴ it was held that reproductions of pictures as “living pictures” (living actors grouped and costumed to resemble the originals as closely as possible) did not constitute an infringement. In *Boosey v Whight*⁵⁷⁵ it was found that the sale of punched rolls of paper which, when inserted in a suitable pipe organ, caused certain tunes to be played, was not an infringement of the copyright in the sheet music. In *Scholtz v Amasis Ltd*⁵⁷⁶ the court of appeal held that there was no infringement in taking the plot of a play.

With the above historical perspective in mind, as well as the contrary viewpoint that the idea rather than the expression of the idea constitutes the true legal object of the law, Copeling's submission that any embodiment of an idea that results in the communication thereof to the mind of an outside party satisfies the purpose of the fixation requirement – that material form is therefore not an absolute requirement – seems sound. However, as has been submitted under 2.3.1.3, the view of Copinger

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& Skone James is *prima facie* to be preferred over that of Copeling, as such a general protection of ideas would negatively influence the free flow of information in society.

However, in the United States of America, where ideas have proven to be a very valuable commodity, especially in the film industry, measures have been developed which attain much the same result as Copeling envisioned, without negatively influencing the free flow of information in society.

3.4.2 United States protection of works not fixed in any tangible medium of expression

As pointed out in paragraph 2.3.1.3(a), the United States Congress alone has the power to regulate copyright. The power derives from Article I, section 8 of the United States Constitution:

The Congress shall have power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Congress's constitutional power in this regard is currently implemented through the Copyright Act of 1976.⁵⁷⁷ Section 102(b) of the 1976 Act explicitly excludes ideas from the subject matter of copyright, regardless of the form in which they are embodied in a work:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.

According to section 301 of the 1976 Act, providing for pre-emption with respect to other laws, rights equivalent to the exclusive rights in works⁵⁷⁸ that are fixed in a

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tangible medium of expression and come within the subject matter of copyright⁵⁷⁹ are governed exclusively by the 1976 Act.⁵⁸⁰

*Murray v National Broadcasting Co.*⁵⁸¹ provides an example of a claim to protect an idea appearing in the context of a copyrightable work. In June 1980 Hwesu S. Murray submitted a series of *written* proposals for television programmes to the National Broadcasting Co. One of the proposals was for a situation comedy called “Father’s Day”, featuring a wholesome African-American family and starring Bill Cosby, who in a 1965 interview envisioned participating in a television series based on a similar theme. The defendant indicated that it was not interested in pursuing the programme idea. However, four years later “The Cosby Show” was broadcast. The court found that under New York Law non-novel ideas do not constitute property and that Murray’s proposal lacked novelty. Consequently Murray’s claims for breach of implied contract, breach of express contract, misappropriation, conversion, unjust enrichment, breach of fiduciary duty, as well as fraud were all dismissed.

Between ideas appearing in copyrightable works and ideas not appearing in tangible format, lie “purely spoken words”. Being more than mere ideas, yet not fixed in any tangible medium of expression, spoken words are designated by the Act to remain within the concurrent common law copyright jurisdiction of the states.⁵⁸² Typically this type of infringement involves the plaintiff’s spoken words (i.e. during a conference,⁵⁸³ radio news announcement,⁵⁸⁴ press conference,⁵⁸⁵ interview,⁵⁸⁶ television documentary⁵⁸⁷ or conversation⁵⁸⁸) being quoted. As it was spoken words that were shared at the Ouplaas table, the Paljas incident can serve as an example in this regard. If therefore one of the other guests had simply reduced De Vries’s spoken words to a written version thereof, the incident would fall within the “spoken words” category. However, what tends to put this case in the category of unfixed idea is the fact that the story told was further expanded to become a full-length film.

After scrutinising the relevant legislation and case law, Brennan and Christie conclude that, although separate residual state jurisdiction exists which permits the subsistence of copyright in spoken words, and although at least one state has given

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satisfactory recognition to copyright subsiding in intangible subject matter such as speech,⁵⁸⁹ certain drawbacks need to be noted. Under the residual state jurisdiction, relief has never been granted where there was unambiguous reliance on such copyright. Secondly, the circumstances in which such copyright might be claimed have been described by courts only by way of obiter, and finally, materiality has even been (paradoxically) required in one case. In the context of the spoken word, Brennan & Christie conclude that an undue focus on material form leads to results that are inconsistent with the underlying objectives of copyright law.

Garon sets out to answer the question of when copyright law should pre-empt contract claims involving idea submissions. He concludes that contract claims involving ideas expressed in a commercially distributed, tangible medium of expression should be pre-empted if the breaching action is a power normally reserved for a copyright owner.⁵⁹⁰

Halpern, Nard & Port hold that, although ideas are excluded from the subject matter of copyright, state law purporting to protect ideas may be enforceable and not subject to pre-emption. The states vary considerably in their approach to the protection of ideas.⁵⁹¹ As Swarth points out, the “law of ideas” has special significance to the entertainment industries, who are known for their voracious appetite for new ideas. It is therefore no wonder that most of the significant litigation concerning the protection of ideas has occurred in New York and California – the jurisdictions covering the two great centres of entertainment and media.⁵⁹²

In the United States of America, creators of ideas not embodied in works and creators of copyright works who found that only the idea and not the expression has been borrowed have looked especially to state contract law to protect their ideas. As Liebman & Carton explain, even if an abstract idea cannot rise to the level of “property”, its disclosure may be valid consideration for a contract, which can be either express⁵⁹³ or implied-in-fact⁵⁹⁴.⁵⁹⁵ However, the courts place many obstacles in the way of a person seeking idea protection under one of the contract theories. Concreteness, novelty and pre-emption are the most important of these barriers.⁵⁹⁶

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Swarth highlights the fact that, although many cases have declared that an idea is only protectable if it is “concrete”, the courts have not consistently used this requirement to mean a tangible expression similar to that required by copyright law.⁵⁹⁷ Concreteness is also used to refer to a level of conceptual development. With reference to Nimmer, Swarth explains that there are two ways of identifying the level of development for an idea to qualify as “concrete”: the “immediate use” theory and the “elaborate idea” standard.

The immediate use theory holds that an idea is concrete when it has been developed to the point where it is ready for immediate use without any embellishment. As Nimmer points out, however, to speak of an idea developed to the point where it is ready for use presents a contradiction in terms. If so developed an idea, being a conception, a preliminary plan, ceases to be merely an idea.

The elaborated idea standard asks whether the interpreter could have produced the end product if the author had not produced the idea elaborated on. It is less concerned with specific levels of development than is the immediate use theory, and is more appropriate for cases where a plaintiff has disclosed an idea that the defendant then exploited. Swarth concludes the elaborate idea standard to be the most suitable measure.

Regardless of which theory of idea protection a plaintiff pursues, US courts generally protect only novel ideas. “Novelty” has been defined by the courts to mean “original to the plaintiff” and/or “innovative in character”.⁵⁹⁸

New York courts differ from those in California in that novelty is required even where the plaintiff’s claim is based on an express contract. Swarth criticises this policy on two grounds. Firstly, the novelty requirement serves to prove the idea to be the *property* of the plaintiff. However, the nature of an idea is such that, even though it is not property subject to exclusive ownership, its disclosure may be of substantial benefit to the person to whom it is disclosed. Furthermore, as contract creates no copyright as does a copyright, any person not a party to the contract is free to use the idea. Secondly, novelty is not a requirement in a contract for any other type of

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service or product: if you use a pencil from a supplier you cannot deny the contract to pay on the ground that a pencil can be obtained anywhere.

Not requiring novelty, as the Californian courts tend to do, leads to the undesirable situation that buyers would be reluctant to view works for fear that the work might contain ideas which the buyer might use in another context. Swarth suggests that if the law of ideas is going to promote progress, it should strive towards creating an environment where the idea purveyor can feel confident that he may freely and safely contract for the sale of his product, while prospective buyers are protected from spurious claims for infringement and breach of contract. According to Swarth, this goal may be reached by applying the two criteria: “novelty” and “concreteness” in inverse ratio to one another. The more novel an idea is, the less concrete it needs to be. On the other hand, the more concrete an idea is, the less novel it needs to be.

Winteringham proposes a “concept initiator credit” as an additional model of idea protection.⁵⁹⁹ Based on past and current US case law, Winteringham submits that unique and exact ideas, which warrant protection when fixed in an expression, should be treated as protectable property before they are fixed in expression, regardless of whether the idea was created while under contract. The “concept initiator” credit would thus, unlike copyright law that protects only fixed expressions, protect certain ideas.

Winteringham formulates a three-part test for use when deciding whether a concept initiator credit is needed in an entertainment product. First, the idea is eligible for the concept initiator credit if it qualifies as an independently created narrative crux.⁶⁰⁰ Second, the narrative crux must be used qualitatively and quantitatively in a second work.⁶⁰¹ Finally, the narrative crux must have been knowingly used in another work.⁶⁰²

Winteringham acknowledges that the concept initiator standard increases the possibility of frivolous suits. He suggests that the burden of proof in such cases be raised to a “clear and convincing standard”. This would discourage unmeritorious

suits and help protect narrative cruxes, while keeping general ideas in the public domain.

In the light of Nimmer’s criticism of the “immediate use” theory, it is submitted that Swarth’s “inverse ratio” theory would probably go further to protect unfixed ideas. It is also a more flexible standard – a question of degree that can be adapted to different sets of circumstances. The “inverse ratio” theory also goes a long way to harmonising the opposing view points of Copeling and Copinger & Skone James. Remembering that most of the above discussion as to the position in the United States is played out against the background of some degree of contractual relationship – the idea remaining in the public domain – adds further momentum to the drive towards more comprehensive idea protection.

3.5 *Die Redding van Vuyo Stofile* – Wilhelm du Plessis (1999)

“Die Redding van Vuyo Stofile”⁶⁰³ was incorporated into the compilation of short stories entitled *Die Mooiste Liefde is Verby*,⁶⁰⁴ to which seven M-Net bursary (for creative writing training) winners contributed.⁶⁰⁵ The book was compiled by the authors’ promotor, Etienne van Heerden, and published by Tafelberg. After Petra Muller in her critique of the work pointed out similarities between Du Plessis’s work and that of the Jewish American writer Malamud, Tafelberg withdrew the work from the market.⁶⁰⁶ This was done on Van Heerden’s request and meant that one third of the edition (about 400 books) had to be pulped.⁶⁰⁷ Hannes van Zyl of Tafelberg said that the similarities between the two works were difficult to explain and that Tafelberg would not have withdrawn the compilation unreasonably. Van Heerden described it as “tragic” that a young, talented writer at the brink of his career should commit such an error of judgement.⁶⁰⁸

Izak de Vries drew up a table comparing “Die Redding van Vuyo Stofile” with Malamud’s *The Magic Barrel*.⁶⁰⁹ The latter work had been published in the magazine *Partisan Review* in 1954.⁶¹⁰ In tabular format De Vries accurately shows the close resemblance between the two storylines. For instance, in paragraphs three and four of “Die Redding van Vuyo Stofile” Vuyo tells the Xhosa marriage broker (who smells of cow’s milk) that his father has died, that his mother is losing

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her authority and that as a result of his studies he has little contact with young women. His parents met through a marriage broker and, even though his father had eight other women, they had a good marriage. In the third paragraph of *The Magic Barrel* Leo tells the Jewish marriage broker (who smells of fish) that his parents are very old, that he has no other family and that as a result of his studies he has little contact with young women. His parents met through a marriage broker and, even though they were never rich, they had a good marriage.

Helize van Vuuren's doctoral thesis entitled *Die gesprek tussen literêre kunswerke met spesifieke verwysing na Tristia en Komas uit 'n bamboesstok*⁶¹¹ provides the perfect basis for her to render an opinion as to the originality of Du Plessis's text. She quotes from page 31 of Edward Koster's 1954 book *Over navolging en ooreenkomst in de literatuur*:

Hij, die een ander mooi nazingt, geeft mij meer genot dan hij de ruw, smakeloos en baldadig origineel is. Ik geloof waarlijk niet, dat men uitsluitend en alleen naar de 'individualiteit' van de kunstenaar moet vragen bij de beoordeling van kunstwerken.

In the light of Koster's words, Van Vuuren concludes that Du Plessis's story rises above the other short stories in *Die Mooiste Liefde is Verby*, being "ruw, smakeloos en baldadig origineel".⁶¹² She is of the opinion that, despite its many similarities with Malamud's work, "Die Redding van Vuyo Stofile" is aesthetically, substantially and structurally much more advanced than the other contributions.⁶¹³

Joan Hambidge makes it clear that, although the to and fro borrowing of texts is an acceptable practice, postmodernism is not a "free for all". She puts forward two criteria to which the "new" text should adhere. Firstly, the sources from which material were borrowed must be acknowledged. Secondly, something new and original has to be added.⁶¹⁴

Hambidge states that sources can be acknowledged either by means of a bibliography, or through clear codes in the text that leave no doubt as to the fact that other texts were used. As pointed out by Stephanie Nieuwoudt, Du Plessis

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does not acknowledge Malamud in “Die Redding van Vuyo Stofile”. According to Helize van Vuuren, all the accusations against Du Plessis could have been avoided by simply furnishing his work with a subtitle such as *Malamud in Africa*.⁶¹⁵ On the other hand, both Danie Venter and Petra Muller immediately recognized Malamud’s story in that of Du Plessis.⁶¹⁶

According to Izak de Vries, insofar as all informed readers would be able to spot that you have borrowed from another’s work, it is not necessary to name the source – especially if what was taken has been changed a little. Such practice should, however, not go as far as making the first author feel that his property has been violated. A friendly nod in the first author’s direction will probably serve to avoid action by a first author against the author of a work that is simultaneously original and infringing.⁶¹⁷

According to Phillip John, a colleague of Du Plessis at the University of the Transkei, a comparison between the two texts shows that, although there can be no doubt as to the similarities, the texts are not identical, so much so that Du Plessis’s story can be said to be wholly new.⁶¹⁸

The aspect receiving the most attention in the littérateurs’ discussions as to the originality of Du Plessis’s work is the question of whether the transposition of a text to another milieu constitutes originality. Izak de Vries states that the mere transposition of text to another part of the world does not make it new within the corpus of the language it is transposed into. The basis of an intertextual work lies in the way in which the borrowed words are made new, interpreted differently and are ultimately made to contribute to the reception of the transposed text.⁶¹⁹

Van Vuuren is of the opinion that Du Plessis does add something new to the text by creatively transposing it to a new milieu. The transposition does not only take place in terms of space, but in time as well – forty years later. Du Plessis accentuates certain aspects that are unique to Umtata and the surrounding region. In fact, the environmental descriptions constitute some of the most outstanding features of the Afrikaans story. Striking Afrikaans idioms appear in the work and English words are skilfully used to suggest the multilingual language backdrop. After further referring

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to various other differences between the two works,⁶²⁰ Van Vuuren concludes that the transposed material acquires a different meaning in its new context and that the Afrikaans text can therefore be said to be a creative rewriting of Malamud's work.⁶²¹

What complicated the case was the fact that Du Plessis has denied having ever read *The Magic Barrel*,⁶²² and is unable to give any explanation for the similarities between the two texts. Phillip John attributed Du Plessis's conduct to an overwhelming need to avenge himself on his mentor, Etienne van Heerden.⁶²³ According to John, the idealistic image Du Plessis had of Van Heerden became tarnished in the course of their relationship and the pupil became increasingly disappointed with the mentor.⁶²⁴

John offers four possible explanations for Du Plessis's denial of being acquainted with the Malamud text. The first is that Du Plessis read *The Magic Barrel* and found therein a remarkable resemblance to the decaying relationship between himself and Van Heerden. His need to express his feelings towards his mentor in literary form was so intense that the fact that this story had originated with someone else was completely banished to his subconscious mind. The possible second reason submitted by John is that Du Plessis wished to insult his mentor by giving him something that was *not* literature. Should the mentor not realise that the work closely resembled that of another author, Du Plessis's altered opinion of Van Heerden would be confirmed. Thirdly, it is submitted that Du Plessis might have wanted to set a literary "snare" for his mentor. The discovery of his "plagiarism" would set off the "snare", resulting in the entire Afrikaans literary world being in uproar for weeks. Fourthly, Du Plessis's conduct could be set in the context of a parent-child relationship where the "child" provokes the "parent" in an attempt to have his existence acknowledged. The parent's failure to punish the child for his wrongdoing can be interpreted by the child as lovelessness on the part of the parent.⁶²⁵

It is submitted that Du Plessis's claim of being unfamiliar with *The Magic Barrel*, whether this obvious "lie" was told consciously or not, is irrelevant for the purpose of establishing originality. As concluded under Chapter 2, paragraph 3.1.4.5, only skill and/or labour as reflected in the "special features" of a work is relevant when

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establishing originality. In the light of especially Van Vuuren's review of the "special features" of "Die Redding van Vuyo Stofile", it is concluded that Du Plessis's work is indeed original, although it can also be said to be infringing copyright at the same time. However, as pointed out by Grové, when a work is expanded, developed or adapted and so on, plagiarism is not to be alleged without more ado.⁶²⁶ From Grové's definition it is again evident that plagiarism and infringement of copyright do differ. Whereas in terms of the Act a work can simultaneously be original and infringing, in terms of moral law a work cannot at the same time be original and plagiaristic.

Amidst the row over *Die Mooiste Liefde is Verby*, Van Vuuren asks why plagiarism is so hastily alleged in cases such as the "unexplicable similarities" between Du Plessis's and Malamud's work, while so much space is allowed for other possibilities in cases such as Van Wyk Louw's poems in *Tristia* (1962).⁶²⁷ Van Vuuren ascribes the latter phenomenon to three factors: the stature of the author, the genre used by the author, and the length of the "new" work being different from that of the plundered work.

Unrecognised young writers such as Du Plessis and scarcely established poets such as Botes are more readily accused of plagiarism than poets of outstanding stature and complexity whose place in the canon is undisputed (such as Van Wyk Louw). Ironically, it is a generally accepted convention that developing writers should read a lot and imitate admired examples.

Furthermore, in the cases of Botes and Du Plessis the genres remain the same and the lengths of the different works do not differ drastically. Van Wyk Louw's conversion from fiction and historic works to poetry is already an intricate process of transformation. He transformed minuscule parts (single paragraphs) from lengthy historical and fictional works into poetry.⁶²⁸

3.6 *Metronoom* – Terblanche Jordaan (2001)

Terblanche Jordaan was for more than three years responsible for the weekly column *Metronoom*⁶²⁹ in *JIP*, *Die Burger*'s Monday annexure for teenagers. When his book *Metronoom III*, a selection from Jordaan's weekly writings in *Die Burger*, appeared in 2001, *Rapport* alleged that parts of Jordaan's new book were direct translations of material found on the Internet.⁶³⁰ In particular he was criticised for incorporating an Afrikaans translation of a poem entitled *Just for today*, appearing on more than one web page, the copyright of which belongs to a Sally Meyer.⁶³¹

The *Metronoom* column, as well as Jordaan's column in the *Sarie* magazine, was terminated shortly before *Metronoom III* appeared, for reasons not relating to the degree of originality of his work.⁶³²

In the wake of the allegations made against him, Jordaan and his publisher (Tafelberg) reviewed the allegations and Jordaan read through the three *Metronoom* books in search of further examples of copying.⁶³³ The investigation, according to Tafelberg, revealed a few examples where a source had not been mentioned.⁶³⁴ Tafelberg withdrew the three books and ceased supplying copies to traders.⁶³⁵

In Jordaan's own words: "Ek het nog nooit op die internet iets gekry, dit direk vertaal en dit as my eie probeer weergee nie." At the beginning of the specific column incorporating Meyer's poem, Jordaan does in fact state that: "ek besluit het om die volgende deel wat ek van iemand ontvang het, te verwerk in 'n *Metronoom*." It was e-mailed to him by a friend, Karine Retief.⁶³⁶ Jordaan emphasises the fact that he is frequently provided with material, directly or via e-mail, without the sources thereof being mentioned.⁶³⁷ He says that where an author is indicated, he does recognise such an author, as is evident from the numerous direct references to other writers in Jordaan's books.⁶³⁸

Jordaan repeatedly stresses the fact that he did not intentionally steal from others.⁶³⁹ Section 24(2) of the Act provides as follows:

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Where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement.

For obvious reasons it is highly unlikely that Jordaan would succeed in defending himself by relying on Section 24(2) as grounds of justification. At best his contention of not having intentionally infringed copyright could serve to lessen any moral blame attributed to him.

Jordaan further says he thought it unnecessary to recognize a source where the author was anonymous or unknown.⁶⁴⁰ To this Britz replied that authors must always recognise their sources, even if the original author is indicated as “anonymous”. In such instances recognition can be given by reference to the web page where the information was found. If no recognition is given, and the text is presented as being original, that constitutes plagiarism.⁶⁴¹

As far as it could be established, Jordaan has not published again since the plagiarism accusations. Louise Steyn, Publisher: Children’s Books at Tafelberg, who was the publisher of the Metronoom books, is unfamiliar with his present whereabouts.⁶⁴²

From this case study it is once again evident that a *semblance of originality* should not be created. One always has to acknowledge one’s sources. The fault in not doing so lies in the fact that the original author is deprived of (potential or actual) income from the work.⁶⁴³ The accuracy with which the source is recognized is thus subordinate to the necessity of some indication that the present author is not the original source of the work.

3.7 Ingrid Jonker – Beeld van ‘n Digterslewe⁶⁴⁴ – Petrovna Metelerkamp (2003)

”Sedert sy in 1965 by Drieankerbaai, Groenpunt, selfmoord gepleeg het toe sy die nag van 18 Julie die see ingestap en verdrink het, dam verwyte, beskuldigings, gerugte en skinderstories gereeld op en loop in die pers oor.”⁶⁴⁵

Ex-journalist Petrovna Metelerkamp is the compiler and publisher of *Ingrid Jonker – Beeld van ‘n digterslewe*.⁶⁴⁶ According to Metelerkamp the said work is not a biography. Whereas a biography implies interpretation, this book is merely a collection of anecdotes, letters, memories, photos and other documents, laying the foundation for any in-depth biography of Ingrid Jonker.⁶⁴⁷

From the many newspaper articles that followed the publication of the book, it is evident that most of the sensation caused by *Ingrid Jonker – beeld van ‘n digterslewe* is due to the first-time publication of certain material that Metelerkamp obtained from Cathy de Villiers, the child of Ingrid’s only sibling, Anna. In *Rapport* of 24 Augustus 2003 it was reported that Cathy de Villiers (daughter of Jonker’s older sister, Anna Jonker-Bairos) had instigated legal action against Metelerkamp.

De Villiers’s case seems to rely heavily on certain contracts entered into between Metelerkamp and herself. In June 2000 the first contract between the two parties was drafted. De Villiers accuses Metelerkamp of letting the last two pages of the original, signed version thereof disappear. Metelerkamp regards such accusations as irrelevant, as she alleges that the contract of June 2000, wherein De Villiers was stipulated as the author and Metelerkamp as publisher, lapsed after a year. In March 2003 Metelerkamp requested De Villiers to sign a second contract in which Metelerkamp is referred to as the author/publisher. De Villiers refused.⁶⁴⁸

Metelerkamp did not hesitate to defend herself against De Villiers’s allegations. After Jonker’s death and through the involvement of Jack Cope, Jonker’s documents and possessions went to the National English Literary Museum (NELM) in Grahamstown. At some stage Jonker’s older sister Anna went to collect all the

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material, as she wanted to write Jonker's biography. After Anna died of a heart attack, her daughter, Cathy de Villiers, drove from Onrus to Sea Point to collect the suitcases and boxes containing Ingrid's belongings. As she did not have storage available (at that stage she rented a cottage in the garden of Jan Rabie and Marjorie Wallace) she left these with her brother, Anthony Bairos.

Metelerkamp phoned Bairos and alleges that Bairos immediately requested payment for the items in his possession. She then phoned Otto Liebenberg at NALN in Bloemfontein and asked his assistance. Some time later she read in *Die Burger* that Bairos had sold all the documents to Gerrit Komrij of the Netherlands. Metelerkamp further alleges that Anna Jonker had given some indication that NELM in Grahamstown and the Document Centre in Stellenbosch were entitled to Ingrid's documents.

However, Cathy de Villiers had not left all the documents with Bairos, and Anna had made some photocopies. This resulted in De Villiers being in possession of two unmailed letters of Jonker's, various photocopies and photographs.⁶⁴⁹ De Villiers came into contact with Metelerkamp and Metelerkamp admits that the idea for the book had its origin with De Villiers. Metelerkamp's own information, together with the NELM register at Grahamstown, made her realise that enough information existed for such a project. This initiated nearly three years of intense research.⁶⁵⁰

Metelerkamp further justifies the fact that De Villiers was left out of the rest of the process of writing and publishing the book and sharing in any profit by claiming that she did it in the first place for Simone, Jonker's daughter, so that Simone could at least benefit from her mother's heritage. According to Metelerkamp the greater part of the proceeds of the work is to go to a trust created for Simone.⁶⁵¹

Despite the many positive reviews, Breyten Breytenbach described the work as “’n aasvoëlboek”.⁶⁵² Breytenbach was furious because his poem “Ballade van die ontroue bemindes”, and a picture of him and his wife Yolande that had been taken in Paris, were included without his permission. Metelerkamp's defence is that she sent Breytenbach a fax and two e-mails to ask his permission to publish the poem, to which he did not respond. Thereupon she asked the advice of a good friend of

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Jonker's, who advised her to publish it. Metelerkamp admits that, in retrospect, that was a mistake.⁶⁵³ According to Breytenbach's friend of many years, Ampie Coetzee, Breytenbach was upset because the dispute, which he regarded as a matter between Metelerkamp and himself, was disclosed in the press. He also did not react to any newspaper enquiries regarding the matter.⁶⁵⁴

Kerneels Breytenbach confirms that it is standard practice in the publishing industry that when an entire poem is taken over by another author, the permission of the poet and his publisher is obtained, the source of the poem is mentioned and the poet is paid for the use of his work. Merely removing the poem from subsequent editions does not therefore constitute sufficient rectification of Metelerkamp's mistake.⁶⁵⁵

The question remains whether Metelerkamp's work is original or not. Book reviewers pointed out several aspects of *Ingrid Jonker – beeld van 'n digterslewe* that are indicative of expended skill and labour.

Parker points out the many readers' aids provided by the compiler, such as a chronology of events at the beginning of the book; a complete index of book sources at the back which gives an indication of the extent of Metelerkamp's research; an alphabetical index of important people in Jonker's life and a reader-friendly layout with marginal notes.⁶⁵⁶ Parker further states that Metelerkamp succeeds in presenting her extensive research in an accessible way.⁶⁵⁷

Olivier asks what better gift Afrikaans literature could be presented with than Metelerkamp's finely edited publication on the life of Ingrid Jonker. He describes the work as a popular introduction to the archives about Jonker and probably the best portrait of a writer in Afrikaans. The compiler's role stays limited to the organisation of the material according to the course of Jonker's life. Although she took great care to try to paint an objective picture, it cannot be said to be totally objective, as naturally it does not contain all available facts and material. Olivier firmly states his belief that the compiler's decision not to interpose her own opinions is the more difficult approach, rather than the easy way out.⁶⁵⁸

Odendaal also points out certain aspects that serve as fingerprints of the skill and labour expended by the compiler. Metelerkamp's hand is evident in the chronological arrangement of material, the dissection of longer texts so that other material can be fitted in between and the addition of captions and linking passages. Like Olivier, Odendaal states that it is not correct to describe the work as objective. It could rather be described as the placing of different views and evidence next to one another in an attempt to facilitate the most probable conclusion. Olivier laments the fact that an evaluation of the quality and importance of Jonker's writings is absent.⁶⁵⁹

Van Vuuren describes Metelerkamp's book as *diggeweef* ("tightly woven") and rich in previously unknown information and perspectives. The juxtaposing of disparate sources weaves a canvas that cannot all be taken in at first. Van Vuuren is of the opinion that through her readable and informative text, with aesthetic skill, Metelerkamp brings regeneration to the genre of Afrikaans biography.⁶⁶⁰ Grundling goes as far as to describe the work as a "biographical quantum leap in Afrikaans".⁶⁶¹

Kannemeyer also points to a certain degree of novelty in the work. According to this most experienced Afrikaans biographer, Metelerkamp's objective presentation of available facts represents something "new" in Afrikaans biography. He describes her attempt as extremely gripping.⁶⁶²

3.8 Conclusion

The case studies set out above highlight three important aspects of the overlap between the legal and the literary concepts of originality. The foremost requirement relating to plagiarism is that an author should not create the impression that he is the source of a literary work when it has been "borrowed" from another. Secondly, the legal requirement of "skill and/or labour" is confirmed by the literary and philosophical concept of "crucial distance"; the covering of distance implies the exertion of skill and/or labour. Thirdly, the legal concept of *adequate* skill and/or labour is reflected in the literary concept of how "tightly woven" (*diggeweef*) a work is, which is also a question of degree. The more tightly it is woven, the more likely a

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work is to be regarded as original and the closer it comes to being recognised as “literature” in the technical sense of the word.

Van Vuuren points out three factors that play an important role in whether an author who derives matter from the work of another, without acknowledging his or her sources, will be accused of plagiarism. These are the stature of the author, how the genre the author works in differs from that of the plundered work, and how much the length of the “new” work differs from that of the “original”.

Probably the most important outcome of these case studies is that they indicate how an artistic community can be divided and deprived of precious potential due to inadequate means of handling and defusing originality and other copyright disputes.

Chapter 4

4. Postmodernism as a paradigm for determining originality in the 21st century

4.1 Originality: A historic and futuristic perspective

4.1.1 The manuscript era

The era of the manuscript arose with the invention of writing. It ended with the duplication of manuscripts through the technology available at the time. In Europe the duplication of manuscripts began as a direct result of the emergence of the information market. The demand for manuscripts at approximately the beginning of the fifteenth century led independent merchants to develop an assembly-line division of labour. Specialists in lettering, decorative initialing, gold ornamentation, proof-reading and binding worked together to speed up production.⁶⁶³ These developments were expedited by the mechanisation of printing that occurred in the mid-fifteenth century.

What Landow refers to as the “ancient or medieval manuscript”⁶⁶⁴ differs from the manuscripts existing around 1450 when Gutenberg invented the mechanical printing press. This distinction between “ancient or medieval manuscripts” and what may be called “Renaissance manuscripts”, pervades Landow’s discourse aimed at portraying copyright as a product of print technology that will change as technology advances.

4.1.1.1 The “ancient or medieval manuscript”

It seems that the first and most effective protection of intellectual property was found in ancient Egypt. Non-priests overheard citing the sacred rituals were liable to immediate execution. From this Plowman and Hamilton logically deduce that a

similar prohibition must have applied to the replication of the hieroglyphs which described these rituals.⁶⁶⁵

Plowman and Hamilton also observe⁶⁶⁶ remarkable similarities between modern copyright and copyright principles in legal literature developed over centuries by the Jewish rabbis:

The early prophets referred to the stealing of words from another. This concept was later expanded in Jewish religious law to the principle of 'reporting a thing in the name of him who said it'. In Talmudic law, the reporters who orally passed on principles of law from one generation to another were very careful not to express such principles without mentioning the author. Only when the reporter developed a principle that was original and unprecedented did he adopt it as his own.⁶⁶⁷

Landow elaborates on the character of the manuscript during Greek times and thereafter.⁶⁶⁸ Contemporary readers of Plato, Vergil or Augustine processed text without inter-word spacing, capitalization, or punctuation. Had you read this paragraph fifteen hundred years ago, it would have taken the following form:

landowelaboratesonthecharacterofthemanuscriptduringgreektimesandthereafteritisexplained thatcontemporaryreadersofplatovergiloraugustineprocessedtextwithoutinterwordspacingcapitalizationorpunctuationhadyoureadthisparagraphfifteenhundredyearsagoitwouldhavetaken the following form

For understandable reasons such texts were easier to read if read aloud, which drew listeners and turned reading into a kind of public performance. Landow explains why such an encounter would have been a very rare and privileged opportunity. First of all you would have had to discover the existence of the manuscript. Thereafter you would have had to make an inconvenient, expensive and often dangerous trip in the hope of gaining access to the particular manuscript.⁶⁶⁹

Eisenstein observes that the first role of the scholar in a manuscript culture was simply to preserve the text. It was under a twofold threat of degradation. Firstly, physical handling of the fragile document reduced its longevity. Secondly, the manuscript was inevitably altered by copyists copying the manuscript to preserve and transmit its text. The text was further open to modification by the addition of notes and glosses, which, after being written, became an integral part of the manuscript and gained the same status as the original text.⁶⁷⁰

Thus every manuscript physically written by Plato, Vergil, or Augustine (each existing as a unique object) exposed itself to change every time it was read. Furthermore, many (continually changing) versions of such a (continually changing) manuscript would have been created by copyists and readers turned commentators. It is therefore concluded that “each ancient or medieval manuscript, which embodied only one of many potential variations of a text, existed as a unique object”. In the manuscript culture the quest was therefore not so much “to determine... some probably mythical and certainly long-lost master text but the ways individual readers actually encountered Plato, Vergil, or Augustine”.⁶⁷¹

Landow stresses the fact that during the time of the “ancient or medieval manuscript, the aim was not to legally protect the fruits of individual minds, but to keep conversation flowing”.⁶⁷²

On the other hand, according to Ploman & Hamilton, there are numerous statements in the writings and correspondence of Roman authors and public figures that point to a recognition of certain concepts of intellectual property. References are made to contracts between authors and publishers and to authors selling their work for publication, indicating that the right of the author of a literary work to control the publication thereof seems to have been generally accepted.⁶⁷³

Plagiarism was recognised as morally wrong.⁶⁷⁴ According to Garnett, James & Davies, the word plagiarism derives from the Latin *plagiarius* (an abductor or kidnapper). They define plagiarism as the practice of copying the work of another and passing it off as the copier's own.⁶⁷⁵ Ulmer reports that “there was undoubtedly a strong feeling, at least in some *élite* circles already in Antiquity, that the creator of

literary or artistic work was alone entitled to praise and honour, and that plagiarism was highly immoral".⁶⁷⁶ In the words of Garnett, James & Davies, plagiarism was condemned as an immoral and contemptible practice from the earliest historical times, but it was not illegal as there was no law regulating plagiarism. Ploman & Hamilton conclude that there is no direct evidence that such legal sanctions existed in Roman times.⁶⁷⁷

The earliest recorded copyright case occurred in sixth century Ireland. Columba, a prominent medieval Irish scholar-monk, visited his old teacher Abbot Finnian for the purpose of making a clandestine and hurried copy of Finnian's *Psalter* or *Book of Psalms*. Upon hearing of Columba's deed, Finnian contended that this act constituted a theft, because the transcript was the offspring of the original work. King Dermott ruled in Finnian's favour with the following words: "To every cow her calf, and consequently to every book its copy."⁶⁷⁸

During the Middle Ages, intellectual work was largely carried out by the clergy for pious purposes. Works were not regarded as the product of an individual, but of the religious and spiritual community represented by the monastery.⁶⁷⁹ With time, however –

Not only monasteries, but also lay persons and establishments, undertook the reproduction of books, mainly by the classical authors. By the thirteenth century the literary life in countries such as France was highly organized. Those who dealt in manuscripts were protected by the University of Paris and divided into two classes: those dealing in existing manuscripts; and the stationers, who were the publishers of the day since they acquired manuscripts, made copies and had them disseminated among the public.⁶⁸⁰

4.1.1.2 The "Renaissance manuscript"

Meggs describes the climate in Europe during the first half of the fifteenth century as follows:

The demand for books had become insatiable. The emerging literate middle class and students in the rapidly expanding universities had snatched the monopoly on literacy from the clergy, creating a vast new market for reading material.⁶⁸¹

It must have been this “vast new market” that made Johann Gutenberg to dedicate 15 years of his life to the development of a mechanical, movable type printing machine, seeing it as a worthy investment. Despite the demand, producing books was still a frustratingly slow and expensive process. It took a scribe four or five months to copy a two-hundred page book. In 1424 the University library at Cambridge housed only 122 manuscript books. The value of a book was equal to that of a farm or vineyard.⁶⁸²

Although the copying of manuscripts by hand was a time-consuming process, the well-established block-printing process enabled copies to be produced with amazing speed and accuracy. The block cutter quickly and accurately carved away the surface around the reverse image that had been transferred to the wooden block, enabling a skilled printer to pull over two hundred impressions per hour.⁶⁸³ The obvious drawback of this method was that the text could not be changed. Nevertheless, the democratising ability of printing that Landow attributes to the Gutenberg press was already visible in block-printing technology. Block printing made card playing, formerly the game of kings, also the game of peasants and craftsmen. Whereas in 1415 the Duke of Milan played cards with painted ivory slats and Flemish nobles used engraved silver plates, the working class played with cards block printed and stenciled on coarse paper.⁶⁸⁴

Even though certain types of copyright clearly seem to have existed before the invention of the printing machine, one has to agree with Garnett, James & Davies that there was little practical need for legal protection of authors against the copying of their works.⁶⁸⁵ Generally speaking, the situation can be summarised in their observation that, in today’s terms, classical authors were concerned with their moral rights and enjoyed very few economic rights.⁶⁸⁶

Seignette, who starts her historical survey of the development of the book trade after the invention of the book press, acknowledges the fact that a “sense of

authorship” may have existed before Gutenberg's invention. With reference to Dock, she states that several authors have presented evidence that there was already a clear sense of authorship before the existence of the printing press. In this regard Seignette also refers to Ballin, *Urheberrecht am Scheideweg*, where it is suggested that the invention of the printing press slowed down the development of author's rights. Seignette's translates the relevant passage as follows:

The fact that the emerging awareness of the concept of authorship coincided with the invention of a machine – the printing press – is an utter tragedy... The place of the creative human being was taken over by the owner of a machine: the printer-publisher, i.e. a third party who did not participate in the creation.⁶⁸⁷

4.1.2 The fixed text era

4.1.2.1 The mechanisation of print and its consequences

In 1440, all the elements of mechanical print work were known in Europe. All that was lacking was the printing machine itself.

Movable type had been invented by the Chinese, but as Eastern written language systems consist of literally thousands of characters, movable type was of little use in the Far East.⁶⁸⁸ All over Europe, however, printers were investigating movable type, recognising it to be an important factor in the mechanisation of book production.⁶⁸⁹ As presses were already used in making wine and cheese and baling paper,⁶⁹⁰ the key to Gutenberg's invention was not the press mechanism. It was the development of an adjustable type mould used to cast individual letters. Being adjustable, the type mould enabled narrow characters such as “l” to have the same margin around the character as wide characters such as “m”, enabling the type to be set into words and phrases with equal intervening spaces.⁶⁹¹

Gutenberg used his knowledge as metalsmith to develop a unique alloy that was soft enough to cast, but hard enough to endure thousands of impressions and not expand and contract when melted. As the ink used in wood block printing would run

off or puddle on non-absorbent metal type, Gutenberg had to use thick, tacky ink that was evenly applied to the metal type with a leather ball.⁶⁹²

Seignette describes how the new opportunity for large-scale reproduction of books introduced the element of risk to the book industry. The printing process required equipment and supplies, an investment which could only be recouped if many copies were sold. As reprints could generally be marketed at a lower price, the risks involved were exacerbated by competitors who reprinted books that were being successfully sold by other printers:

In order to minimize the risk involved in printing, printers turned to the authorities, who appeared to be willing to meet the demands of this new industry. By the turn of the century, kings, emperors, land-owners and city-states started to guarantee printer territorial exclusivity by granting privileges, the most common instrument for creating rights in the feudal system.⁶⁹³

During the Renaissance, privileges were granted on a larger scale than before.⁶⁹⁴ Ulmer defines a privilege (within a copyright context) as an *ad hoc* act of grace, granting an exclusive right in favour of an individual author, publisher or printer to reproduce and distribute a named work for a specified (usually short) period of time.⁶⁹⁵

According to Ulmer, it seems to be the Duke of Milan who, in 1481, granted the first known exclusive right to *print* a work. The Republic of Venice granted Sabellicus the privilege for the printing and sale of his history of Venice.⁶⁹⁶ According to Ploman & Hamilton, the first printing privilege was granted by the city of Venice in 1495 to the publisher Aldus Manutius.⁶⁹⁷

Ploman & Hamilton state that: “most experts seem to agree that the functions of the privileges had little to do with protection of the author and his rights”. Generally speaking, privileges served to protect the publishing industry and served as a tool to maintain public order through censorship.⁶⁹⁸

Ulmer contends that the Sabellicus privilege, being a favour to an *author* and not given with the primary motive of promoting the publishing and printing trades, is an important milestone in the development of authors' copyrights.⁶⁹⁹ Ulmer regards privileges like these as the first initiatives of rulers to protect the interests of writers, composers and artists.⁷⁰⁰ "As the German book trade developed and became concentrated in Frankfurt and Leipzig in the sixteenth and seventeenth centuries, it became customary for the authorities to grant privileges to authors upon request". Although there is a difference of opinion as to whether such privileges conferred non-statutory authors' rights upon creation or upon publication, authors' privileges reinforced the link between the exclusive right to print and the author, "even though the grantors did not yet link the privilege to the intellectual creation embodied in the manuscript".⁷⁰¹

Roman lawyers and their medieval European successors concerned themselves with rights in specific physical objects or against specific persons. A great intellectual leap was required to invent the legal basis for protecting rights in the intellectual substance as an object in itself, as opposed to rights in physical products of the mind. Ulmer describes how the need for such intellectual effort became very "pressing" when the invention of the printing press made the reproduction of works less demanding in terms of time, skill and cost than the actual composition.⁷⁰²

The emergence of natural law thinking in Europe from the seventeenth century onwards facilitated the transformation of the vague notions of intellectual property from a merely ethical into a legal idea.⁷⁰³ State censorship proves to have been an obstacle; for instance, although the German statutes of the late seventeenth century were clearly influenced by the natural law concept of intellectual property, privileges remained necessary for effective protection.⁷⁰⁴ According to Laddie, Prescott & Vitoria, it "would appear that before the eighteenth century the book trade was small enough to be run successfully as a fairly close-knit guild, powerful enough to discipline recalcitrant members".⁷⁰⁵

Rose observes that the development of the idea of copyright as an immaterial property right was reflected in another eighteenth century innovation: paper money.

Money became “immaterial” in the sense that it now was “a matter of the circulation of signs abstracted from their material basis.” Also, just as the acceptability of commercial paper depended on the credibility of note issuers and endorsers, so literary property was underwritten by the author’s personality.⁷⁰⁶

Ulmer describes the nineteenth century, especially the second half thereof, and the first part of the twentieth century, as a classical period in the development of copyright, on both national and international level. Theoretical analysis of copyright also made great strides during this period, with German law professor Josef Kohler being heralded for his decisive contribution to the emergence of modern Continental copyright law.⁷⁰⁷ Although Kohler acknowledged that authors’ rights and patents were based on the same basic assumptions as property in corporeal goods, he qualified authors’ rights and patents as *rights to incorporeal goods* – “immaterialgüterrechte”.⁷⁰⁸ The rationale for these rights to incorporeal goods was Locke’s labour theory that every man has a natural right to the goods he creates.⁷⁰⁹

4.1.2.2 The publishing industry

When his machine printed its first page, it is unlikely that Gutenberg could have foreseen the consequences this invention would bear. It led to books becoming less expensive and more accessible to a larger part of society. The attention was directed from the preservation of information in the form of fragile manuscripts that degraded with frequent use to the consumption of precious information contained in a manifold produced format that in itself is not worth much and is therefore free to be *used*.⁷¹⁰ As many identical copies of the same text could now be produced, discourse was stimulated in the sense that the interlocutors could now all have the same texts available to launch their conversation and to refer to as authority.

Scholarly writing had, however, not yet been freed by print technology. As is generally known, research and articles that challenge prevailing paradigms are at serious risk of being rejected for publication. As Gleick so accurately describes:

Years later Feigenbaum still kept in a desk drawer, where he could get at them quickly, his rejection letters. By then he had all the recognition he needed. His Los

Alamos work had won him prizes and awards that brought prestige and money. But it still rankled that editors at the top academic journals had deemed his work unfit for publication for two years after he began submitting it. The notion of a scientific breakthrough so original and unexpected that it cannot be published seems a slightly tarnished myth.⁷¹¹

Regarding the economic implications of print, which led to new conceptions of originality and authorial property, Landow's conclusion that the writer in the print era is free from subservience to wealth needs serious qualification.⁷¹² Apart from some sparsely spread exceptions, the fixed page writer is still bound by economic factors, perhaps even more so than the writer of the manuscript era.

Although every reader in the manuscript period was free to cross from reading to writing without any substantial expense, in many instances he was dependent on the support of a patron. His travels to obtain access to various manuscripts and his day-to-day needs while busy reading and writing had to be financed. Such dependence inevitably led to subservience to wealth.⁷¹³

In the fixed page era, becoming a writer involves publishing. The South African industry employs an estimated 2000-3000 people full time (compared with 20 000 in the British publishing industry), while further providing employment for freelance editors, designers, desktop publishers, typesetters, reproduction houses and printers. Publishing is also linked to the paper manufacturing industry, the book printing industry and booksellers. Approximately 9000 South African authors earn around R150 million in royalties annually.⁷¹⁴

Publishers have the unenviable task of balancing the interests of authors, literature and consumers, while at the same time promoting sound business principles that include the interests of investors and will ensure the long-term survival and growth of the industry. Publishers also function as gatekeepers and arbitrators of literary taste and culture.⁷¹⁵ In the words of Altbach, publishers are "part of an intellectual system which consists of both the circulation of ideas and trends in a society and economic and institutional structures".⁷¹⁶

The most fundamental principle in the publisher's mind is the fact that book prices are derived from printing and production costs. **Increasing the print run reduces the unit cost.** This means that the smaller a market becomes, the less viable a project aimed at that market would be.⁷¹⁷ Factors affecting small markets are:

- language (e.g. minority languages as opposed to English)
- genre (e.g. currently prose is preferred to poetry)
- specialisation (e.g. academic books relating to specialised fields)
- illegal copying (the more that are copied, the fewer need to be printed, for only a few will be bought)
- a well-developed library system (e.g. hundreds of people read a book that was paid for only once).⁷¹⁸

Although publishing needs to be profitable for the industry to survive, profit is not the publishers' only aim. As Van Zyl of NB Publishers explains,⁷¹⁹ an undertaking that imports caterpillar tractors can stop doing so if this is no longer financially viable, but the publisher has a moral obligation to continue publishing certain works even though he knows it to be at a financial loss. He emphasises that publishers continue to publish poetry and other works of merit, well knowing that they will sell poorly. Van Zyl further states that, in South Africa, poorly selling works of literary merit are not subsidised by government, as is the case in countries like France and the Netherlands. Publishers themselves have to endeavour to finance such works by cross-subsidisation from titles that sell well.

Cross-subsidisation is, however, hampered by the situation that the best-selling South African writers, such as Wilbur Smith and JM Coetzee, publish their work in London, as more readers can be reached by doing so. Although they can not be resented for their decision, the fact remains that indigenous publishers would be able to publish 10 to 20 young writers on the success of a single top seller.

Furthermore, authors adapting their voices to suit readers elsewhere in the world dilute our indigenous heritage.⁷²⁰

Although in the case of most books published in South Africa, subsidiary rights arising from the work do not play an important role, these certainly are a very important economic consideration when deciding whether to publish a manuscript or not. Subsidiary rights include, but are not limited to, serial and extract rights, translation rights, motion picture, radio and television rights, book publishing rights leased to another publisher, anthology and quotation rights and the right to reproduce the work or any part thereof by sight or sound or a combination of both, or electronically.⁷²¹ In short: The manuscript of *Harry Potter and the Philosopher's Stone* had the potential of becoming far more than a single children's book. From the following comment by Davies it becomes clear just how important a factor potential income from subsidiary rights is when deciding whether to publish:

[S]ubsidiary rights managers in trade publishing houses are extremely important people who know exactly how to milk the last drop of income out of a book. It is not that unusual... for the subsidiary rights actually to make the difference between scraping by and achieving an acceptable profit.⁷²²

It is therefore no wonder that, in many publishing contracts, the subsidiary rights clause encompasses a number of pages.⁷²³

4.1.2.3 Information market versus print technology as origin of copyright

Very importantly for the purposes of this thesis, Landow states that historians of print technology point out that economic factors associated with book production led to the development of both copyright and related notions of creativity and originality.⁷²⁴ Modern concepts of intellectual property derive from the organisation and financing of book production and from the uniformity and fixity of text that characterises the individual book.⁷²⁵

Regarding economic factors and fixity leading to the development of copyright, two remarks need to be made. Firstly, as manuscript assembly lines existed during the pre-Gutenberg era, economic factors associated with book production go further back than the financing of printed books, whatever the printing technique. Even in ancient Rome, slavery allowed labour-intensive manual reproduction.⁷²⁶ It is suggested that, even if no printing technique had ever been invented and manuscripts were still mass-produced by hand, the copyright concept would still have emerged. Secondly, viewed from a block-printing perspective, the notions of uniformity and fixity were even more firmly set in the days before the Gutenberg press with its movable metal type.

The point is that, even if no printing process had ever been invented, manuscripts would still have been copied by hand on a relatively large scale. It is therefore suggested that the emergence of a need for copyright should not be traced back to the development of a certain type of technology, but rather to the emergence of the information market. “Information market” refers to the ever-growing need for information that is met by mass production of information products through whatever technology is available. It just so happened that the rising of the information market synchronised with the advancement of print technology. However, what is true is that the information market was (and still is) fuelled by print technology: books created a demand for more books, resulting in more books being printed, which again gave rise to a need for more books.

What one regards as the origins of copyright has a major impact on how one sees its future. Viewing copyright as the result of print technology leads to predictions that copyright will radically change and even die out as technology advances to include concepts such as the internet and cyberspace. Seeing copyright as the result of the birth of the information market implies that copyright will indeed change as technology advances, but that its role will escalate in the light of the ever-increasing role information is playing in modern society.

4.1.3 The postmodern era

Postmodernism originated in the United States of America.⁷²⁷ The term was initially used in American architecture, but was soon applied to all current cultural expressions, such as literature, painting, music, film, theatre, philosophy and theology.⁷²⁸ Owing to the cultural boycott, state of emergency and strict censorship, South Africa experienced political and cultural isolation during the 1970s and 1980s. Scheepers heralds September 1988 as the birth date of postmodernism in South African literature, when *Tydskrif vir Literatuurwetenskap* dedicated both its September and December editions exclusively to postmodernism.⁷²⁹

4.2 Postmodernism

4.2.1 Defining postmodernism

Postmodernism is notoriously difficult to define.⁷³⁰ The adaptiveness of this “chameleon-like term”⁷³¹ can be ascribed in part to the fact that postmodernism serves as explanation, excuse and footnote for every modern-day dilemma,⁷³² including copyright issues. As with Jacques Derrida’s concept of logo centrism, there can never be only one answer to “what is postmodernism?” One answer would mean suppression of evidence that would undermine that answer.⁷³³

Although there is no consensus regarding the meaning, the range or even the validity of the term “postmodernism”, it is evident from the wide range of publications dealing with postmodernism that it has become an interpretative strategy that reaches to nearly every aspect of modern society. Scheepers defines postmodernism as the label and overarching period indicator attributed to eclectic cultural forms which have dominated the cultural viewpoints of the United States of America and Europe for the past three decades. The characteristics of postmodernism she chooses to highlight by including them in her definition are self reflexivity, irony and the combining of popular and elitist art forms.⁷³⁴

According to Scheepers, the definition of postmodernism most frequently referred to is that of Brian McHale, which focuses on the ontological aspect of postmodernism.⁷³⁵ Scheepers herself regards the contradictory nature of postmodernism as the greatest common factor in the postmodern discourse.⁷³⁶

In her definition, Hambidge describes postmodernism in terms of how it relates to parameters set by society. She defines postmodernism as an artistic movement that examines, re-examines and ironises the boundaries of the artistic medium⁷³⁷ — including the frontiers of the law of copyright.

The palimpsest proves to be a very handy metaphor to describe the nature of the postmodern text. The palimpsest was a parchment scroll that was written on during a time when writing materials were extremely precious. Writing was scratched from the parchment so that it could be used again. Modern photographic techniques make it possible to read the underlying text that is often of greater worth than the surface text. In the context of postmodernism, “palimpsest” refers to text that shows signs of earlier, underlying texts, even though the author consciously or unconsciously tried to erase those texts.⁷³⁸

Another way to try to define postmodernism is in terms of modernism. At this point it is important to note McHale’s conclusion that “modernism and postmodernism are not successive stages in some inevitable evolution from less advanced to more advanced aesthetic forms, but rather alternative contemporary practices.”⁷³⁹ Modernistic text is a therapeutic instrument against the disorder of the human being and his incoherent world. At its best postmodernism only describes the symptoms of the postmodern person by sharing in his uncertainty.⁷⁴⁰

Most critics evade the problem of defining the concept by identifying various characteristics of postmodernism.⁷⁴¹ Again postmodernism shows its resistance to being pinned down, in that no two commentators’ lists of characteristics are exactly the same.

What follows is a compilation of attributes of postmodernism. It is important to note here that it is possible for a text boasting postmodern characteristics to be

fundamentally modernistic and *vice versa*.⁷⁴² Discussion of the various characteristics is based on how they relate to the concept of originality. These are:

- Rebelliousness
- Resistance against “master narratives and universal truths”
- Fragmentation and mosaicism
- Fading boundaries
- Contradiction
- Playfulness
- Labyrinth
- Intertextuality

a) Rebelliousness

According to Hambidge, the whole concept of the author’s textual property rights is being challenged. It seems that copyright is intentionally ignored and transgressed.⁷⁴³ It is the aim of postmodern text to intentionally undermine authority.⁷⁴⁴

b) Resistance against “master narratives” and “universal truths”

Modernists oppose the present chaos by creating “master narratives” that may be of a religious, historical, cultural, political, scientific or aesthetic nature. In contrast, the

subtle force of postmodernism is located in its resistance to the build-up of power that is acquired through the appropriation of certain truths.⁷⁴⁵

The postmodernist has learnt that logical reasoning does not provide “universal truths” in dealing with issues such as the death penalty, euthanasia, abortion and cloning.⁷⁴⁶ To this list copyright can be added. The postmodernist, whether wittingly or unwittingly, shows his distrust of the master narrative of copyright law by creating texts that challenge existing rules.

c) Fragmentation and mosaicism

As we are, from a postmodern point of view, prisoners of the pre-existing narrative, the only way to create something “new” is by using fragments of what already exists.

This aspect of postmodernism is very well reflected in the artistic concept of the “found object”, which basically means that one is to use anything except an artist’s brush to create art – literally *anything*, from tin foil to condensed milk. An example of the creating of text from “found objects” is Carlos Fuentes’s *Terra Nostra*, where characters from the works of various South American authors play a round of poker.⁷⁴⁷

d) Fading boundaries

True to its rebellious nature, postmodernism is notorious for its ability to question and to blur boundaries between “high” and “low” art forms. On the other hand, the wide range of fragments available for selection by the postmodern author tends to lead to eclecticism.⁷⁴⁸ Another result of this equating process, as Hambidge acknowledges, is that the first work is contaminated by the second. Mona Lisa will never be the same again after being seen with a moustache, hair curlers or an “I love Leonardo” T-shirt. Elevated aestheticism necessarily becomes playful banality or everyday commercialism.⁷⁴⁹

Postmodernism highlights the fact that knowing reality is an uncertain, even impossible ideal.⁷⁵⁰ This degeneration of the boundaries between fact and fiction corresponds with the movement to ignore the principles of discernment between genres: An autobiography is not “truth”, a fictional text not “imagination”.⁷⁵¹

Postmodernist works do not attempt to reflect the world or its consciousness, for postmodernists do not believe in the concept of “reality”. The boundaries between reality and fantasy fade, as postmodernism does not even attempt to represent the outside world, but rather creates its own.⁷⁵² Every “Big Brother” household across the globe is a contemporary example of the creation of a world within a world.

In postmodern works, as in hypertext, the roles of author and reader overlap. The postmodern text begs the reader to consummate the work through reproducing it by rewriting, reviewing, or performing.⁷⁵³ In order to be a postmodern author, one needs to be a reader. Writing produces writing.⁷⁵⁴ Postmodernism is artistic recycling.⁷⁵⁵

In the light of the above it is postulated that, generally speaking, the question of whether a pre-postmodern boundary – e.g. between “high” and “low” art, fact and fiction, reality and fantasy, author and reader – has been crossed, can be viewed as a manifestation of the test to determine if a work is original or not.

e) Contradiction

All theorists endorse the contradictory nature of the postmodern.⁷⁵⁶ Despite it being elitist, ordinary people can also understand it.⁷⁵⁷ Although it makes us aware of the already said, it also makes a new contribution.⁷⁵⁸ Although it brings the hope of change, it does not make a difference.⁷⁵⁹ The postmodern author is narcissistic, yet self-denying.⁷⁶⁰ It is a contradiction that as one author draws our attention to the already existing work of another, postmodernism actually resensitises us to the importance of the author.⁷⁶¹ Some embrace copyright as a means of encouraging creativity, others regard it as a means of depriving individuals and society of the means to develop further.

f) Playfulness

Hambidge gives various examples of parody from the art of painting, as found in Ward Kimball's *Art Afterpieces*, one of which is Degas's "Nude fixing her hair" that represents a nude model with a bikini tan. Hambidge comments that all Kimball's examples banalise and ridicule the "original" work. At the same time such a joke acknowledges the magnificence of the "original" work. Since an unknown work would not be dealt with in such a jocular manner, the eminence of the work is acknowledged and a new view from the spectator is required.

The problem with postmodernism's playful nature is that authors often feel themselves free to, under the cloak of postmodernism, disregard copyright. In addition, not all postmodern texts are playful in the fun sense of the word. Although Hambidge in *Judaskus* plays around with the content of many authors, *Judaskus* cannot be said to be playful in the same sense as a Mona Lisa portrayed with curlers is playful. In *Judaskus* the self-consciousness of the author comes to the fore. The work appears to be a very serious attempt by the author to flaunt the extent of her reading.⁷⁶²

g) Labyrinth

From the labyrinth, which is the central metaphor of postmodernism, no escape is sought.⁷⁶³ This labyrinth is perceived to have no boundaries. The metaphor does not seem to refer to the two-dimensional maze constituted by pruned hedges that one sees in the gardens of European palaces. It is perceived as being (at least) three-dimensional, stretching to infinity on all sides. When seen as such, it is understandable why the postmodernist does not believe that one can experience a creative surge that can lift you from the maze. Any such surge would simply bring one to the part of the maze "above" (where is up and under in outer space?) where you were previously standing.

Brink describes the labyrinthine womb in which *Donkermaan* developed as such a crow's nest of quotations and second-hand references in the main character's head that he is unable to identify them all.⁷⁶⁴

h) Intertextuality

Intertextuality is an integral premise within the postmodern context.⁷⁶⁵ Castell's use of the karaoke metaphor illustrates the intellectual property implications of intertextuality well. The listeners are so familiar with the original melody that the interpretation thereof by an unknown person does not harm the original song.⁷⁶⁶

According to Hutcheon, parody is mimicking with an ironic inversion or distance from the original text.⁷⁶⁷ Parody is the most important consequence as well as the most complicated modus of postmodernism. It illustrates the inter-art traffic of postmodernism well and,⁷⁶⁸ as central vehicle of the postmodern, accentuates all principles and characteristics of the movement.⁷⁶⁹

Parody illustrates the fact that postmodern art is representation that points to other, already existing texts.⁷⁷⁰ As a form of non-parasitical symbiosis,⁷⁷¹ parody widens the view of the original (first in time) text.⁷⁷² It is a way in which an author can survey and come to terms with the intimidating tradition within which authoring takes place.⁷⁷³ What is more, parody continually engages in some form of criticism of society and of other works.⁷⁷⁴

As criticism can be temporarily masked by its playful touch, parody frequently succeeds in conveying the most caustic commentary of all.⁷⁷⁵ As satire is a lesson, so parody is a game in which the reader plays expositor.⁷⁷⁶ Revealing all sources would take the fun out of this hermeneutical game. Part of the fun is unravelling the intertexts.⁷⁷⁷

Extremely important for copyright purposes is that, according to Hutcheon, parody should not only be in the eye of the beholder, but must also be encoded in the text.⁷⁷⁸ In short, it must be obvious that the text is flirting with other texts(s), and the reasonable reader must be able to decipher from the text which the other texts are.

4.2.2 Criticism of postmodernism

For the sake of completeness it has to be mentioned here that not all commentators on postmodernism share the same enthusiasm. For instance, Conradie criticises Hambidge for writing a whole book on the subject without duly referring to critics such as Norris, Kellner, Lyotard and Baudrillard.⁷⁷⁹

To Hambidge, postmodernism means a heckling of existing text through which the status of such source is confirmed – as in parody – incorporating a high degree of originality. For others, such as Jameson, postmodernism essentially means “blank parody” or pastiche, encompassing a low degree of originality. According to such commentators, postmodernism licenses the creation of spiritless works without the will to engage in satire and humour, the deadness of which is overpowering the present culture.⁷⁸⁰

It is thus clear that classification of a work as being postmodern does not mean that it can be said to be original or not original on that basis alone. Originality in terms of postmodernism is a slide rule with blank parody (low degree of originality) at the one end and brilliant parody (high degree of originality) at the other end. Therefore each work's originality has to be measured on its own merits. The fact that minimal originality may cast a dismal shadow over cultural well-being should be taken into account when deciding whether a work is to enjoy copyright or not.

4.2.3 Beyond postmodernism

In the words of Gert Vlok Nel “you must be postmodern. Or post postmodern. Pomomo. You must be pomomo. We're all on our way to pomomo. As the Beach Boys to Cocomo.”⁷⁸¹

Beyond postmodernism lies unknown territory. Signs of irritation at low levels of originality are evident. Loots gives the example of art lecturers who are compelled, on assignment hand-in day, to accept window dolls with two strategically placed stars under the banner of “postmodern art”. Further, according to Loots, the “foot

soldiers” are sceptical, especially regarding the deconstructive characteristics of postmodernism, such as fragmentary and achronological story lines, incoherent characters and the undermining of representation. However, playfulness, irony and eclecticism are here to stay.⁷⁸²

Escape from the pre-existing seems nearly impossible,⁷⁸³ and postmodernism is likely to feature for the foreseeable future. What is likely to vary, however, is the level of originality that is acceptable to society, as well as the importance of the characteristics of postmodernism in relation to one another.

4.2.4 Postmodernism and originality

Hambidge complains that, though we live in the midst of the postmodern era, even literary critics are so uninformed about the characteristics of the postmodern text that they still expect text to be original.⁷⁸⁴

Wholeness and “originality” (newness) are the hallmarks of modernism.⁷⁸⁵ Opposed thereto stands the postmodern that makes no claim to newness, as it acknowledges that everything has already been said. For the postmodernist, originality can only be achieved by selecting fragments from the existing and arranging it in a way that creates new relationships between texts.⁷⁸⁶ Postmodernism is about representing what has already been said in a new or different way.⁷⁸⁷ There is less emphasis on innovation and experimentation than upon self-conscious imitation and linguistic play.⁷⁸⁸

One of the metaphors for modernism is the ceramic vase, representing wholeness, originality and coherence.⁷⁸⁹ Since fragmentation and mosaicism are important facets of the postmodernism, the mosaic is an important metaphor in this regard. True to its rebellious nature, postmodernism shatters mirrors (metaphor for mimesis),⁷⁹⁰ lamps (metaphor for romanticism),⁷⁹¹ ceramic vases (modernistic works) and fellow mosaic works on the floor, selects fragments from the rubble and then creates a new work.

Although the emphasis seems to be on the fragments and the (typically incoherent) pattern assembled from them, equal or even greater importance lies in the gaps between the fragments. According to Barthes, the most erotic places are “where the garment gapes”. Iser also accentuates the empty places that determine how a text is read.⁷⁹²

Originality therefore also exists in the space left for original interpretation by different readers that is created by arranging fragments in a certain way. When a reader strokes over a “gap” in a text, does the grout remain fixed, or is there the possibility of it opening like a magic door leading to another world? This possibility echoes McHale, who defines postmodernism in terms of its ontological aspect.⁷⁹³

Therefore, originality does not depend only on the degree of labour and/or skill expended on selecting and compiling fragments to form a certain fragment design, but also on the degree of labour and/or skill expended on selecting and compiling fragments in such a way that other worlds are opened up to the reader. The originality of the compilation thus co-dependes on the dimensions of the gaps between the fragments.

It is interesting to note that the fewer fragments taken to compile a mosaic, the fewer gaps are created. This means that the selection and compilation of few fragment(s) and/or the dimensions of the gap(s) need to show a higher degree of labour and skill expended per fragment and/or gap in order to qualify as original, than a work consisting of hundreds of fragments and the resulting gaps. This means, for instance, that in the case of a parody based on a single line of poetry, a relatively high degree of labour and/or skill will be required in order to alter the sole fragment in hand into something that can qualify as an original work in its own right.

4.2.5 Test for Originality

What follows is an examination of how *littérateurs* determine whether a work is original or not and an attempt to reconcile this with the already stated legal definition above.⁷⁹⁴

Two principles seem to dominate the originality debate by littérateurs. They are:

- First: If you want to steal, make sure everybody knows how and where to expose you.⁷⁹⁵
- Second: “Crucial distance”⁷⁹⁶

4.2.5.1 First principle

The intention to steal must in some way be overtly signalled, so that it is recognised and accepted. The postmodern writer should at least make use of a “nudge-nudge-wink-wink approach”.⁷⁹⁷

4.2.5.2 Second principle

De Vries refers to what McHale calls the “crucial distance” between the parody and the model being parodied that is necessary in order for a rewritten text to succeed, as well as Hutcheon’s “critical distance that allows ironic signaling of difference at the very heart of similarity”. De Vries confirms that within such distance lies the key to postmodern originality. De Vries unwittingly indicates the overlap between the postmodern and legal concepts of originality: as any runner or writer would be able to tell you, “distance” is associated with sweat, practice and pain.⁷⁹⁸ “Crucial distance” can therefore be equated to the copyright law concept of “skill and/or labour”.

Defending accusations of unoriginality against Hambidge, André le Roux states as follows: “*sy skommel te swaar aan haar gedigte*”.⁷⁹⁹ The transformation of milk into other products through churning serves as an apt metaphor for the creation of original works by applying skill and/or labour to that which already exists. Expenditure of skill and/or labour creates distance; as butter differs from milk, so the “new” work is distinguishable from the old.

In his biographical sketch of Andries Albertus Pienaar (Sangiro),⁸⁰⁰ Van der Bank evaluates opinions⁸⁰¹ on the remarkable points of resemblance between Sangiro's work and that of the German author Fritz Bronsart von Schellendorff.⁸⁰² One of the remarks made points to an interesting aspect of the "crucial distance" concept. Dekker says that the parts "waar Sangiro sy eie koers gaan, dikwels die bes geslaagde dele [is]".⁸⁰³ Against this stands Fred de Vries's review of *In Tangier We Killed the Blue Parrot*,⁸⁰⁴ where he states that, in this debut work, Adair's postmodern game works to her disadvantage. In her preface Adair lists six books by Paul Bowles and two by his wife Jane, from which she quotes, without indicating in the text itself where these quotations are, leaving it to the reader to identify them. According to De Vries, the overall impression is that the well-written parts are "stolen" from the Bowles texts, while the inferior parts must be Adair's. Adair therefore becomes the victim of her own postmodern game.⁸⁰⁵ The principle that can be derived from these examples is that, unless one is an established author like Sangiro and Hambidge, it is to one's own advantage to identify one's own skill and/or labour ("crucial distance") invested in an intertextual work.

Furthermore, according to Scheepers, crucial distance also refers to distance in terms of time. It is not possible for a writer to write a successful parody of current trends, as the transgressions or applications become obvious by the passage of time alone.⁸⁰⁶

Parody always pretends that its creation was effortless.⁸⁰⁷ Painting a moustache on a print of the Mona Lisa does not seem to require too much. Irony is, however, a very important indicator of originality in the present "inter-art traffic". Although creating a crucial distance through irony may often seem to require little labour, it does require a high degree of skill.⁸⁰⁸

4.2.6 Originality as an indicator of literary value

Littérateurs regard originality as an indicator of the literary value of a work.⁸⁰⁹ In the words of S.C. Pepper, the aesthetic value of "literature" is dependent on the "amount and diversity of material integrated".⁸¹⁰ Therefore the higher the degree of skill and/or labour expended ("amount and diversity of material incorporated"), the higher

the degree of originality and therefore the closer the text comes to being regarded as “literature”.

4.3 Hypertext as an aspect of postmodernism and its influence on originality

4.3.1 Hypertext era

Hypertext is an aspect of postmodernism made possible by the availability of computer technology during this era. The importance of hypertext within the context of this thesis can be summarised by statement that it changes our understanding of authorship and creativity (or originality) by moving away from the bounds created by page-bound technology.”⁸¹¹

It is uncertain exactly how and where and when hypertext came into being.⁸¹² The concept is traced to a pioneering article by Vannevar Bush in a 1945 issue of *Atlantic Monthly*. It called for mechanically linked information-retrieval machines to help with what was already becoming an information explosion. According to Bush, with one fact or idea in its grasp, the mind snaps instantly to the next that is suggested by association of thoughts. Conventional information storing systems do not operate along the same paths as the brain, frustrating the researcher.⁸¹³

Bush proposed an apparatus called the “memex”: “a device in which an individual stores his books, records and communications, and which is mechanized so that it may be consulted with exceeding speed and flexibility”. As the idea first came to Bush in the mid-1930s, before the days of digital computing, he conceived of his invention as a desk with transparent screens, levers and motors for rapid searching of microform records. Through the use of dry photography, marginal notes and comments could be added by the reader. The essential feature of the memex lay in the concept whereby any item could be caused at will to select immediately and automatically another – “linking” in terms of present hypertext systems.⁸¹⁴

The simplest way to define hypertext is to contrast it with “traditional” text, as does Nielsen:

All traditional text, whether in printed form or in computer files, is *sequential*... First you read page one. Then you read page two. Then you reach page three...

Hypertext is *nonsequential*; There is no single order that determines the sequence in which the text is to be read...⁸¹⁵

Kaplan, as referred to by Van Heerden in his discussion of LitNet as a hypertext journal, describes hypertext as a menu of alternative routes, trapdoors, *cul de sacs* and circle routes – a structure that does not yet exist.⁸¹⁶ In a nutshell: Hypertext is text comprising blocks of texts and the electronic links that join them.⁸¹⁷

Nielsen points out that true hypertext is further characterised by the following attributes:

- An overview diagram. Due to limited screen space, the overview diagram need only display detail regarding the local neighbourhood of the user’s current location.⁸¹⁸
- Bi-directional links, meaning that the system should be able to show the user the links that have the current node as their departure point as well as the links that have that node as their destination.⁸¹⁹
- Supporting links across various forms of computer networks, such as Local Area Networks and international networks.⁸²⁰
- Freedom for users to move freely through the information, according to their own needs, meaning short response times and low cognitive load.⁸²¹

Nielsen concludes his definition of hypertext with the following comment:

When asked whether I would view a certain system as hypertext, I would not rely so much on its specific features, command, or data structures, but more on its user interface ‘look and feel’.⁸²²

4.3.2 How hypertext influences originality

Walter J. Ong, as cited by Landow, terms the present age the “secondary orality”, as it strikingly resembles the primary, preliterate orality. Resemblances include “its participatory mystique, its fostering of a communal sense, its concentration on the present moment, and even its use of formulas”.⁸²³ If it is accepted that hypertext is taking us back to a pre-print (manuscript) culture, and as copyright and the related concept of originality have been shown to stem from the duplication of unitary linear text through whatever technology is available, then the contents of “copyright” and “originality” need to be reviewed in the light of the present (postmodern) culture.

What follows is an assessment of how hypertext technology influences originality.

4.3.2.1 Mutability of text

Unlike the spatial fixity of text reproduced by means of book technology, electronic text always has variation, for no one state or version is ever final; it can always be changed.⁸²⁴

In the 1998 case of *Accesso CC v Allforms (Pty) Ltd*⁸²⁵, one of the questions the court had to answer was whether copyright existed in a certain form “representing a statement of account to be used by medical practitioners in the rendering of accounts”.⁸²⁶ With reference to *Waylite Diary CC v First National Bank Ltd*,⁸²⁷ Le Roux J held that, when having to decide whether the work is of so commonplace a nature that it is not copyrightable, “a court must also consider what the *consequences would be of awarding copyright to a particular work*” (my italics).⁸²⁸ The court then asks what the consequences would be of awarding copyright to the form in question. The court does not think that the awarding of copyright would preclude the respondent from carrying on its business, and similar businesses from

distributing forms. It was concluded that the contents of the form were commonplace and would not attract copyright, but that the layout of the form had required skill, judgment and labour by the author (in other words, it was *original*) and therefore merited copyright protection.

If one transfers the foregoing to Wilhelm du Plessis's "Die Redding van Vuyo Stofile", it raises the question of whether "Die Redding" is an original work. As in the case of the *Waylite Diary*- and *Accesso*-judgments, the court would have to consider the consequences of its decision whether copyright exists in Du Plessis' work or not. A court decision to the effect that "Die Redding" is not an original work and therefore does not enjoy copyright would probably mean that all copies of *Die Mooiste Liefde is Verby* would have to be withdrawn from the market and pulped. The detrimental consequences of such a decision would be that a promising young Afrikaans author and the other six who contributed to the collection would suffer, in addition to the financial losses Human & Rossouw (a recognised and valuable member of an already vulnerable indigenous publishing industry) would sustain. Consideration of such consequences by the court could possibly have tipped the scales in favour of a decision that "Die Redding" was indeed original.

Had *Die Mooiste Liefde is Verby* been published in electronic format, a decision that "Die Redding van Vuyo Stofile" was not original would have caused far less actual or potential damage. The judge could then have ordered all copies of the work to be withdrawn from the electronic bookselling chain and altered in a specific way in order for it to qualify as original and thus to enjoy copyright. Such an order might entail the deletion of Du Plessis's work from the electronic book, or merely the insertion of the words "Malamud in Afrika" beneath "Die Redding van Vuyo Stofile", a three-word phrase which, according to Van Vuuren, could resolve the whole problem.⁸²⁹ Understandably this process would be even easier, faster and less expensive when a work is published on the internet. Other options the court could have considered would include orders to link *The Magic Barrel* and/or commentaries that appeared in the wake of "Die Redding van Vuyo Stofile" in hypertext format to Du Plessis's text. As Landow explains:

One can imagine hypertext presentation of books (or the equivalent thereof) in which the reader can call up all the reviews and comments on that book, which would then inevitably exist as part of a complex dialogue rather than as the embodiment of a voice or thought that speaks unceasingly.⁸³⁰

In linear texts it is customary for reference to be made in the form of foot- or endnotes. There is thus no reason why icons linking “Die Redding van Vuyo Stofile” to texts that indicate the relationship between Du Plessis’s work and that of Malamud could not serve as adequate referencing, without the text itself having to be altered in even the slightest way to acknowledge Malamud’s text.

4.3.2.2 Hypertext’s influence on meaning of “work”

Under the above heading the nature of the object that needs to be original in order to enjoy copyright is examined from a hypertext perspective.

In terms of subsection 2(1) of the Act, nine categories of works are eligible for copyright – provided that they are original: Literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs.

As explained above, present copyright legislation primarily evolved as a means of protecting the intellectual and financial investments required for the production of fixed, unitary text through whatever technology is available. As the notion of an individual, discrete work becomes increasingly undermined and untenable within the hypertext era,⁸³¹ and as without fixity one cannot have a unitary text,⁸³² hypertext is changing the contents of the acknowledged concept of “works”.

Hypertext technology slots perfectly into what Toffler terms the “blip culture”, which forms part of the so-called Third Wave: our present information environment wherein the senses are bombarded with diverse, incoherent images and information fragments. Toffler’s First Wave, Second Wave and Third Wave concepts are explained below.

The First Wave is the name given to the period before the industrial revolution. First Wave individuals typically lived in semi-isolated agricultural communities. Growing up and growing old, these people were given the same connected “strings” of precepts and ideas and images at home and at church and at school. Out of these were built their extremely narrow models of reality, the borders of which were further entrenched by community consensus and pressures to conform.

Industrialism brought the Second Wave:

The Second Wave multiplied the number of channels from which the individual drew his or her picture of reality. The child no longer received imagery from nature or people alone but from newspapers, mass magazines, radio and, later on, television. For the most part, church, state, home and school continued to speak in unison, reinforcing one another.⁸³³

During the Second Wave the mass media was used to “standardise the images flowing in society’s mind-stream” - across regional, ethnic, tribal and linguistic borders. Images such as that of Marilyn Monroe’s skirt blown by the wind became “standard parts of a universal filing image”.⁸³⁴ The mass media created a mass mind.⁸³⁵

Toffler compares the Third Wave to an information bomb exploding in our midst, showering us with a shrapnel of images.⁸³⁶ To remain relevant, one needs to keep revising one’s image file; keep replacing older images based on past reality – faster and faster. It is impossible to keep up. Therefore images and ideas become increasingly temporary, more disposable. Theories, ideologies and celebrities rise and fall in small expanses of time.

As the Second Wave was characterised by the mass media, so diversity is the hallmark of the Third Wave. More papers, more magazines, more radio stations, more television networks, more video games and video cassettes and DVDs and more web sites are all at work dissecting the audience into mini-publics and de-massifying our minds.⁸³⁷ Toffler describes this as follows:

On a personal level we are all besieged and blitzed by fragments of imagery, contradictory and unrelated, that shake up our old ideas and come shooting at us in the form of broken or disembodied ‘blips’. We live, in fact, in a ‘blip culture’.⁸³⁸

Instead of trying to force received blips into Second Wave frameworks, Third Wave people are always looking out for concepts and metaphors to form their own “strings” of blips.⁸³⁹

It is remarkable how Toffler’s 1980 blip culture description is not only visible in the human psyche of the twenty first century, but also in our hypertext era concept of text. Although hypertext in no way prevents those interested in reading in terms of author and tradition from doing so,⁸⁴⁰ “text” can now also refer to highly unforeseeable, extremely variable strings of blips created by postmodern writers and – very importantly – readers.

The individual hypertext lexus (text block) associates with whatever text links to it, destroying the “cell membrane” that traditionally separates one text from another. Landow, who uses the membrane metaphor to describe the disintegration of textual separation, is of the opinion that:

...destroying now-conventional notions of textual separation may destroy certain attitudes associated with text, but it will not necessarily destroy text. It will, however, reconfigure it and our expectations of it.⁸⁴¹

Once inserted into a network of electronic links, a document no longer exists by itself, but always in relation to other documents in a way that a page-bound document never can.⁸⁴² Fixed text is like ice, hypertext like water.⁸⁴³ As ice can turn into water, so what was previously a book, when placed in a hypertext environment, becomes merely a node within a network of references.⁸⁴⁴

Furthermore, in hypertext “the metatext or document set – the entity that describes what in print technology is the book, work, or single text – has no center”.⁸⁴⁵ In

hypertext the centre of the text is the user's own interests for the investigation of the moment.⁸⁴⁶ The centre of the print text is much more consistent.

In print “anything in the main text is clearly more important than anything outside it”.⁸⁴⁷ The writer can only concentrate on a quoted section by the repeated combination of full quotation, selections and paraphrase thereof in the main text, if that section is central to the argument.⁸⁴⁸ In contrast, in hypertext the “other authors” are virtually present, participating in the discussion in that the reader is able to centre-stage their voices by the click of a button.

Although hypertext does not permit the active reader to change someone else's text, it narrows time and space and fields of study that separate individual documents from one another in the world of print and manuscript.⁸⁴⁹ Although a letter on “SêNet” cannot be changed by another person, the contents thereof can speedily (the site is updated once a day, six days a week) be contradicted or affirmed by anyone anywhere in the world.

Distinction between the interior and exterior of a particular text becomes irrelevant in hypertext. This reminds us of the manuscript age “where the text of ‘Plato’ couldn't not be involved, at least in a virtual, dynamic, lateral manner, with all the worlds that composed the system of the Greek language”.⁸⁵⁰ It is within the parameters of “the physically isolated discrete text” that text needs to be demarcated,⁸⁵¹ like land being bounded by borders in order to establish property rights within those confines. In hypertext, the text appears to fragment into constituent blocks of text that “take on a life of their own... less dependent on what comes before or after in a linear succession”.⁸⁵² Furthermore, the formation of metatexts by linking individual sections of individual works increasingly undermines the notion of an individual, discrete work.⁸⁵³

Generally speaking, any substantial part of a copyrighted work is protected. The liquefaction of text in a hypertext environment therefore ought not to create too big a deviation from the meaning of “work”, as this was a broad and adaptable concept even before the dawn of hypertext.

However, Aristotelian philosophy prevailed. The world was dedicated to order and Lucretius's vision of the *clinamen* has gone unheeded for nearly two millennia. The Western world craved order, and that is what Newton provided. Newtonian philosophy pervaded all of society, and every social system became aimed at order.⁸⁵⁸ It is a soothing idea that, although complexities exist that result in chaos and cannot as yet be tracked by scientists, they might one day be able to do so and then there will be no more chaos. That is probably the reason why Newton rules supreme even to this day.⁸⁵⁹ This mindset sees only the tragedy of disorder, failing to appreciate that rising disorder paves the way for opportunities for change, relocation and improvement.⁸⁶⁰ The desire for stability amounts to little more than a desire for death, the consummate stability.⁸⁶¹

Exponents of the Romantic revolution of the late eighteenth century, such as Goethe, Wordsworth, Blake, Byron and Shelley, regarded change, disorder and disequilibrium as positive features of nature. By doing so they led a relatively minor *clinamen*-like revolution against Newtonian philosophy's hold on cultural thought.⁸⁶²

The modern study of Chaos began with the gradual realisation in the 1960s that, even though a butterfly stirring the air in Peking could transform storm systems next month in New York, systems as violent as a waterfall were still modelled by quite simple mathematical equations.⁸⁶³ People tend to disregard nonlinear features (e.g. friction), when they require a good comprehension of a system. You cannot assign a constant importance to friction, because its importance depends on speed, and speed again depends on friction. Although such twisted changeability makes nonlinearity difficult to calculate, it creates rich kinds of behaviour that never occur in linear systems.⁸⁶⁴

During the 1970s a few scientists from different fields began studying disorder. A surprising *order* was found in everything, from the irregular beating of a human heart causing sudden death, to the rise and fall of gypsy moth populations, to the galactic clustering of stars.⁸⁶⁵ Many premodern cultures saw chaos as the soup of energy out of which change, creativity, and hope have sprung.⁸⁶⁶ Western civilisation is once again beginning to see chaos as a place of opportunity. Chaos theory as a precise means of articulating a "vision that has been aging and ripening

for centuries, awaiting the right cultural moment to be brought out of the cellars”,⁸⁶⁷ can be attributed to our Third-Wave, postmodern culture.

According to Müller, *modernism*, from which *postmodernism* originated, has its starting point in the (re)discovery of relativity. Although both modernism and postmodernism accept chaos (relativity), the difference lies in the fact that modernism tries to structure chaos, whereas postmodernism is opposed to any such structuring.⁸⁶⁸ In one way or another the characteristics of postmodernism⁸⁶⁹ are all related to its acknowledgement of the fact that we live in a nonlinear world in which linear “solutions” don’t necessarily offer workable answers.

Gleick described analysing a nonlinear equation as being “like walking through a maze whose walls rearrange themselves with each step you take”.⁸⁷⁰

Postmodernism – the labyrinth – can therefore also be described as an aspect of Chaos. Chaos and postmodernism are also alike in that both these concepts break across the lines that separate different disciplines.⁸⁷¹

In his book *Hurting Toward Oblivion*, futurist Richard A. Swenson analyses the forces driving our current culture and thus our future. The first such force is the concept of “profusion”, defined as the “generalized phenomenon of *more*: more people, more progress, more products, and more of everything else you can think of all added together”.⁸⁷² The exponentiality of profusion leaves us seriously behind in understanding our world, simply because there is too much to understand. Furthermore, each object that profusion introduces into the world is affected by fallibility. Modern airliners crash. Computers go off line. Nuclear power is employed in building bombs. As nothing is purely good, the total fallibility of our world is increasing rapidly along with profusion, leading to an increasing opportunity for fallibility to express itself. Chaos therefore seems to be on the increase.

The science of Chaos does not, however, refer to chaos in the disorderly sense of the word, but, as Demastes explains, to the vast middle realm that lies between the extremes of order and disorder, embracing a certain stability as it also promotes change. Any stability we experience is temporary and nonlinear, not a culmination, but part of a process of ascent and decline as time progresses. This stability is

neither as invariable as order's linearity, nor as random as pure disorder. What the new scientists call Chaos is orderly disorder: humans and nature pursuing constant change and reorder.⁸⁷³ Demastes provides the following important perspective:

While one cannot help but acknowledge that chaos theory has become “dreadfully fashionable,” we must also be forewarned that, as Kellert argues, in many ways “chaos theory is not as interesting as it sounds” (*In the wake of Chaos*, p. ix). Chaos theory does not precisely undermine or overturn Newtonian laws; it quite simply redirects our viewing of them and of nature so as to appreciate the chaos that was heretofore ignored.⁸⁷⁴

Scientists regard “chaos theory” as too inexact a term to describe this new science. As N. Katherine Hayles puts it:

“[C]haos theory” and the “science of chaos” are not phrases usually employed by researchers who work in these fields. They prefer to designate their area as nonlinear dynamics, dynamical systems theory, or, more modestly yet, dynamical systems methods. To them, using “chaos theory” or the “science of chaos” signals that one is a dilettante rather than an expert.⁸⁷⁵

This is echoed in the following caution by Ibsch: “... we should be aware of the fact that uncertainty or chaos in the sciences has a well-defined position.”⁸⁷⁶

4.4.2 Applying Chaos to Originality

Chaotic behaviour in the natural sciences varies from that in the social sciences. Principles from the natural sciences, where Chaos originated, cannot be unreservedly transferred to the social realm. A wavelet, for instance, resonates directly with any other wavelet that happens to be within its physical proximity, but only with those in its proximity. Due to, inter alia, human communication channels, only a limited number of (legal) persons may be able to communicate with a limited number of other (legal) persons, although those communicated with (e.g. through the internet in a language that is understood by both) may be at some distance.

Therefore natural systems are said to be Chaotic, while social systems are “at the edge of Chaos”.⁸⁷⁷

Even though many strains of Chaos pervade every social system – natural science (e.g. quantum physics), economics, politics, spirituality, social sciences, literature (in Deon Meyer’s *Proteus*, “Van Heerden” even asks “Allison” if she is familiar with the theory) and law – there is much more to it than the popularly known butterfly effect. Only the influence of the most basic Chaos principles on originality is discussed here. The application of Chaos on law does, however, lend itself to an extensive and groundbreaking study that promises valuable results.

French philosopher-mathematician Auguste Comte (1798-1857) argued that more complex bodies of knowledge depend on relatively simpler ones. One would start with mathematics, proceed through astronomy to physics, and then to chemistry, followed by biology and finally “sociologie” (sociology). “Sociologie” today would most probably encompass all the social sciences and their applications.

Comte did not imply that a knowledge of physics automatically led to a knowledge of chemistry. What he meant was that to understand chemistry, one must know physics. Although physics by itself is insufficient to explain chemical reactions, the structure that constitutes the corpus of chemistry is based on physics.⁸⁷⁸

Physicist B. West and virologist J. Salk (the discoverer of the polio vaccine) proposed that the “life sciences” (e.g. physics and chemistry) build on the “physical sciences”(e.g. biology), and that the “human sciences” build on the “life sciences”. “Human sciences” would include decision-making and therefore would involve great complexity and uncertainty.⁸⁷⁹

Even though the “edge of Chaos” concept seems to contradict Comte and West and Salk’s conclusions regarding the degree of complexity in social as opposed to natural sciences, it can be reconciled by what Swenson terms “profusion” and “fallenness”: Living on the edge of Chaos *today* does not leave one much more in charge than trying to manage a truly chaotic natural system *yesterday*.

The two most basic conclusions reached through studying chaos are:

- Simple, deterministic systems could breed complexity; and
- There are patterns to be observed in even the most complex systems.

As with all science before the dawn of Chaos, legal science also attempted (and still does) to pinpoint certain issues in the belief that the simpler the question that can be formulated, the more certain and accurate and stable the answer would be. This philosophy is the foundation on which legal concepts such as “legal certainty”, “legal positivism”, and the quest to accurately determine the “legal question”, are based.

Ronald Fox, as quoted by Gleick, describes a person introduced to Chaos as follows:

You now look at any problem you looked at before, no matter what science you're in. There was a place where you quit looking at it because it became nonlinear. Now you know how to look at it and you go back.⁸⁸⁰

Fox's words form an apt description of the thought process that preceded this dissertation. The initial approach was to attempt to reduce the originality issue down to a single “linear” question. It was assumed that a simpler, more specific question would lead to a simpler, linear answer to a “nonlinear” problem. As the study developed, the futility of this approach became evident. The aim then became to derive a *set* of linear questions, that would have led to a *set* of linear answers that together would solve the nonlinear problem.

It soon became clear that even the simplest, most deterministic question could breed complexity. As Fox describes, there came a point where the chosen subject seemed nonlinear and insolvable. I then familiarised myself with Chaos theory. I went back and found both the problem (when is a creative literary work original?), as well as the legal test for originality (adequate skill and/or labour) to be...

nonlinear. Not only does the “skill and/or labour” part of the test mirror the postmodern concept of “crucial distance”,⁸⁸¹ but the originality test⁸⁸² acknowledges Chaos as well. The legal test for originality is therefore not to be viewed as weak due to its uncertainty, but rather as strong in its acknowledgement of Chaos.⁸⁸³ It is therefore concluded that the problems surrounding originality do not lie with the legal test as it presently stands, but rather with the application thereof. This aspect is developed in Chapter 5: Conclusions and Recommendations.

Chapter 5

5. Conclusions and recommendations

5.1 Summary and conclusions: originality

5.1.1 Legal requirements for originality

The originality requirement, as it appears in Section 2(1) of the Act, originates in English law. “Sufficient skill and/or labour” have to be expended for a work to be original in the legal sense of the word. In the English tradition the emphasis is on work/labour/effort rather than inspiration/creativity.⁸⁸⁴ How much is “sufficient” is a question of degree. It is difficult – impossible even – to say precisely how much skill and/or labour need to be contributed, for much depends on the facts of each case. Even if different adjudicators all apply the same “sufficient skill and/or labour” test to the same creative literary work, they may still differ in their answers as to whether that particular work is original or not.⁸⁸⁵ What is clear, however, is that only a low degree of skill and/or labour is required.⁸⁸⁶ The legal test thus acknowledges the nonlinearity of the originality concept and does not claim to provide linear solutions to a complex problem. Therefore, although having its roots in the seventeenth century and even before that,⁸⁸⁷ the legal test for originality is well in line with the prevailing interdisciplinary acknowledgement of Chaos.⁸⁸⁸

“Skill” and “labour” are generic terms. Depending on the facts of each case, aspects of skill and/or labour such as effort, knowledge/expertise, thought, insight, creativity, imagination, innovation, talent, taste, judgment, discrimination, time and money can all serve as indicators of originality.⁸⁸⁹ In jurisdictions the world over the question is asked whether labour alone, in the absence of a “creative spark”, can suffice to render a work original. This is an important question in relation to works such as telephone directories and data banks that play an important role in our present culture. Generally speaking “sweat of the brow” / “industrious collection” is protected or in the process of being protected,⁸⁹⁰ although not necessarily through copyright

law. In South Africa (in common law tradition) labour is protected by copyright law.⁸⁹¹

It is important to note that the product created must be the result of the individual's *own* intellectual efforts and thus in a sense original to him. An author may not adopt the labour of another, but must go through the process himself.⁸⁹²

Is there an objective element to the originality test? Both the “relevant”⁸⁹³ and the “meritorious distinctiveness”⁸⁹⁴ elements require that it is the *special features* of a work – that which is not copied, that which is distinguishable from the commonplace – that must be original. Labelling this identification of the relevant subject matter as an “objective element” to the test for originality would be an overstatement. It can rather be described as a logical demarcation of the boundaries of the subjective enquiry as to whether adequate skill and/or labour is present.⁸⁹⁵

5.1.2 Literary requirements for originality

The legal requirement of “skill and/or labour” is confirmed by the literary and philosophical concept of “crucial distance”; the covering of distance implies the exertion of skill and/or labour.⁸⁹⁶ Adequate skill and/or labour is reflected in the literary concept of how “tightly woven” (*diggeweef*) a work is,⁸⁹⁷ which is also a question of degree.

Fierce moral blame befalls the author who intentionally creates the impression that he is the source of words, ideas or structures, whether copyrighted or not, that have been borrowed from another, often resulting in the author's disappearing from the literary scene.⁸⁹⁸ Factors that play an important role in whether an author will be accused of plagiarism are the stature of the author, how the genre the author works in differs from that of the plundered work, and how much the length of the “new” work differs from that of the “original”.⁸⁹⁹

5.1.3 Postmodernism as a paradigm for determining originality in the 21st century

Originality in terms of postmodernism is a slide rule with blank parody/pastiche (low degree of originality) at the one end and brilliant parody (high degree of originality) at the other end.⁹⁰⁰

As it is the aim of postmodern text to intentionally undermine authority,⁹⁰¹ the concept of textual property rights is being challenged and copyright is seemingly intentionally ignored and transgressed. The postmodernist, whether wittingly or unwittingly, shows his distrust in the master narrative of copyright law by creating texts that challenge existing rules.⁹⁰² Postmodernism examines, re-examines and ironises boundaries, including copyright law frontiers. Generally speaking, the question of whether a pre-postmodern boundary – e.g. between “high” and “low” art, fact and fiction, reality and fantasy, author and reader – has been crossed, may indicate that skill and/or labour has been invested.⁹⁰³

Originality does not depend only on the degree of labour and/or skill expended to select and compile fragments to form a certain fragment design, but also on the degree of labour and/or skill expended to select and compile fragments in such a way that it opens up other worlds to the reader. Originality of a compilation thus co-dependes on the dimensions of the gaps between the fragments. The fewer fragments taken to compile a mosaic, the fewer gaps are created. This means that the selection and compilation of the fragment(s), and/or the dimensions of the gap(s), need to show a higher degree of labour and skill expended per fragment and/or gap in order to qualify as original than a work consisting of hundreds of fragments and resulting gaps.⁹⁰⁴

Postmodernism is likely to feature for the foreseeable future. What is likely to vary, however, is the level of originality that is acceptable to society, as well as the importance of the characteristics of postmodernism in relation to one another.⁹⁰⁵

If the present hypertext age is termed the “secondary orality”, as it resembles the preliterate orality, it would be philosophically speaking quite sound to withdraw *Die Mooiste Liefde is Verby* from the bookselling chain and insert “Malamud in Afrika”

beneath “Die Redding van Vuyo Stofile”. Technically speaking, as distinction between the interior and exterior of a particular text becomes less relevant in our hypertext frame of mind, the thorough job done by *littérateurs* in linking “Die Redding van Vuyo Stofile” with *The Magic Barrel* may fulfil the same role as a sub-heading or a footnote to this end within the text itself.⁹⁰⁶

Modernism, from which *postmodernism* originated, is said to have had its starting point in the (re)discovery of relativity.⁹⁰⁷ The characteristics of postmodernism are all related to postmodernism’s acknowledgement of the fact that we live in a nonlinear world in which linear “solutions” don’t necessarily offer workable answers. The problem (when is a creative literary work original?), as well as the legal test for originality (adequate skill and/or labour expended) are *nonlinear*. The legal test for originality is therefore not to be viewed as weak due to its uncertainty, but rather as strong in its acknowledgement of Chaos, which does not refer to chaos in the disorderly sense of the word, but to the vast middle realm that lies between the extremes of order and disorder, embracing a certain stability as it also promotes change.⁹⁰⁸

5.2 Protection of original “ideas” under appropriate circumstances⁹⁰⁹

Although a general protection of ideas would negatively influence the free flow of information in society, idea protection measures are developing, especially in the United States of America, where ideas are a very valuable commodity, especially in the film industry.

In the United States, creators of ideas not embodied in works and creators of copyright works who have found that only the idea and not the expression has been borrowed, have looked especially to state contract law to protect their ideas. However, the courts place obstacles such as concreteness, novelty and pre-emption in the way of a person seeking idea protection under one of the contract theories.

As Brennan & Christie conclude, an undue focus on material form leads to results that are inconsistent with the underlying objectives of copyright law. According to

Swarth, in cases where a plaintiff has disclosed an idea that the defendant then exploited, the most suitable standard for the “concrete” requirement is to ask whether the interpreter (the defendant) could have produced the end product if the author (the plaintiff) had not produced the elaborate idea. Swarth suggests that, if the law of ideas is going to promote progress, it should strive towards creating an environment where the idea purveyor can feel confident that he may freely and safely contract for the sale of his product, while prospective buyers are protected from spurious claims for infringement and breach of contract. For the reasons set out under 3.3.2 above, Swarth’s suggestion that this goal may be reached by applying the two criteria “novelty” and “concreteness” in inverse ratio to one another, is plausible. The more novel an idea is, the less concrete it needs to be. On the other hand, the more concrete an idea is, the less novel it needs to be.

5.3 Problem statements and recommendations

Apart from the above conclusions as to the content of the originality concept and the protection of original ideas under appropriate circumstances, the following specific problems need to be addressed in more detail.

5.3.1 Problems primarily relating to publishers and authors

The following problems primarily affecting publishers and authors may be identified:

- Obliteration of original content
- Breach of trust by author

5.3.1.1 Obliteration of original content

(i) *Concept*

In cases where “plagiarism” is alleged, publishers’ attempts to deal with the infringing part of the work frequently also eradicate the original content of the work in question, as well as potential original works by the same author.⁹¹⁰

(ii) *Recommendations*

Section 2(3) of the Act states as follows:

A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.

A work can thus be simultaneously original *and* infringing.

Recommendation 34 of the PICC Report on Intellectual Property Rights in the Print Industries Sector advises as follows:

“If South African creative writing... [is] to have a strong presence locally and internationally, and if South Africa is not to be colonised by international content, a copyright policy needs to be created that fosters growth in local writing and publishing.”⁹¹¹

South Africa cannot afford to lose authors. In the same breath it must be said that South Africa can also not afford to disregard copyright.⁹¹² The ideal would thus be to deal with the infringement as severely as would seem appropriate in each specific case, yet in such a manner that neither the talented author nor the original content of the work goes to waste. The more original the work and/or the more promising the author, the more plausible the above ideal would be.

5.3.1.2 Breach of trust by author

(i) *Concept*

What logically stands in the way of publishers reaching towards the above goal is breach of trust by the author. Verster negligently and/or fraudulently failed to mention his sources; Botes says he was unaware of the fact that he translated existing poems into Afrikaans; Du Plessis said he had never read Malamud; and Terblanche did not play open cards with his publisher.

(ii) *Recommendations*

Perhaps, if publisher and author can be made to see the situation as our courts view the matter, this huge stumbling block that stands in the way of dealing with the infringement in such a manner that neither the talented author nor the original content of the work is lost, may diminish. As Burger J stated in *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd*⁹¹³:

In order to constitute reproduction within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the original work and the alleged infringements; and (b) some causal connection between the plaintiffs' and the defendants' work.

The blameworthiness of the "plagiarist" is therefore irrelevant for copyright purposes. All that is required is a sufficient degree of objective similarity between the original work and the alleged infringements and a causal connection between the works. This perspective may serve to turn the attention from the question of whether the author indeed intended to deceive, towards rectifying the situation in such a manner that both the talented author and the original content of the work is preserved.

It is in no way suggested that the offender must go scot-free. In line with the publishing contract, the copyright infringement should be rectified at the author's expense. Such steps may include the insertion of references in the text itself and/or the payment of licence fees.

5.3.2 Problems primarily relating to copyright law

In this regard two specific problems were identified:

- Inaccessibility of courts;
- Too few legal precedents.

5.3.2.1 Inaccessibility of courts

(i) *Concept*

As far as it could be established, the only South African court precedents that closely relate to originality in creative literary works are *Erasmus v Galago Publishers (Pty) Ltd* 227 JOC (T) and *Galago Publishers (Pty) Ltd v Erasmus* 1989 1 SA 276 (AD). The plaintiff (Erasmus) held the copyright in the first work on behalf of a syndicate who assisted Lt Col Reid Daly financially whilst he produced the work. The two authors, Ron Reid Daly and Peter Stiff, assigned their copyright to the syndicate, of which Reid Daly was also a member. These cases serve as an example of the inaccessibility of our courts. It took a *syndicate* to be able to afford to go to court and in the process provide South African copyright law with this singular precedent regarding creative literary works. The profit margin of the indigenous book is simply too small for authors and publishers to be able to afford court litigation.

The PICC Report on Intellectual Property Rights in the Print Industries Sector also recommends that civil prosecutions need to be made more effective and less onerous for rights holders.

(ii) *Recommendations*

- **Copyright advisory service**

It is recommended that a copyright advisory service be established to which persons with problems of a copyright nature can turn to for basic advice, which may include referral to a copyright attorney, licensing agency or other appropriate institution. Such a body would go a long way towards meeting the need for copyright education as identified in the PICC report.

- **Copyright Tribunal**

In order to make the courts more accessible to authors and publishers, it is suggested that the jurisdiction of the existing Copyright Tribunal⁹¹⁴ be broadened to include other copyright matters. Due to the specialised nature of cases dealing with originality in creative literary works, it is further recommended that the judge should be assisted by at least one literary and/or publishing specialist.

It is important that the Tribunal should be free to make any order which it deems fit. For instance, in a case such as that of *Die Mooiste Liefde is Verby* the Tribunal may order that, as Van Vuuren suggested and at Du Plessis's expense, stickers with the phrase "Malamud in Africa" must be printed and pasted below "Die Redding van Vuyo Stofile", both in the list of contents and where the story itself appears in the compilations.

Locus standi

According to Section 24(1) of the Act, infringement of copyright shall be actionable at the suit of the owner of the copyright. However, in the Botes, Verster and Du Plessis cases the copyright holders in the plagiarised works did not take part in the disputes and were not even aware of the controversy surrounding the relevant works.

It is therefore recommended that legislation should provide for any party with a clear interest in the case (such as the other authors that contributed their short stories to *Die Mooiste Liefde is Verby*), or acting in the public interest, to be allowed to approach the appropriate court for a declaratory order as to whether a specific work is original and, if not, an order aimed at rectifying the situation as much as possible. Any party with a clear interest in the case, or someone acting in the public interest, should also be allowed to request an interdict that prohibits the destruction of copies of an allegedly plagiaristic work, pending a ruling by the appropriate court as to the originality of that work.⁹¹⁵

Funding

The implementation of the above recommendations could be partially funded through means such as a levy payable every time an ISBN number is registered.

5.3.2.2 Too few legal precedents

(i) Concept

Jurisdictions such as the United States of America have so many originality precedents that it is possible to make a selection of case material dealing with a specific type of subject matter, such as creative literary works. Within the South African context one has to refer to cases dealing with literally anything, from hinges to wrist watches, when trying to establish what originality entails. Comparing the proverbial apples with apples is therefore not possible if one's search is limited to the South African context alone.

(b) Recommendations

South African courts frequently refer to the law of other jurisdictions in cases regarding intellectual property. The worth of legal comparison by referring to a variety of cases dealing with subject matter as similar as possible to that of the case at hand, must be stressed. For instance, in a South African case dealing with originality in a children's book, it is generally better to search for cases heard in other countries regarding originality in children's books than only to refer to South African cases dealing with originality in hinges and plastic kettles.

It is further recommended that, whether or not a case has been subjected to the scrutiny of an adjudicating body, as much material as possible concerning such matters as the above should be voluntarily donated to NALN in Bloemfontein or NELM in Grahamstown. Although the National Library, due to its statutory positioning and language inclusivity, may seem like a more designated agent to conserve such documents for future research and legal reference, I nonetheless still

recommend NALN and NELM as being more suited for this role. The service culture of the staff at NALN and the easy, speedy access to information held there make these institutions desirable vehicles for this role. Currently the museum in Bloemfontein is in the process of expanding its services to Sesotho literature. The idea is that the literatures of all the official languages should have a museum such as NALN in the region where the language is mostly spoken.

5.3.3 Summary of problem statements and recommendations

For easy reference, the four specific problems identified above, and the key aspects of the recommendations made in this regard, are listed in the table below.

Table 6 Problems and recommendations

PROBLEMS	RECOMMENDATIONS
Problems primarily relating to publishers and authors	
Obliteration of original content	Section 2(3) of the Act
Breach of trust by author	Infringement requirements
Problems primarily relating to copyright law	
Inaccessibility of courts	Copyright advisory body
	Copyright Tribunal
	Locus standi
	Funding
Too few legal precedents	Legal comparison
	NALN/NELM

It is my sincere hope that, despite the current inaccessibility of our courts to authors and publishers, the above recommendations will contribute to our understanding of the originality concept and its continuous development – in such a measure that not only South African literature, but that of other countries as well, will be able to benefit from the many factual scenarios⁹¹⁶ that play themselves out in this country. May we further succeed in conserving our talented authors and their original work, while simultaneously respecting and promoting the ideals of intellectual property law.

Research methodology

The study started out as a LLM study in 2000, upgraded to a LLD study during May 2002.

The first year of the study was spent studying three subjects that closely relate to the research topic. The available material regarding each subject was searched in order to find the concentration of information that related to the topic at hand. A curriculum for each subject was drafted, which had to be adapted and approved by the study leader, after which studying commenced.

It must be stated that, right from the beginning, the possibility of finding “new” solutions in areas relatively foreign to the issue at hand, was foreseen. Although the curricula were structured to relate to the research problem, great care was taken not to narrow down the available information to the extent of excluding lateral thinking and the creative outcomes that tend to result from such thought. Another important consideration was not to channel the study to such an extent that a bird’s-eye view of the field of intellectual property law was completely lost.

Main subject: Copyright Law

The bulk of the research consisted of the analysis of 40 court cases dealing with “originality”, five dealing with “material form” and 14 dealing with “ideas”. The subject matter of these copyright cases involved, inter alia, the following: jerseys, mine shovels, crushing equipment, hinges, gaskets, sofas, textiles, computers, rocker bins, clutch parts, the Bush War, valves, income tax, electric kettels, generators, TV games, doctors’ and dentists’ forms, high-tension wires and the Kruger National Park. The facts of each case and the part of the dictum dealing with either “originality” or “material form” or “ideas” was summarised on index cards.

Ancillary subject: Law of competition

“Passing off” is frequently used as an alternative should the action on the basis of copyright fail. An understanding of how gaps in copyright law are supplemented by developments in the law of competition is vital in order to understand the interplay between these two subjects in the larger legal context. As the Law of Competition is a relatively new and rapidly evolving field, the needs of present-day society are mirrored therein and modern solutions are offered which inspire workable answers for challenging copyright law issues.

The study focused on court cases and journal articles dealing with passing off and how copyright law is supplemented by the law of competition.

Ancillary subject: Publishing

The knowledge resources prescribed for students who wish to do an Honours degree in publishing without having completed undergraduate studies in this subject were surveyed for relevant content. A great volume and variety of resources had to be consulted in order to obtain the many invaluable bits of information that publishing resources have to offer in the research of the topic under investigation. While examining the prescribed resources, quotations relating to the research theme were marked, computerised and thematically sorted for later incorporation into the final dissertation.

“Fieldwork”

The first part of 2001, after completing the exams on the above three subjects, was spent on more practical study activities which may, in contrast to absorbing written content acquired from various libraries, be termed “fieldwork”.

A three-hour lecture on the legal aspects of editing was compiled for students in Publishing. The topic was subdivided into two themes: “Editing for personality rights” and “Diverse legal aspects”. As a very wide spectrum of legal issues had to be dealt with students with little legal background, a comprehensive range of study material in lay language had to be developed and made available on the virtual campus for the students to study outside formal lectures. A great part of the resources used by

publishing students were of English and American origin. The study material that was created aimed at harmonising the legal discussions in such sources with the South African legal position.

The “Nasionale Afrikaanse Letterkundige Museum en Navorsingsentrum” (NALN) was requested to search its records for newspaper extracts relating to infringement of copyright. Scrutiny thereof resulted in finding practical examples of copyright problems, which this study aims to address, as well as the opinions and emotions of various interested parties involved with these issues.

Further research

Apart from the three oral exams that were passed at the end of 2000 and the beginning of 2001, an oral examination was passed in front of a panel of six referees on 23 October 2001. For the said exam the previously studied knowledge resources were revised and many studied in greater detail. The study material was further supplemented.

Writing the thesis

With “fieldwork” and research steadily continuing, writing of the thesis started in the first quarter of 2002.

Necessity of study for subject field

Whereas –

- (a) a trite copyright law test for originality does exist, and
- (b) this test leaves a large scope for interpretation, and

- (c) lawyers and littérateurs tend to approach originality from different perspectives, and

- (d) the law and creative literary works rarely cross paths due to a lack of finance in the world of creative literary works,

this study should significantly benefit authors and publishers as well as enrich South African – and international – copyright law.