

**"ORIGINALITY" AND "REPRODUCTION" IN COPYRIGHT LAW WITH
SPECIAL REFERENCE TO PHOTOGRAPHS**

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Black cabs and red buses are part of the London landscape. Countless tourists, bedazzled by the sight and using expensive Nikons, cheap disposable cameras or mobile phones, have been taking snapshots of a red bus passing the Houses of Parliament in Westminster, quite often because they had seen the scene before in some or other tourist brochure, all of them oblivious of copyright issues.

There is reason to believe that the reaction of any sensible person on the Clapham bus would be that there cannot be any copyright in a photo of such a mundane scene and, in any event, unless one copies a photograph for instance by photocopying, one cannot infringe copyright. It is also unlikely that the poor tourist, turning around and photographing the statue of Mr Mandela on Parliament Square, would give a thought to the fact that he was infringing the copyright of the sculptor, at least under South African law.¹ A shot of General Smuts, though, will not cause any complication under our law, considering that the sculptor, Jacob Epstein, died in 1959 and that we have not yet succumbed to the life plus 70-regime.

The example of the red bus in London instead of a minibus taxi (or for that matter, a black Mercedes-Benz with tinted windows and no number plates) passing the Union Buildings in Pretoria is chosen not because of affectation but because of the judgment in the England and Wales Patents County Court in *Temple Island Collections Ltd v New English Teas Ltd*,² which dealt with a photo of a red bus passing those particular Houses. By the way, there are sculptures of both General Smuts and Mr Mandela in front of the Union Buildings.

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¹ Further explanation to follow below.

² *Temple Island Collections Ltd v New English Teas Ltd* 2012 EWPC 1.

To set the stage for the discussion it might be useful to relate at the outset the salient facts of the case (to which reference will be made as *Red Bus*) of His Honour Judge Birss QC who has since been appointed to the High Court. The claimant claimed to be the owner of copyright in a photograph of a red bus travelling across Westminster Bridge. The photographer stood where many tourists stand with their cameras. He knew he would be able to capture the bus heading to the south side of the river and thus show the front of the vehicle. He could ensure that other landmarks, i.e., Parliament, Westminster Bridge, and the river, were included and he would have a strong skyline. He then manipulated the photo on his computer using the standard Photoshop software. The result was an image in black and white, with the Houses of Parliament and the bridge shown in grey. The sky is white. A bright red London bus stands out on the bridge. The red colour of the bus was strengthened and the sky was removed.



The alleged infringer saw the photo and thought of producing something similar but sufficiently different so as not to infringe. He took four photographs. Three were of different aspects of the Houses of Parliament and the fourth was one of a red bus while it was stationary on the Strand. The images³ were combined and manipulated, the bus was resized to fit and the road marks were changed to be consistent.

The similarities and differences between the two photos appear from the reproductions. The court found that the first photo was entitled to copyright and that

³ The reproductions of the photographs inserted here are to be found in the judgment referenced in fn 2.

the second infringed that copyright. The judgment raised some respectful eyebrows, not in regard to its legal exposition but rather for the factual conclusion.⁴

This note is not a critique of the judgment; rather it is to indicate that the result of a case such as this depends on one's approach to copyright; that, once again, copyright has taken on a life of its own; that as long as the United Kingdom (UK) forms part of the European Union (EU), judgments with that provenance on copyright are dangerous precedents; and that our copyright law is in more than one respect caught in a time capsule.⁵

There is, unexpectedly, no local case law that is of assistance for the present discussion.⁶ As a result it is necessary to consider how foreign courts approach such matters and try to draw conclusions that might be valid in the legal context of South Africa.

The basic problem with photographs is that they are produced mechanically and more often than not without any effort or mental input. A minute number are taken for anything but personal use and in the digital age they tend to have a high degree of mobility and are also ephemeral and without any commercial value. It is accordingly difficult to justify in general terms copyright protection for them. This is not a novel insight. One of the pioneers in the field of photography who went under the name of Nadar (Gaspard-Félix Tournachon (6 April 1820 - 23 March 1910)) believed that there is no such a thing as artistic photography because in photography, as in all things, there are people who can see and others who cannot even look.⁷ He believed (considering the age in which he wrote) that 'the theory of photography could be learnt in an hour and its techniques in a day'; but, he said, 'what couldn't be taught were a sense of light, a grasp of the moral intelligence of

⁴ Eg Rahmatian 2012 *EIPR* 796.

⁵ *Krisarts SA v Briarfine Limited* 1977 FSR 557 dealt with similar issues in relations to drawings. Since the case was decided at an interlocutory stage no further reference will be made to it.

⁶ The only case of any relevance is *Laubscher v Vos* 3 JOC (W), a judgment by Nicholas J in the WLD.

⁷ Nadar Date Unknown www.photoquotes.com.

the sitter, and "the psychological side of photography - the word doesn't seem too ambitious to me".⁸

The two main issues in this context are (a) the criteria for originality and (b) the meaning of the reproduction of a photograph, and the discussion that follows will concentrate on them.

The *Berne Convention for the Protection of Literary and Artistic Works* of 1886, which applies to literary and artistic works in the literary, scientific and artistic domain, did not in its original version deal with photographs as a class of protected works in spite of the fact that the technology had already reached puberty.⁹ The UK *Fine Arts Copyright Act* of 1862 recognised that a photograph was entitled to copyright protection, although not in the same manner and to the same extent as other works. It was only with the Brussels revision in 1948 of the *Berne Convention* that photographic (and cinematographic) works were finally added to the list of literary and artistic "works"¹⁰ and photography appears on the list of the 1971 Paris version of Berne, which is binding under the TRIPS agreement on members of the World Trade Organisation (WTO).¹¹

In spite of this belated acceptance of photographs as copyrightable works by Berne, South African legislation, following developments in the UK, adopted the approach that they are artistic works and are consequently entitled to copyright protection. The *Union of SA Patents, Designs, Trade Marks and Copyright Act* 9 of 1916 defined copyright as the sole right to 'produce or reproduce' a work¹² and defined an artistic work to include a photograph. It defined a photograph to include a photo-lithograph and any work produced by any process analogous to photography.¹³ The term of copyright was fifty years from the making of the original negative from which the photograph was directly or indirectly derived; and the owner of the negative at the

⁸ Barnes *Levels of Life* 16.

⁹ For a timeline (and much more): Michalos *Law of Photography*, Greenspun 1999 photo.net.

¹⁰ For the full history: Ricketson and Ginsburg *International Copyright* paras 8.48-8.58.

¹¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994) (*TRIPS Agreement*).

¹² Schedule 3 art 1 of the *Patents, Designs, Trade Marks and Copyright Act* 9 of 1916.

¹³ Schedule 3 art 35 of the *Patents, Designs, Trade Marks and Copyright Act* 9 of 1916.

time of its making and not the photographer was deemed to be the author.¹⁴ In this regard it treated copyright in photographs in the same manner as that in films.

Although a photograph is by its very nature a technical work akin to cinematography, the *Copyright Act* 98 of 1978 also classifies it as an artistic work, ie, an author's work theoretically on the same level as a painting, drawing, sculpture and the like.¹⁵ The term is defined to mean any product of photography or of any process analogous to photography, not including any part of a cinematograph film. The "author", in relation to a photograph, means the person who is responsible for the composition of the photograph but where a person commissions the taking of a photograph and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, that person is the first owner of its copyright.¹⁶

A photograph, provided it is original and irrespective of its artistic merit, is eligible for copyright.¹⁷ (It is unnecessary for present purposes to discuss the criteria of eligibility for protection.) Copyright is infringed if someone other than the owner, without licence, in the Republic performs any act which the owner has the exclusive right to do or to authorise.¹⁸ There are a few exceptions.¹⁹ The important exclusive rights attaching to artistic works like photographs are the right of reproducing the work in any manner or form and the right of making an adaptation of the work.²⁰

¹⁴ Schedule 3 art 21 of the *Patents, Designs, Trade Marks and Copyright Act* 9 of 1916.

¹⁵ The *Copyright Act* 63 of 1965 is bypassed.

¹⁶ The definitions appear in s 1 and ownership is dealt with in s 21. The issue arose tangentially in *Prinsloo v RPC Media Ltd t/a Rapport* 2003 4 SA 456 (T).

¹⁷ Section 2(1) of the *Copyright Act* 98 of 1978.

¹⁸ Section 23(1) of the *Copyright Act* 98 of 1978.

¹⁹ The exception in s 10 (2) of the *Copyright Act* 63 of 1965 and the subject of *Argus Printing and Publishing Co Ltd v Perskorporasie van Suid-Afrika Bpk* 1975 4 SA 668 (A) relating to photographs of artistic work on view in a public place or in premises open to the public in the Republic has been omitted from the current Act. A similar exclusion is to be found in respect of cinematograph films in s 15(3) of the current Act.

²⁰ Sections 7(a) and (e). Both concepts are defined in s 1 but the definitions do not affect the argument.

Burying *Graves' Case*,²¹ as did Laddie, Prescott and Vitoria,²² the only English judgment dealing with the originality of photographs that is of real assistance is *Antiquesportfolio.Com Plc v Rodney Fitch & Company Ltd*,²³ a judgment of Neuberger J. The case, to the extent relevant for this discussion, was concerned with the question whether photographs of individual antique items could be original in the copyright sense. Neuberger J quoted the following from Laddie, Prescott and Vitoria with approval:²⁴

Originality presupposes the exercise of substantial independence, skill, labour, judgment and so forth. For this reason it is submitted that a person makes a photograph merely by placing a drawing or painting on the glass of a photocopying machine and pressing the button gets no copyright at all ... It will be evident that in photography there is room for originality in three respects. First, there may be originality which does not depend on creation of the scene or object to be photographed, or anything remarkable about its capture, and which resides in such specialities as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques... Secondly, there may be creation of the scene or subject to be photographed ... Thirdly, a person may create a worthwhile photograph by being at the right place at the right time. Here his merit consists of capturing and recording a scene unlikely to recur ...

In the case of photographs of a three-dimensional object, according to the learned judge,

it can be said that the positioning of the object (unless it is a sphere), the angle at which it is taken, the lighting and the focus, and matters such as that, could all be matters of aesthetic or even commercial judgment, albeit in most cases at a very basic level.

²¹ *Graves' Case* 1869 LR 4 QB 715.

²² Laddie, Prescott and Vitoria *Modern Law of Copyright* para 3.56.

²³ *Antiquesportfolio Com Plc v Rodney Fitch & Company Ltd* 2001 ECDR 5.

²⁴ *Antiquesportfolio Com Plc v Rodney Fitch & Company Ltd* 2001 ECDR 5. He also quoted, as far as English authorities are concerned, Garnett *Copinger and Skone James on Copyright* para 3.104, which is to a similar effect.

In the present case, he said,

the instant photographs appear to have been taken with a view to exhibiting particular qualities, including the colour (in the case of some items), their features (*e.g.* the glaze in pottery) and, in the case of almost all the items, the details. It may well be that, in those circumstances, some degree of skill was involved in the lighting, angling and judging the positioning.

Considering that photographs as artistic works need not have any artistic quality²⁵ but only some artistic pretensions,²⁶ one senses that Neuberger J was somewhat uncomfortable about applying the stock sweat- of- the- brow test for originality.

The sweat-of-the-brow test for originality, which our courts follow, requires a substantial (or not trivial) degree of skill, judgment or labour in the creation of the work.²⁷ Some jurisdictions have developed a degree of unease about this mundane level, especially if one has regard to the consequences. For instance, the copyright in the song "Happy birthday to you", published by two sisters in the 19th Century, which now vests in TimeWarner, has not yet lapsed, at least not in the United States of America (US).²⁸

In *Feist Publications Inc v Rural Telephone Service Co*²⁹ the US Supreme Court revisited the requirement of originality without specific reference to photographs (the case dealt with a compilation) and concluded that the sweat- of- the- brow test did not suffice. It held, per O'Connor J, that "original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."

²⁵ *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (A).

²⁶ *Lucasfilm Ltd v Ainsworth* 2009 EWCA Civ 1328 para 54.

²⁷ *Appleton v Harnischfeger Corporation* 1995 2 All SA 693 (A); *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA).

²⁸ *Eldred v. Ashcroft* 537 US 186 per Breyer J (dissenting).

²⁹ *Feist Publications Inc v Rural Telephone Service Co* 499 US 340 (1991).

The application of *Feist* to photographs appears from the judgment of Kaplan J in *Bridgeman Art Library Ltd v Corel Corp.*³⁰ He held that colour transparencies of paintings, which themselves are in the public domain, are not original works. He concluded as follows:

There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. "Elements of originality . . . may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved." But "slavish copying", although doubtless requiring technical skill and effort, does not qualify. As the Supreme Court indicated in *Feist*, 'sweat of the brow' alone is not the "creative spark" which is the *sine qua non* of originality. [Citations omitted.]

In *CCH Canadian Ltd. v. Law Society of Upper Canada*³¹ the Canadian Supreme Court, although of the view that the sweat-of-the-brow test is too low a threshold, felt that the spark of creativity requirement set by *Feist* was too high and opted for an intermediate position in the words of McLachlin CJ at para 16:

For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the

³⁰ *Bridgeman Art Library Ltd v Corel Corp* 36 F Supp 2d 191 (SDNY 1999). See also *Rogers v. Koons* 960 F 2d 301 (2d Cir 1992).

³¹ *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13.

font of a work to produce 'another' work would be too trivial to merit copyright protection as an 'original' work.

Vaver is of the view that since Canadian courts have in the light of this judgment held that such items as simple word and design trade-marks, the outline for a talent contest, the repackaged version of a children's game, payroll books, and a commonplace floor plan for a mass-produced house are not original, "one could suspect that routine photographs taken on cell phones, tweets and texted messages, short letters, e-mails, and shopping lists may now more readily be treated as trivial or mechanical work than they may have been in the past."³²

The court in *Red Bus* was required to interpret English law in such a manner that it did not conflict with EU law, more particularly, as expounded in a leading judgment by the Court of Justice of the EU in *Infopaq International A/S v Danske Dagblades Forening*.³³

EU law obliges member states to provide for the exclusive right for authors to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works.³⁴

Photographs "which are original in the sense that they are the author's own intellectual creation" have to be protected as copyright works without the addition of any criteria to determine their eligibility for protection. Rather oddly, from a Southern perspective, member states may also provide for the protection of "other photographs", ie, those that do not require 'the author's own intellectual creation'.³⁵

The same criterion of originality, namely that the work must be the author's own intellectual creation, applies in EU law to computer programmes and databases. But it does not lay down any such requirement for other copyrightable works. However,

³² Vaver *Intellectual Property Law* 101.

³³ *Infopaq International A/S v Danske Dagblades Forening* 2009 EUECJ C-5/08.

³⁴ A 2(a) of Directive 2001/29/EC.

³⁵ Directive 2006/116/EC on the term of protection of copyright and certain related rights OJ L372/12, modified by Directive 2011/77/EU, OJ L265/1.

the court in *Infopaq* reasoned that having regard to the explicit requirement in respect of photographs, computer programmes and databases and to the fact that it is "apparent from the general scheme of the Berne Convention . . . that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations', concluded that to be a copyrightable 'work' it must be the author's 'own intellectual creation".

Parts of a work, the court said, should not be treated any differently from the work as a whole and are protected by copyright since they share the originality of the whole work. In other words, the various parts of a work enjoy protection provided that they contain elements which are the expression of the intellectual creation of the author of the work.

The case did not concern photographs but news headlines and snippets, although it dealt with general principles. In this regard the court found that although words in themselves do not constitute elements covered by copyright protection (ie, they are in our terminology not "works"), isolated sentences, or even certain parts of sentences, may be regarded as the intellectual creation of the author of the article and, as such, be entitled to copyright protection.

This, to an outsider, appears to be in conflict with the approach of Oliver LJ in *Exxon Corp. v Exxon Insurance Consultants Ltd.*³⁶ The question there was if the invented and therefore original word 'Exxon' qualified for copyright protection as a literary work. He said that

'original literary work', as used in the statute, is a composite expression, and for my part I do not think that the right way to apply a composite expression is, or at any rate is necessarily, to ascertain whether a particular subject matter falls within the meaning of each of the constituent parts, and then to say that the whole expression is merely the sum total of the constituent parts. In my judgment it is not necessary, in construing a statutory expression, to take leave of one's common

³⁶ *Exxon Corp v Exxon Insurance Consultants Ltd* 1982 Ch 119.

sense... [T]hat for which protection is sought in the instant case does not appear to me to have any of the qualities which common-sense would demand.

It is true that he was concerned with a word, which *Infopaq* excluded, but his statement would also apply, one would have thought, to isolated sentences and parts of sentences.³⁷ Our *Copyright Act* does not use the same composite expression but, nevertheless, to consider them as substantial literary works requires one to take leave of one's common sense, accepting that common sense is one's own sense which others are supposed to agree with.

The effect of *Infopaq* appears first to be that anything that can be called an intellectual creation is a copyrightable work and that works are deemed to be original if they are the author's own intellectual creation. In other words, whether something is a 'work' and whether it is "original" depends on the answer to the same question. This appears to amount to circuitous reasoning. As Arnold J observed, it may now be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed and defined in the UK *Copyright, Designs and Patents Act* of 1988, as long as it falls within the meaning of "literary or artistic work" in the *Berne Convention*, while recognising that although it 'is expansive and open-ended, it is not unlimited'.³⁸ Such an approach would, in a local context, be completely at odds with our statute because the *Berne Convention* is not part of our municipal law.³⁹

The second result appears to be that anything in a work that is identifiable as an intellectual creation is a work in its own right. This means that any work consists of a multitude of min-works, the reproduction of which could amount to copyright infringement.⁴⁰ In other words, to determine infringement one no longer asks whether the work or a substantial part has been taken but whether the part taken

³⁷ *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd* 1940 AC 112 (PC); *Ladbroke Football Ltd v William Hill Football Ltd* 1964 1 WLR 273 (per Lord Reid); *Waylite Diary CC v First National Bank Ltd* 1995 1 SA 645 (A).

³⁸ *SAS Institute Inc v World Programming Ltd* 2013 EWHC 69 (Ch) para 27.

³⁹ Compare the analysis in *Progress Office Machines v SARS* 2007 SCA 118 paras 5-6.

⁴⁰ *Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* 2011 EWCA Civ 890; Moran 2011 *Wash J L Tech & Arts*.

was an intellectual creation. This, too, is at odds with the prior English position and our understanding of the position.⁴¹

That brings one to the meaning of "the author's own intellectual creation". The Chancellor (Morritt LJ), in *Meltwater*,⁴² had to deal with an application of the *Ifopaq* principles to newspaper headlines. He said that to be entitled to copyright a headline must be "a work" and both "original" and "literary" and continued:

A headline is plainly literary as it consists of words. The word 'original' does not connote novelty but that it originated with the author. This test was clearly established in the domestic law of England ...

He did not refer to the dictum of Lord Oliver quoted above to support the first sentence. In any event, referring to *Infopaq*, he said that although it referred to "intellectual creation" he did not understand the decision to have qualified the "long-standing test" in England for originality.⁴³ He may have been mistaken, at least as far as photographs are concerned, if regard is had to the European court's subsequent judgment in *Painer v Standard Verlags GmbH*.⁴⁴

Painer concerned portrait photographs, a member of a species of what the court referred to as "realistic photographs".⁴⁵ The court restated that copyright is available only in relation to a subject-matter, such as a photograph, "which is original in the sense that it is its author's own intellectual creation and that an intellectual creation is an author's own if it reflects the author's personality" and further:

As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. In the preparation

⁴¹ Based on *Ladbroke Football Ltd v William Hill Football Ltd* 1964 1 WLR 273 (per Lord Reid).

⁴² *Ladbroke Football Ltd v William Hill Football Ltd* 1964 1 WLR 273. Other issues arising from the judgment have been referred to the European Court by the UK Supreme Court: *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited* 2013 UKSC 18.

⁴³ But see *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* 2010 FCA 984 for what appears to be a different approach.

⁴⁴ *Eva-Maria Painer v Standard Verlags GmbH* C-145/10, 1 December 2011 (CJEU).

⁴⁵ For a case note: Lee 2012 *EIPR* 290.

phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. By making those various choices, the author of a portrait photograph can stamp the work created with his "personal touch".⁴⁶

It added that copyright protection in respect of a portrait photograph "cannot be inferior to that enjoyed by other works, including other photographic works".⁴⁷

This approach is in line with Continental national jurisprudence, namely that a photograph is protectable under copyright only to the extent that it is the result of a creative effort and does not aim solely to reproduce, as faithfully as possible, a pre-existing object.⁴⁸

The claimant's photograph⁴⁹ in the *Red Bus* case is on any test original but what this excursus shows is that, as least as far as photographs are concerned, the idea that authorship and originality are correlatives is not necessarily correct. The approach adopted by Neuberger J in *Antiquesportfolio.Com* and followed in *Red Bus*⁵⁰ gave special meaning to the sweat of the brow concept for photographs by introducing an element of creativity, and it is difficult to discern the practical differences between the different approaches discussed. In other words, the statement that 'the author need not be creative, so long as she perspires'⁵¹ is not entirely appropriate, also for our law in this regard.

⁴⁶ *Eva-Maria Painer v Standard Verlags GmbH* C-145/10, 1 December 2011 (CJEU) paras 90-92.

⁴⁷ *Eva-Maria Painer v Standard Verlags GmbH* C-145/10, 1 December 2011 (CJEU) paras 99.

⁴⁸ For the Netherlands: *Rudolph Jan Romme v Van Dale Lexicografie BV* Hoge Raad, 4 January 1991, Nr. 14 449, dealing with lemmas; and for France: *Concorde Photographs Case* 2012 www.legalis.net, dealing with photographs of the Concorde airplane.

⁴⁹ Whether especially the infringing photograph was in fact a photograph and not some or other innominate artistic work is an open question. The difference might be of moment in relation to the term of copyright as well as to original ownership under our law.

⁵⁰ *Antiquesportfolio Com Plc v Rodney Fitch & Company Ltd* 2001 ECDR 5 para 22.

⁵¹ Ginsberg 2003 *DePaul L Rev* 1063.

The defendant's work in *Red Bus* is also original and in its own right entitled to copyright but that does not mean that it was not infringing.⁵² In this regard it is similar to an improvement patent which may infringe the patent it improves. The test for originality of a reproduction as proposed by Sir Robin Jacob in *Hyperion Records Ltd v Sawkins*⁵³ is significant: I think the true position is that one has to consider the extent to which the 'copyist' is a mere copyist - merely performing an easy mechanical function. The more that is so, the less is his contribution likely to be taken as "original". Ginsberg puts it this way:⁵⁴ "Reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are *copies* of pre-existing works. This would be the case for photographic and other high quality replicas of works of art." In the end the question is one of degree - how much skill, labour and judgment in the making of the copy is that of the creator of that copy? Both individual creative input and sweat- of- brow may be involved and will be factors in the overall evaluation.

The idea of creativity also lurks in South African law because authorship of a photograph vests in the person responsible for its "composition", a pregnant word. The Chancellor, it is suggested, might have been closer to the mark if his remark about the effect of *Infopaq* on English law had been limited to photographs.

The more difficult question relates to infringement. In other words, when is a photograph "reproduced"? The other exclusive acts are not contentious.

The first issue in this regard is whether one "copies" a photograph by photographing the same object or scene or by drawing it. The idea that every photograph of the Union Buildings is a reproduction of any earlier photograph tends to rattle the senses. Most scenes have an optimum point for photographing. For Table Mountain it is the view from across the bay with the clouds moving over. Every photographer

⁵² Section 2(3) of the current Act. *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA).

⁵³ *Hyperion Records Ltd v Sawkins* 2005 EWCA Civ 565 para 83. The court held that copyright subsists in modern performing editions of the out-of-copyright music of Michel-Richard de Lalande, the principal court composer at the courts of Louis XIV and Louis XV.

⁵⁴ *Hyperion Records Ltd v Sawkins* 2005 EWCA Civ 565 para 83.

has seen a prior photo of the scene and to suggest that when trying to catch a similar moment on film or in digital form the earlier photograph is being reproduced does simply not appear to be right. Every visitor to the Kruger Park has probably experienced that someone, having spotted a lion lying in the grass, would manoeuvre his vehicle to get the best view of the animal. Courtesy demands that the next visitor gets access to the same spot. Crazy copyright apparently holds that the second photograph infringes the first.

In ordinary parlance, it is submitted, this cannot amount to a 'reproduction' of the photograph. Obviously, if the first photograph were to be reproduced in the ordinary sense of the word - which is not limited to photocopying but would include a change of medium, for instance the making of a drawing of the photograph - there would be copyright infringement.⁵⁵

The justification for the extended meaning of 'reproduction' appears to be the assumption that once there is a causal connection between two photographs and they are similar, the second is a reproduction of the first.⁵⁶ The problem arises due to looseness of terminology. The fact that one work inspires another and that the two are in that sense causally connected does not mean at the same time that the second, independently created, is a reproduction.

Richard Arnold QC (now Arnold J) dealt with the anomaly produced by the extensive meaning of "reproduction" in an incisive and refreshingly brief discussion on the subject, albeit written from the point of view of law reform.⁵⁷ He indicated that copyrights in broadcasts, films and sound recordings are 'medium' or 'signal' copyrights, that is to say,

they are copyrights in the medium or signal in question (and not in the content carried by that medium or signal). An important consequence of this is that such

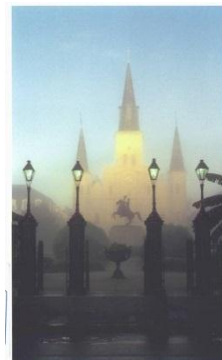
⁵⁵ *Bauman v. Fussel* 1978 RPC 485.

⁵⁶ As to causal connection: *Galago Publishers (Pty) Ltd v Erasmus* 1989 1 SA 276 (A); *Creation Records Ltd v News Group Newspapers Ltd* 1997 EWHC Ch 370.

⁵⁷ Arnold 2005 *EIPR* 303.

copyrights are only infringed if the medium or signal itself is copied. Thus sound recording copyright is only infringed if there has been copying of part of the recording itself, and it is not an infringement to reproduce the sound content of the recording without copying the recording. Similarly, film copyright is only infringed if there has been "photographic" copying of part of the film, and it is not an infringement to reproduce the content of the film by "non-photographic" copying. The same would be true of a broadcast.

He then questions with reason why the same does not apply to photographs which, as mentioned earlier, are considered by the Act to be authors' (artistic) works instead of technical works.



The approach of US courts in determining infringement is the following: they first dissect the plaintiff's work to identify the expressive choices in the work that qualify as original. They then consider whether, focusing solely on those original elements, the defendant's work is substantially similar to the plaintiff's.⁵⁸ In essence according to their jurisprudence they distinguish between protected expression and unprotected ideas.⁵⁹

If all that is taken is the idea of the first photograph then there will be no infringement. This is a difficult concept when considering photographs as often the idea and the expression are so closely connected as to be inseparable. Broadly speaking, if the second photograph copies not just the idea but the exact expression of the first photograph (or a substantial part of the exact expression), there will be infringement unless the exact expression is either (a) unoriginal, or (b) the only way of expressing that particular idea. This approach has been adopted in the USA and it has been held that we have an idea for a photograph is capable of expression in 'countless different layouts' but the exact layout of the claimant's photograph has been copied, a contention that the idea and expression are

⁵⁸ *Harney v Sony Pictures Television Inc LLC* US Court of Appeal First Circuit No. 11-1760, 7 January 2013. For a case comment: Rosati 2013 *JIPLP* 356.

⁵⁹ Michalos *Law of Photography* para 2-139.

indistinguishable will fail stop in reality, there are probably very few instances when it can genuinely be said a particular image is the only way of expressing the idea containing the photograph. In many cases there will be options as to lighting, angle, choice of background, etc.



The approach can best be explained with reference to an example. It is of photographs of a gate in the touristy French Quarter of New Orleans.⁶⁰ The black and white one was taken by Sahuc and the other by Tucker. Tucker took his after having seen Sahuc's. Causation was accordingly not an issue. The court found for the defendant, Tucker.

Anyone with half an eye would immediately realise that if this approach had been followed in *Red Bus* the result would have been different. As pointed out by Rahmatian:⁶¹

[t]he decision might have been different if more attention had been given to the aspect of 'composition' of the photograph and to the idea-expression dichotomy. Contrary to what the court held in *Temple Island*, the recreation of a scene that is then independently photographed does not infringe the copyright in the earlier photograph, as was clearly said in *Creation Records*,⁶² a case strangely not referred to in *Temple Island*: two works created from a common source do not by reason of that fact involve copying one or the other, however similar they are.

The "expression versus idea" dichotomy is inherent in copyright law. It also appears from the TRIPS agreement which states that ideas may not be protected by copyright. There are, however, those who doubt its validity.⁶³

⁶⁰ See *Sahuc v Tucker* 300 F Supp 2d 461 (EDLA 2004). The reproductions of the photographs inserted here were obtained from http://media.csusa.org/caw/caw_2006_teachers_articles_visual_art.htm (accessed 12 February 2014).

⁶¹ Noted earlier: Rahmatian 2012 *EIPR* 796-799.

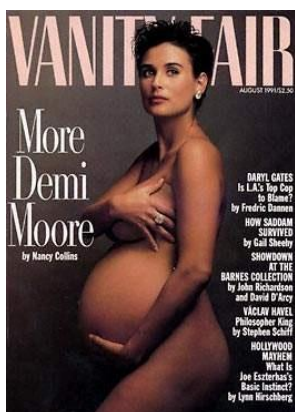
⁶² Noted earlier: *Creation Records Ltd v News Group Newspapers Ltd* 1997 EWHC Ch 370.

⁶³ For instance Jones 1990 *Pace L Rev* 551.

In the context of recognising or conferring copyright, Lord Hoffmann identified two quite distinct propositions in relation to the dichotomy:⁶⁴ The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work; and the second is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or are so commonplace as not to form a substantial part of the work.

I would have thought that the correct proposition was that copyright protects the form in which an idea is cast and not the idea itself. However, when considering whether a work infringes copyright the distinction is vital even if it is often difficult to apply, as appears from the important judgment of Wunsch J in *Rapid Phase Entertainment CC v SABC*.⁶⁵ The defendant produced an advertising strip based on the underlying concept in the well-known cartoon strip *Madam and Eve*. Although the idea was copied, the expression of the idea in the original was not copied, and the court, correctly in my submission, held that there was no infringement.

US law, in addition, has an expansive doctrine of fair use which was originally judge-made but has since been codified. It differs from the fair dealing provisions in the Copyright Act because it is based on principle and is not casuistic and it gives courts rather wide latitude in reaching fair conclusions. US courts refer to it as an open-



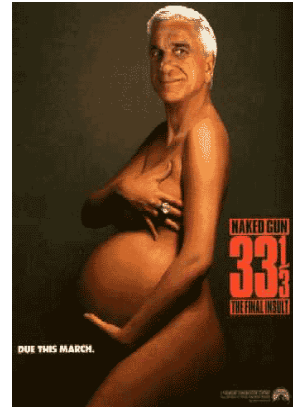
ended and context-sensitive inquiry. Infringement cases are often decided on this basis because, I suspect, it obviates a focussed analysis of the infringement issue, which is inherently subjective.

An example of fair use is parody. The classical case is the well-known photograph of a highly pregnant Demi Moore taken by Annie Leibovitz and published on the front page of the

⁶⁴ *Designer Guild Limited v. Russell Williams (Textiles) Limited* 2001 1 All ER 700.

⁶⁵ *Rapid Phase Entertainment CC v SABC* 1997 JOL 393 (W).

periodical *Vanity Fair*.⁶⁶ Moore was depicted nude, in profile, with her right hand and arm covering her breasts and her left hand supporting her distended stomach, a pose evocative of Botticelli's *Birth of Venus*. Her facial expression is serious, without a trace of a smile. To advertise the motion picture *Naked Gun 33 1/3: The Final Insult* the defendant commissioned a photograph in which the lead actor's face was to be super-imposed on a body of a pregnant woman similar to that of Moore. The pictures tell the story. The court upheld the defence of parodic use.



It is not hereby suggested that *Red Bus* could have been decided on this basis but that it could have been decided on another manifestation of fair use, namely transformative use, is clear. Transformative works lie at the heart of the fair use doctrine's guarantee of providing breathing space. A recent example is *Patrick Cariou v Richard Prince*.⁶⁷ Prince, the defendant, is an appropriation artist, ie, someone who directly takes over into a work of art a real object or even an existing work of art. His work involves taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own. In this case he used with little or no changes photographs taken by Cariou in the course of six years living among Rastafarians in Jamaica. The result is not important for this discussion; the principle is.

In determining if a work is transformative, the court asks if it adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. Images with a different character that give the original photographs a new expression and employ new aesthetics with creative and communicative results make fair use of the original and are not infringing.

⁶⁶ *Annie Leibovitz v Paramount Pictures Corp* 137 F 3d 109. The reproductions of the photographs inserted here were obtained from http://en.wikipedia.org/wiki/Leibovitz_v._Paramount_Pictures_Corp (accessed 12 February 2014).

⁶⁷ *Patrick Cariou v Richard Prince* US Court of Appeal (2d Circ) 25 April 2013, Doc 11-1197cv.

In conclusion: The question is constantly being raised as to whether intellectual property rights can be justified. One could likewise pose the same question in relation to virtually any other economic right. On analysis it seems that the issue is not so much the justification for the right; it is rather the justification for the scope of the right that requires attention. Greed, one of the seven deadly sins, kills as it recently led to the demise in many parts of the world of ACTA (the Anti-Counterfeiting Trade Agreement).

For us the question is what the appropriate level of copyright protection in a developing country should be. We do not have a constitutional measure, as has the US, against which to test the scope of copyright and its protection. Other developing countries do not provide any leads, and although some of the developments in the developed world are to be welcomed, others are not.

It is apparent that the traditional test for originality does not withstand scrutiny and it is not possible to justify a higher level of protection in a country with a lower level of commercial sophistication.⁶⁸ It is difficult to understand why locally a database, photograph, computer programme or any other work should be entitled to a life plus 50 years' protection simply because it was the result of some supposed sweat worked up in an air-conditioned office and irrespective of merit. What this means is that a mundane German database, for instance, will have copyright in South Africa but not in Germany.

It is generally accepted that our copyright law is outdated, more specifically if regard is had to the fact that the Act has not been amended to accommodate the internet age - considering that the World Wide Web is now twenty years old. It is particularly disconcerting that the Draft National Policy on Intellectual Property, 2013, contains no proposals about amending the Act.⁶⁹ In particular, one would have assumed that it would at least also have dealt with fair use and fair dealing where I prefer the US approach even if it might arguably not be in accordance with the three-stage test in

⁶⁸ Vaver 2012 *IPJ* 19.

⁶⁹ Notice 918/2013, Government Gazette 36816 of 4 September 2013.

the Berne Convention and the TRIPS agreement. If the US can get away with it, we can too. The Australians and Hong Kong are also moving in that direction and the Canadian Supreme Court now recognises the right of the public (instead of copyright exceptions) which has to be balanced against that of the author.⁷⁰

In this regard I can do no better than to quote Pallante, the head of the US Copyright Office, testifying before Congress during March 2013, who is of the view that the law is showing the strain of its age and requires reconsideration:

A central equation for Congress to consider is what does and does not belong under a copyright owner's control in the digital age. I do not believe that the control of copyright owners should be absolute, but it needs to be meaningful. People around the world increasingly are accessing content on mobile devices and fewer and fewer of them will need or desire the physical copies that were so central to the 19th and 20th century copyright laws.

⁷⁰ *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37.

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List of abbreviations

DePaul L Rev

DePaul Law Review

EIPR

European Intellectual Property Review

IPJ

Intellectual Property Journal

JIPLP

Journal of Intellectual Property Law and Practice

Pace L Rev

Pace Law Review

Wash J L Tech & Arts

Washington Journal of Law, Technology and Arts