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Herbert Rosenthal Jewellery Corp v Kalpakian 446 F 2d (1971) at 738, on appeal to the US Court of Appeals, 9th Circuit

International News Service v Associated Press 248 U.S. 215

End notes

[1] Gleick *Chaos, The Amazing Science of the Unpredictable* (1998).
[2] Landow *Hypertext 2.0* (1997) 3.
[3] Landow 3.
[4] Maartens *'n Postmodernistiese verkenning van LitNet se meningsruimte, SêNet, van die tydperk Januarie 1999 tot Oktober 2001* (2002).
[5] Brown (Ed) *The New Shorter English Dictionary on Historical Principles* (1993) 2544.
[6] Beeld (1999-12-13).
[7] "My grootste bekommernis in dié tyd is Du Plessis. Hy het besonderse skryftalent."
[8] See 4.2.1.
[9] The phrase "creative literary works" was chosen in order to focus on *literature* rather than the less authorial subject-matter listed in the definition of "literary work" in section 1 of the Act such as dictionaries, memoranda, tables and compilations of data.
[10] Section 2(3) of the Act.
[11] *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112 at para 16.
[12] Section 2(1) of the Act.
[13] Section 2(2).
[14] A brief definition of chaos theory (herein mostly referred to simply as "Chaos", spelt with a capital C) is not easily formulated. The subtitles of books written on the subject may be useful in this regard. James Gleick's book is entitled *Chaos – The amazing science of the unpredictable*. A.B. Cambel authored a book called *Applied Chaos Theory – A paradigm for complexity*. Russ Marion named his book *The edge of organization – Chaos and complexity theories of formal social systems.* William W. Demastes wrote a book entitled *Theatre of chaos: beyond absurdism, into orderly disorder.* As reflected in the titles listed above **unpredictability**, **complexity** and **orderly disorder** are key phrases in defining Chaos. So are **nonliniarity** and **chance**, the two concepts Cambel chooses to define complexity.
The examples Cambel provides of complex problems include "traffic flows, weather changes, population dynamics, organizational behaviour, shifts in public opinion, urban development and decay, cardiological arrhythmias, epidemics, the operation of the communications and computer technologies on which we rely, the combustion processes in our automobiles, cell differentiation, immunology, decision making, the fracture of structures, and turbulence" (Cambel 3).
Although chance events occur all around us and in all aspects of our lives, we tend to formulate generally applicable, linear models for real-life situations. Typically, an exam question asking physics students to calculate the speed of a certain object would mention that friction is an omissible variable in the system and is to be ignored in the calculation. The students would use the simple linear formula speed = distance/time to arrive at "the answer", which does not necessarily reflect the real-life situation sketched in the question. Chaos recognizes that small, "omissible" variables have the potential to cause havoc within a system. This is referred to as "sensitive dependence on initial conditions", or as "what is only half-jokingly known as the Butterfly Effect – the notion that a butterfly stirring the air today in Peking can transform storm systems next month in New York". (Gleick 8)
What is important to note is that Chaos is not only about recognising complexity and acknowledging the fact that it is difficult to deal with. Chaos Theory also embraces the challenge of developing

improved ways of forecasting, observing the fact that Chaos is not just randomness, but that there is a certain order (patterns) involved.

[15] Copeling *Copyright Law* 48, as referred to in *Barker & Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd* 195 JOC (C); *Econostat (Pty) Ltd v Lambrecht* 89 JOC (W); *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (AD); *Lintvalve Electronic Systems v Instrotech* 346 JOC (W); *Nintendo Co Ltd v Golden China TV-Game Centre* 488 JOC (T).

[16] *Accesso v Allforms (Pty) Ltd* 677 JOC (T); *Econostat (Pty) Ltd v Lambrecht* 89 JOC (W); *Fichtel & Sachs Aktiengesellschaft v Laco Parts (Pty) Limited* 174 JOC (T); *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (AD); *Lintvalve Electronic Systems v Instrotech* 346 JOC (W); *Nortthern Office Micro Computers (Pty) Ltd & others v Rosenstein* 1981 4 SA 123 (C); *Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Limited* 202 JOC (W); *Saunders Valve Co Ltd v Klep Valves (Pty) Ltd* 1985 1 SA 646 (TPD); *Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd* 71 JOC (A); *Waylite Diaries CC v First National Bank Ltd* 1993 2 SA 128 (WLD).

[17] 1993 2 SA 128 (WLD).

[18] *Waylite Diaries CC v First National Bank Ltd* 1995 1 SA 645 (AD).

[19] In an *obiter dictum*.

[20] Dean *Handbook of South African Copyright Law* (1987) 1-17.

[21] 1944 AC 329.

[22] 1981 4 SA 123 (CPD) at 132H – 134E.

[23] Van Rooyen *How to get Published in South Africa* (1996) 114, 119.

[24] Section 2(3) of the Act.

[25] My italics.

[26] Whether labour alone can be sufficient to acquire copyright protection is discussed under 2.3.1.2 and 2.3.1.3.

[27] See Chapter 3, para 3.7.

[28] Tritton *Intellectual Property in Europe* (2002) 305.

[29] See 2.3.1.3.

[30] Day How to Write and Publish a Scientific Paper (1993) 132.

31 Nasionale Afrikaanse Letterkundige Museum en Navorsingsentrum (“National Afrikaans Literary Museum and Research Centre”).

32 As the research is primarily of a legal nature and conducted by a legal scholar, and as the study focuses on examples from the Afrikaans literary domain, the use of secondary sources regarding postmodernism is warranted.

[33] See 2.3.1.

[34] As opposed to “sweat of the brow”/”industrious collection. See para 2.3.1.3.

[35] See para 2.3.1.

[36] See para 2.3.2

[37] See para 3.4.

[38] See para 3.7.

[39] The then Union of South Africa.

[40] Laddie, Prescott & Vitoria *The Modern Law of Copyright* (1980) 7.

[41] Garnett, James & Davies *Copinger and Skone James on Copyright* (1999) 106.

[42] *Idem*.

[43] Briggs *The Law of International Copyright* (1986) 669-698.

[44] Garnett, James & Davies *op cit* 106.

[45] *Idem*.

[46] [1900] A.C. 539.

[47] Garnett, James & Davies *op cit* 106.
[48] [1990] F.S.R 359.
[49] Ulmer (ed) *International Encyclopedia of Comparative Law:* Volume XIV *Copyright and Industrial Property* (1987) 3-15.
[50] Rose *Authors and Owners – The Invention of Copyright* (1994) 119.
[51] *Idem* 121.
[52] Ulmer *op cit* 3-16.
[53] Rose *op cit* 114.
[54] *Idem* 128.
[55] Ulmer *op cit* 2-3.
[56] Rose *op cit* 126.
[57] Garnett, James & Davies *op cit* 36, quoting from J.Locke *Two Treatises of Government* (1690), edited by P.Laslett (Cambridge University Press, 1988) para. 27.
[58] Seignett *Challenges to the Creator Doctrine* (1994) 7 at fn 2.
[59] 1981 4 SA 123 (C) at 130C.
[60] *Idem* 129A-B. Before 23 May 1980, section 2(2) of the Act read as follows:
" A literary, musical or artistic work shall not be eligible for copyright unless
(a) sufficient effort or skill has been expended on making the work to give it a new and original character; and
(b) the work has been written down, recorded or otherwise reduced to material form."
[61] Dean *op cit* 4-133.
[62] Copeling *Copyright and the Act of 1978* (1978) 15.
[63] Dean *op cit* 1-15 – 1-16.
[64] Smith *Copyright Companion* (1995) 9-10.
[65] Either sufficient skill together with omissible labour, or sufficient labour together with omissible skill can satisfy the originality requirement. In this regard see para 2.3 and specifically para 2.3.1.3. I therefore prefer using the term "skill and/or labour" rather than the generally used "skill and labour".
[66] As to the statutory provisions that applied at the time of the decisions: The Copyright Act of 1965 stated that copyright could only subsist in *original* works. According to the 1978 act certain works, if they are original, will be eligible for copyright. The 1978 Act initially required that sufficient effort or skill had to be employed in making the work to give it a new and original character, which provision was removed in 1980.
[67] 1920 WLD 35 at 38.
[68] 1972 1 SA 471 (WLD) at 471D, 472G.
[69] *Idem* 472D – 472E.
[70] *Idem* 472B.
[71] 1978 2 SA 184 (CPD) at 192A.
[72] *Idem* 190A – 190B.
[73] 40 JOC (T) at 43.
[74] *Idem* 51.
[75] *Idem.*
[76] 1981 4 (CPD) 123 at 129F.
[77] *Idem* 129G – 130A.
[78] *Idem* 129A-B.
[79] *Idem* 130C.
[80] *Idem* 134H.
[81] 89 JOC (W) at 105-106.
[82] *Idem* 105.

[83] 144 AC 329.
[84] Copeling *Copyright Law in South Africa* (1969) 49.
[85] 71 JOC (A) at 74.
[86] 1944 AC (HL) 329 at 335.
[87] As to the court's use of the word "or" in the context of skill and/or labour, pleas refer to the footnote at the end of para 2.2.
[88] 71 JOC (A) at 74.
[89] 151 JOC (W) at 152.
[90] Copeling *Copyright Law in South Africa* 48.
[91] 151 JOC (W) at 158.
[92] 1985 4 SA 882 (CPD).
[93] *Idem* at 885.
[94] *Idem* 889.
[95] *Idem* 886, 888.
[96] *Idem* 886.
[97] *Idem* 888.
[98] *Idem* 893B – 893C.
[99] 174 JOC (W) at 191.
[100] (1974) RPC 57 at 68 line 23.
[101] *University of London Press Ltd v University Tutorial Press Ltd* (1916) 2 Ch 601 at 608.
[102] 174 JOC (W) at 182-183.
[103] (1979) RPC 551 at 568 line 30.
[104] 174 JOC (W) at 183.
[105] *Idem*.
[106] 1985 1 SA 646 (TPD) at 649E-F.
[107] P.115 para 3.25.
[108] 1985 1 SA 646 (TPD) at 649.
[109] 195 JOC (C) at 197.
[110] Copeling *Copyright Law in South Africa* 48.
[111] 195 JOC (C) at 197-198.
[112] 202 JOC (N) at 215.
[113] Vol 5, para 343.
[114] 202 JOC (N) at 215.
[115] *Idem* 216.
[116] 243 JOC (W) at 269.
[117] Copeling *Copyright and the Act of 1978* (1978) at 15.
[118] 1987 2 SA 1 (AD) at 23.
[119] This paragraph was also quoted by Burger J in *Barker & Nelson (Pty) Ltd v Procast Holdings* 195 JOC (C) at 197-198.
[120] 1987 2 SA 1 (AD) at 22-23.
[121] 1989 1 SA 276 (AD) at 294E.
[122] *Idem* 285H, 286C – 286D.
[123] *Idem* 286G, 288E, 294F.
[124] 335 JOC (W) at 342.
[125] *Idem* 343.
[126] "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 or labour. Precisely

how much skill and labour he need contribute is difficult to say, for much will depend upon the facts of each particular case." 335 JOC (W) at 342-343.
[127] *Idem* 343.
[128] 346 JOC (W) at 347.
[129] *Idem* 349.
[130] 1989 4 SA 427 (TPD) at 449G.
[131] *Idem* 450J.
[132] *Idem* 450G.
[133] 1991 2 SA 455 (WLD) at 461D – 461E.
[134] *Idem* 465A.
[135] *Idem* 465B – 465C.
[136] My italics.
[137] 1993 4 SA 479 (WLD) at 489.
[138] 1994 3 SA 499 (TPD) at 505.
[139] [1967] 1 WLR 723 at 732.
[140] 1994 3 SA 499 (TPD) at 505.
[141] [1902] 86 LT 465.
[142] Author's emphasis.
[143] 1994 3 SA 499 (TPD) at 512-513.
[144] 399 JOC (T) at 398-399.
[145] *Idem* 410.
[146] *Idem* 406.
[147] *Idem* 408.
[148] With reference to Copeling *Copyright and the Act of 1978* para 15, Joubert (ed) *Law of South Africa* vol 5 para 343 and Garnett et al *Copinger and Skone James on Copyright* 13th ed (1991) at 58-60.
[149] 1993 2 SA 128 (WLD) at 133A-D.
[150] [1944] AC 329 (HL) ([1944] 2 All ER 92) at 338.
[151] 1993 2 SA 128 (WLD) at 133I.
[152] 1993 4 SA 279 (AD) at 288H.
[153] *Idem* 288B.
[154] *Idem* 288F.
[155] 488 JOC (T) at 508.
[156] *Idem* 509.
[157] 1994 2 SA 464 (WLD) at 467J-468A.
[158] *Idem* 470E, 473E.
[159] 1987 2 SA 1 (AD).
[160] 1995 2 SA 247 (AD) at 262.
[161] 1995 1 SA 398 (D&CLD) at 399.
[162] *Idem* 400.
[163] 1995 1 SA 645 (AD) at 653C.
[164] *Idem* 650D.
[165] *Idem* 649I.
[166] 1997 1 SA 405 (AD) at 408I.
[167] *Idem* 415H.
[168] 624 JOC (T) 624 at 629.
[169] *Idem*.
[170] 624 JOC (T) at 631.

[171] *Sands & McDougall (Pty) Ltd v Robinson* [1917] 23 CLR 49.
[172] 1998 2 SA 965 (SCA) at 973B.
[173] 3 JOC (W) at 6.
[174] 1998 2 SA 965 (SCA) at 972F.
[175] *Idem* 969E.
[176] 677 JOC (T) at 688.
[177] *Idem* 693.
[178] (1964) (1) A.E.R. 465 (HL).
[179] *Idem* 469I.
[180] *Idem* 475F – 475G.
[181] *Idem* 479-480.
[182] 677 JOC (T) at 689.
[183] 1978 2 SA 184 (C) at 190A – 190B.
[184] 677 JOC (T) at 690-691.
[185] (1997) RPC 289 at 428-430
[186] 677 JOC (T) at 691.
[187] *Idem* 693 with reference to *Copinger and Skone James on Copyright* (13 ed) paras 3.28, 3.29, 3.32 and 3.33.
[188] 818 JOC (T) at 833G-834F.
[189] 811 JOC (W) at 813A.
[190] *Idem* 813G.
[191] *Idem* 813H.
[192] *Idem* 814H.
[193] *Idem* 814B.
[194] *Idem* 815D.
[195] 699 JOC (W) at 702.
[196] *Idem* 702-703.
[197] 1999 BIP 392 (TPD) at 397.
[198] "first re-issue, vol 5, part 2, para 18 by A J C Copeling and A J Smith: 'For the purposes of copyright, originality refers not to originality of either thought or expression of thought but to original skill or labour in execution. What is required is that the work should emanate from the author himself and not be copied from an earlier work."
[199] At 1-15.
[200] 1999 BIP 392 (TPD) at 399.
[201] *Idem* 399-400.
[202] Vol 1 at 110 (par 3-93).
[203] 1999 BIP 392 (TPD) at 400.
[204] Laddie, Prescott & Vitoria *op cit* at 115; *British Northrop Ltd v Texteam Blackburn Ltd* [1974] RPC 57 at 68.
[205] 1999 BIP 392 (TPD) at 400G-401C.
[206] *Idem* 402A.
[207] 2000 3 All SA 367 (C) at 369g.
[208] *Idem* 369i.
[209] 2002 3 All SA 652 (T) at 656[6].
[210] *Idem* 656[7]-657[7].
[211] *Idem* 657[8].
[212] *Idem* 657[7].
[213] *Idem* 657[8].

[214] [1964] 1 All ER 465 (HL) at (469B-E).
[215] 2002 3 All SA 652 (TPD) at 657[9].
[216] *Idem* 657[9].
[217] 2002 4 All SA 67 (SCA) at [1]and [4].
[218] 804 JOC (T) at 807D-E.
[219] *Idem* 809D.
[220] *Idem* 809B.
[221] 2005 (1) SA 398 (C) at 413-414.
[222] *Idem* at 413.
[223] [1967] 1 WLR 723 at 732.
[224] 1994 3 SA 499 (TPD) at 505.
[225] [1902] 86 LT 465.
[226] My italics.
[227] 1994 3 SA 499 (TPD) at 512-513.
[228] 202 JOC (N).
[229] Laddie, Prescott & Vitoria *op cit* at paragraph 2.63.
[230] 1995 (1) SA 398 (D&CLD) at 399C.
[231] In the case of *Econostat (Pty) Ltd v Lambrecht and Another* 89 JOC (W) at 106, Judge Ackermann referred to the following passage quoted in the *Ladbroke* case:
"It may well be that there are cases in which expenditure of time and money has been laid out which cannot properly be taken into account as skill and labour involved in bringing into existence the literary work, be it catalogues or other compilations."From this passage it emerges that, depending on the facts of each specific case, it is possible that time and money spent may be regarded as expended skill and labour.
[232] At 190D (citing *Cramp & Sons*, in which Viscount Simon LC quoted Lord Atkinson in *Macmillan & Co v Cooper*): "What is the precise amount of the knowledge, labour, judgement 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."
[2]At 190B: 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."
[234] At 190D *op cit*.
[235] At 130C: "If the programme is to qualify for copyright protection, I will also have to be able to conclude that its production entails the expenditure of sufficient effort or skill to give it a new and original character."
[236] At 129H – 130A (citing *Kalamazoo Division (Pty) Ltd v Gay and others*, in which De Kock J quoted Viscount Simon LC in the *Cramp & Sons* case): "It is clear that it must be shown that some labour, skill or judgement has been brought to bear on the work before copyright can be claimed successfully for such work… What is the precise amount of the knowledge, labour, judgement 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 1911 cannot be defined in precise terms."
[237] *Idem.*
[238] *Idem.*
[239] At 104: "What is the precise amount of the knowledge, labour, judgement 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."

[240] *Idem*.
[241] *Idem*.
[242] At 106 (citing *Elango v Mansdorps*, where Goff LJ quotes from what Lord Hodson said in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*): "It may well be that there are cases in which expenditure of time and money has been laid out which cannot properly be taken into account as skill and labour involved in bringing into existence the literary work, be it catalogues or other compilations."
[243] *Idem*.
[244] At 84: "Dr Greenfield testified that Kuhlman's design in exhibits 1 and 2 is a substantial improvement on the Swedish bin and one on which a lot of skill, labour, effort and time were expended."
[245] At 74 (citing *Cramp & Sons*, in which Viscount Simon LC quoted *Macmillan & Co v Cooper*): "What is the precise amount of the 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."
[246] *Idem*.
[247] *Idem*.
[248] At 74 *op cit*.
[249] At 886F: "The originality expected of them was to designate the various parts to be used in the manufacturing process with reference to the plaintiff's standard codes and tooling. This aspect does not require a great deal of effort or originality…"
[250] At 183 (Weyer J citing Whitford J in *L B (Plastics) Ltd v Swish Products Ltd*): "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."
[251] At 197: "The originality required for purposes of copyright is not that the idea or concept must be new, but that the expression of any concept of 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."
[252] At 197: "The originality required for purposes of copyright is not that the idea or concept must be new, but that the expression of any concept of 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."
[253] At 215 (citing *Cramp & Sons*, in which Viscount Simon LC quoted Lord Atkinson's observation in *Macmillan & Co v Cooper*): "What is the precise amount of the knowledge, labour, judgement 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."
[254] *Idem*.
[255] *Idem*.
[256] At 342: "This copying, says respondents, does not require the kind of skill, labour or expertise which is required for a work to be original for copyright purposes, in that all it required was some computer expertise." And at 343: "Bencen's evidence, *prima facie* at least, convinces me 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. The original largely pencil drawing handed into court, shows that it is not a computerized printout, which of itself, *prima facie*, dispels the doubt created by repondents' suggestion of a mechanical computer copying."

[257] At 465 C: "…what is required is that the work must emanate from the author himself. Labour, skill or judgment are required."
[258] At 489E – 489F: "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 adequate own insight and own effort aimed at own creation in contrast with trying to merely duplicate the first sketch."
[259] *Idem*.
[260] At 133B: "…what is sought for purposes of originality is that the work should have had its origin in the author's knowledge, skill, labour and judgment, and that it should not be a mere copy…"
[261] *Idem*.
[262] At 133E – 133I: "Mr *Goodman* submitted that Cianfanelli's evidence of the knowledge, skill and judgment which he brought to bear on the development of the sketch constituting his first work, and his evidence of the 12 hours of labour which he put into the task of embodying the idea in a sketch, provided the originality which made the sketch a literary or artistic work, or both, having the necessary quality of originality in that it had its origin in the application of Cianfanelli's own knowledge, skill, labour and judgment.
Mr. *Puckrin*, on the other hand, argued that originality 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 merely commonplace. It must be apparent from the work itself that the author has made such a contribution…
I consider that the approach thus outlined is the correct approach."
[263] At 508 - 509: "The team leader in each instance alleges that the creation of the game required substantial original effort, expenditure of considerable time, skill and creativity. The time spent to create the game is given in each instance as is also done in the case of all other games and it is in each case a substantial period of usually well in excess of six months. There is, however, one game, 'Tetris', which is alleged to have been completed in three months and a few other games which are alleged to have been completed in between five and seven months. That in my view and the examples of drawings and charts annexed to the papers in the case of each game establish that there was sufficient originality for purposes of the act that the applicant can claim copyright in the games as cinematograph films."
[264] At 400B: "…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."
[265] *Idem*.
[266] *Idem*.
[267] At 649I: "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 judgement whether that time and effort produces something original."
[268] *Idem*.
[269] At 629: "There are certain matters on which the applicant cannot possibly acquire copyright. These are the physical features of the Kruger National Park, its roads, rivers, koppies, camps etc. A map, showing the location of these correctly will, unless possibly it is the first one – which VAT5 was not – have no originality, despite the time and effort expended."
[270] *Idem*.

[271] At 973B (Schutz JA citing the Australian case *Sands & McDougall (Pty) Ltd v Robinson* [1917] 23 CLR 49): "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."
[272] *Idem*.
[273] *Idem*.
[274] At 703 (Goldstein J citing Dean): "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 endeavours and should not be copied from other sources."
[275] At 400A Majapelo A.J. says as follows: "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. As stated in *Copinger and Skone James on Copyright* vol 1at 110 (para 3-93): '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, judgement or literary skill or taste which the author of a work must bestow on its composition in order for it to acquire copyright...'"
[276] *Idem*.
[277] *Idem*.
[278] *Idem*.
[279] *Idem*.
[280] At 767E: "The applicant states that extensive independent effort and labour had gone into the compilation…"
[281] At 657[9] (Harms JA citing Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*): "Indeed, it has often been recognised 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."
[282] At 809B: "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."
[283] (2002) 18 C.P.R. (4th) 161 (CA(Can)).
[284] See Table 3: Aspects of skill and labour.
[285] (2002) 18 C.P.R. (4th) 161 (CA(Can)) at para [53].
[286] (2002) 18 C.P.R. (4th) 161 (CA (Can)) at para [54]: "Moreover, I am not convinced that a substantial difference exists between an interpretation of originality that requires intellectual effort, whether described as skill, judgment and/or labour or creativity, and an interpretation that merely requires independent production. As discussed above, any skill, judgment and/or labour must be directed at an exercise other than mere copying for the result to be an original work (see *Interlego, supra* at 262-3; *Tele-Direct, supra* at para. 29). Clearly, therefore, the crucial requirement for a finding of originality is that the work be more than a mere copy. The vast majority of works that are not mere copies will normally require the investment of some intellectual effort, whatever that may be labelled. Works that are entirely devoid of such effort are, almost inevitably, simply copies of existing material."
However, the judge does acknowledge (at para [55]) that: "…it is more difficult to apply the standard of originality to some types of works, such as compilations, than to traditional forms of expression, such as novels, sculptures or plays. The further one gets away from traditional literary works, the less obvious it becomes that a work has not been copied."

[287] 499 US 340 (1991).
[288] 17 U.S.C. § 301(a).
[289] Halpern, Nard & Port *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (1999) 1.
[290] Halpern, Nard & Port *op cit* 2.
[291] *Idem* 17.
[292] *Idem*.
[293] Quoting fron Justice Brennan's dissenting opinion in *Harper & Row Publishers, Inc. v. Nation Enterprises* 471 U.S. 539, 105 S. Ct. 2218 (1985).
[294] "**Romanticism** (the Romantic Movement), a literary movement, and profound shift in sensibility, which took place in Britain and throughout Europe roughly between 1770 and 1848. Intellectually it marked a violent reaction to the *Enlightenment. Politically it was inspired by the revolutions in America and France, and popular wars of independence in Poland, Spain, Greece, and elsewhere. Emotionally it expressed an extreme assertion of the self and the value of individual experience… together with the sense of the infinite and the transcendental. Socially it championed progressive causes… The stylistic keynote of Romanticism is intensity, and its watchword is "Imagination". Drabble *The Oxford Companion to English Literature* (1995) 853.
Enlightenment is defined as "…the philosophic, scientific, and rational spirit, the freedom from superstition, the scepticism and faith in religious tolerance of much of 18th-cent. Europe." *Idem* 324.
[295] Littrell defines this "Romantic genius standard" as follows: "The law, in determining the originality of a given work, accords an uncritical deference to putative authors because of the unexamined, Romantic assumption that an artwork as such is grounded in a purely subjective space that the law cannot and should not interrogate. Examining and critiquing an author's creativity is impossible, according to this model, because the law, as an exterior being, cannot reach into a wholly private realm." Littrell "Toward a stricter originality standard for copyright law" *Boston College Law Review* December, 2001 at 13.
[296] "…the law presumes that a work produced by an individual bears the Romantics' mark of pure subjectivity…" *Idem*.
[297] "By restricting the realm of propertized works to those that are truly original, this approach would reinvigorate the public domain." *Idem* 15.
[298] Strasser "Industrious Effort is Enough." 2002 *European Intellectual Property Review*.
[299] Spaulding "The Doctrine of Misappropriation." 1998 Available at: http://cyber.law.harvard.edu/metaschool/fisher/linking/doctrine/index.html. There is no federal statute addressing misappropriation and the law varies according to a particular state's unfair competition doctrine. The misappropriation doctrine originated in the 1918 Supreme Court opinion in *International News Service v Associated Press* 248 U.S. 215. The majority found that Associated Press had a quasi-property right in the news that it had gathered. Since news is based on unprotectable facts, this right does not exist against the world at large, but against competitors. Therefore International News Service reporters were not entitled to "lift" Associated Press's stories from bulletin boards and early edition newspapers, nor take the reported information and write articles in their own words, resulting in newspapers containing such articles being sold in competition with Associated Press.
Since *International News Services*, two lines of cases have developed, one restricting the doctrine and one expanding it. In *Cheney Bros. V Doris Silk Corp.* 35 F. 2d 279 (2nd Circ 1929) it was found that it is not up to the judicial system to extend a patent- or copyright-like monopoly in the absence of legislation authorizing it. In *Erie R.R. Co. v Tompkins* 304 U.S. 64 (1938) it was decided that, unless the question before a federal court relates to the Constitution or to a federal statute, the court must apply the law of the state in which it resides.

However, despite these constrictions, in certain states the courts have continued to expand the misappropriation doctrine, especially the state of New York, as is further discussed in Chapter 3 when idea misappropriation is examined.

[300] Lipton J "Databases as Intellectual Property: New Legal Approaches" *European Intellectual Property Review* 2003 6.

[301] Marsland "Copyright Protection and Reverse Engineering of Software – an EC/UK Perspective" *University of Dayton Law Review* 1994 fn 7.

[302] Laddie, Prescott & Vitoria 27.

[303] *Idem* 34-35.

[304] [1964] I All ER 465, [1964] I WLR 273.

[305] Laddie, Prescott & Vitoria *op cit* 35-36.

[306] Garnett, James & Davies *op cit* 108–109. "What is required is that the work should originate from the author; it must not be copied from another work, for a mere copyist does not obtain copyright in his copy. This is the true meaning of 'original'… skill, labour and judgement merely in the process of copying cannot confer originality."

[307] Lipton J. *op cit* 8, with reference to Copyright and Rights in Databases Regulations.

[308] Strasser *op cit*.

[309] [2002] FCAFC 112.

[310] *Idem* paras 14-15.

[311] *Idem* para 15.

[312] *Idem* para 160.

[313] "Accessible whole-of universe compilations" is defined by the court (at paragraph 164) as follows: "The task of carefully identifying and listing all the units constituting a defined universe is usefully and commonly, undertaken. Moreover, alphabetical order is a common form of arrangement according to which such lists are made up. There are two special benefits offered by the compiler in such cases. The first is the assurance that the universe has been thoroughly explored, and that all members of it have been captured. "Whole-of-universe certification gives value to the list. A compilation which can only profess to have captured "nearly all" the members of a defined universe is not as valuable as one that can claim to have captured all of them. But whole-of-universe certification is a benefit only if the second special benefit to which I referred is also present: an intelligible arrangement of the data compiled. Who would want a telephone directory containing particulars of all subscribers listed randomly and therefore inaccessibly?"

[314] [2002] FCAFC 112 at para 164.

[315] In this regard, see [2002] FCAFC 112 at para 161.

[316] 499 US 340 (1991).

[317] "collecting/receiving, verifying, recording, computer-aided assembling".

[318] [2002] FCAFC 112 at para 6.

[319] *Idem* para 7.

[320] *Idem* para 8.

[321] 23 CLR 49.

[322] High Court of Australia Transcripts. *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* M85/2002 (20 June 2003).

[323] (2002) 18 C.P.R. (4th) 161 (CA (Can)).

[324] *Idem* [55].

[325] *Idem* [35] - [36].

[326] *Idem* [58] - [59].

[327] 1985 (4) 882 (CPD).

[328] Copeling *Copyright Law in South Africa* 68-69.

[329] Beier, Schricker & Fikentscher *IIC Studies, Studies in Industrial Property and Copyright Law* (1983) 112.
[330] *Idem* 111..
[331] Gielen & Verkade (et al) *Intellectuele Eigendom, Tekst & Commentaar* (1998) 11-13.
[332] "Blood, sweat and tears".
[333] "'Bloed,zweet en tranen' zijn niet voldoende, maar ook niet noodzakelijk: een miljoen dominostenen achter elkaar vormen nog geen werk, een melodietje dat in een opwelling in tien minuten is gecomponeerd is wel een werk." Gielen & Verkade (et al) (*op cit*) 12.
[334] Blanke " Vincent van Gogh, 'Sweat of the Brow', and Database Protection" *American Business Law Journal* 2002 at VI.
[335] Directive 96/9/EC, article 10.
[336] Directive 96/9/EC Reasons for adopting the directive, preceeding the Directive, paragraph 40
[337] *Idem* para 20.
[338] *Idem* para 26.
[339] *Idem* para 19.
[340] *Idem* paras 19 & 40, read with Article 7(1) of the same Directive.
[341] *Idem* para 41.
[342] Powell "The European Union's Database Directive: An International Antidote to the side effects of Feist?" 1997 *Fordham International Law Journal* Introduction.
[343] Powell fn49.
[344] Blanke *op cit* fn 168.
[345] Freedman "Should Canada Enact a new Sui Generis Database Right?" *Fordham Intellectual Property, Media and Entertainment Law Journal* 2002 fn281.
[346] Karnell "The Nordic Catalogue Rule: Origin and Practice" 2003. Available: http://www.jus.uio.no/iri/columbanus/foredrag 1.
[347] *Idem* 2.
[348] *Idem* 2-3.
[349] Lipton *op cit* 17.
[350] *Idem* 7.
[351] Copeling "Copyright in Ideas?" 6: "Copyright law forms an integral part of that branch of the law known as the law of immaterial property, of which it is a basic principle that all rights in immaterial property have as their common object some or other product of man's mind. To discover the true legal object of copyright one has thus simply to enquire what, in a literary or artistic work, constitutes the product of the author's mind. In this there is little difficulty, for there are no logical grounds for supposing that the product of the author's mind is to be found elsewhere than in the idea which inspires and eventually becomes embodied in his ultimate creation. Certainly, it cannot be argued that there is any mental labour in the mere reduction of that idea to some tangible form. The latter is a purely physical act."
[352] *Idem* 9.
[353] Dean 1-18 – 1-19: "It is a maxim of copyright that there is no copyright in ideas. It is the material form of expression of the idea which is the subject of copyright. It is the way in which information is arranged which attracts copyright. The artistic features or attributes of the work are the subject of protection not some concept which it conveys. Even if it is original an idea cannot be protected. The subject of the protection is the embodiment of that idea. The point is made, however, that this maxim can be too simplistic. While it is true that no copyright can subsist in ideas while they have not been expressed in a material form, once they exist in that form they become an integral part of the work and in certain circumstances taking an idea expressed in written or material form, without necessarily taking the wording in which the idea is expressed, can be an invasion on copyright. It is often a

question of degree whether an idea per se or the material expression of an idea is taken. This conundrum is known as the 'idea/expression dichotomy'. The idea/expression dichotomy manifests itself in particular in areas such as whether stories, plots and the personal characteristics or attributes of characters can be protected by copyright. There can be no doubt that copyright can subsist in an author's selection and compilation of ideas or facts."

[354] Laddie, Prescott & Vitoria at 33-34: "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… The subject matter alleged to be copyright must be in truth a literary, dramatic, musical or artistic work, or the claim to protection will fail *in limine*… News, as such, is not a literary work; it is a historical event. But when expressed in language as a newspaper item the work is entitled to protection…"

[355] Copinger and Skone James at 101: "It is a long established principle of copyright law that copyright does not subsist in a work unless and until the work takes some material form. This principle is known as the requirement of fixation. The reasons for this principle are practical. Since copyright is a form of monopoly in relation to the subject matter which is protected, there must be certainty as to what that subject matter is. This is necessary both so as to be able to prove the existence of the work and what the work consists of, in the context of determining whether the work has been copied or otherwise infringed. Fixation also provides a limit to the monopoly, ensuring that the protection accorded to the work does not extend beyond the expression of the work, to the ideas or information contained or represented in it. This is necessary in holding a balance between the author's interests and society's interests. Further, fixation provides a defined moment when the work takes existence, essential for the purpose of applying the rules as to the status of its author and the calculation of the period of its protection."

[356] Dean *op cit* 4-131 n20B.

[357] Garnett, James & Davies *op cit* 101: "Whilst the principle of fixation requires that the work takes a material form, this is a separate matter from any requirement as to the form a particular work shall take. The requirement as to a particular form is an integral part of the description of the work; unless it is in that form, it does not constitute a work of that description. The requirement as to taking a material form is part of the conditions which the designated work must satisfy in order to qualify for copyright protection. Where there is a requirement as to a particular form, and this is met, the requirement as to fixation may also be met, but this is not necessarily so, and this coincidence, when it does occur, should not obscure the distinction between the two."

[358] Dean *op cit* 1-5.

[359] 1995 1 SA 645 (AD).

[360] *Idem* 653B – 653D.

[361] 1987 4 SA 660 (WLD).

[362] *Idem* 663E: "Inasmuch as copyright might vest in the creator of a part of the whole, it seems to me that the plaintiff must identify those parts for which originality is claimed." And at 663H-I. "If it should be established that a drawing in respect of which copyright is sought to be enforced, is part of a series, the plaintiff must establish the originality of that drawing with referenceto the series. For the purpose of pleading it is not sufficient for the plaintiff simply to make the *ex cathedra* statement the drawing is original, while ignoring the series. This is particularly so where a drawing is a composite whole, the parts of which might each be subject to copyright."

[363] 1993 2 SA 128 (WLD) at 133I.

[364] [1944] AC 329 (HL) ([1944] 2 All ER 92).

[365] At 338.

[366] *Idem* 132 F-H.

[367] *Idem* 133J – 134A.

[368] *Idem* 649I.
[369] 1995 1 SA 645 (AD) at 650D.
[370] Dean *op cit* 1-16 – 1-7
[371] 1987 2 1 (AD) at 23.
[372] Dean *op cit* 1-17 at fn 10. From Table 2 above, setting out the legal "test" for originality as formulated by the courts, it is clear that all that is generally required is that the work should originate or emanate from the author. In this regard the following cases may be referred to in Table 2 above: *Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd* 1972 1 SA 471 (WLD); *Kalamazoo Division (Pty) Ltd v Gay* 1978 2 SA 184 (CPD); *Topka t/a Topring Manufacturing & Engineering v Ehrenberg Engineering (Pty) Ltd* 71 JOC (A); *Barber-Greene Company & others v Crushquip (Pty) Ltd* 151 JOC (W); *Fichtel & Sachs Aktiengesellschaft v Laco Parts (Pty) Ltd* 174 JOC (W); *Barker& Nelson (Pty) Ltd v Procast Holdings (Pty) Ltd* 195 JOC (C); *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (AD); *Adonis Knitwear Holding Ltd v OK Bazaars* (1929) Ltd 335 JOC (W); *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (WLD); *Harnischfeger Corporation v Appleton* 1993 4 SA 479 (WLD); *Nintendo Co Ltd v Golden China TV-Game Centre* 488 JOC (T); *Appleton v Harnischfeger Corporation* 1995 2 SA 247 (AD); *Da Gama Textile Co Ltd v Vision Creations CC* 1995 1 SA 398 (D & CLD); *Accesso CC v Allforms (Pty) Ltd* 677 JOC (T); *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 1 SA 398 (C).
[373] Dean *op cit* 1-17.
[374] Dean's submission that "an element of subjectivity can be imported into the test as to whether subject matter qualifies as a 'work' is well illustrated by *Ehrenberg Engineering (Pty) Ltd v Topka t/a Topring Manufacturing and Engineering* 40 JOC (T). In *Ehrenberg Engineering* the court had to decide whether copyright in certain engineering drawings had been infringed (40 JOC (T) at 51). Van Dijkhorst J held that the close resemblance between the Ehrenberg drawings (the copyright work) and the Topka manufactured "donkey" bin was indicative of copying (40 JOC (T) at 53). Important for our purpose is how the court then weighed similarities and differences in order to establish whether copying did indeed occur.
Material differences between two works do not preclude the second work from being a reproduction of the first. The pinpointing of material differences entails an *objective*, comparative approach. The Topka bins were held to be three-dimensional reproductions of the Ehrenberg drawings (40 JOC (T) at 55), even though the two works differed substantially with regards to aspects such the positioning of the curved track (40 JOC (T) at 53). Therefore, even though objective comparison reveals material differences between two works, it is still possible that the second work may not qualify as a "work" in terms of the Act.
Furthermore, if two works both differ from the original work in the same way, it is not because the same original work was used as a basis for production. The fact that the Ehrenberg drawings and the Topka bins both differed from the Swedish bins in the same way, i.e. in being suitable for South African forklifts, cannot be explained by the fact that both works were produced using the Swedish bins as a basis for production (40 JOC (T) at 52). Consequently, even though objective comparison reveals that two or more works differ from the original work in the same manner, it is still possible that the subsequent works may all qualify as "works" in terms of the act.
Despite objective comparison, two works may seem to constitute individual works, but a subjective enquiry may reveal that one is rather to be regarded as a copy than a "work" in terms of the Act. On the other hand, even though, when objectively compared, two works may seem similar, a subjective enquiry may reveal that a "work" in terms of the Act has indeed been created.
Although the tendency is to try and keep the "work" and "originality" enquiries apart, in such cases as set out above it is inevitable that the subjective elements necessary to judge whether a "work" exists will overlap with the originality test.

[375] Dean *op cit* 1-17.
[376] Tritton *op cit* 305.
[377] Beier, Schricker & Fikentscher *op cit* 111.
[378] Dean *op cit* 1-16.
[379] 227 JOC (T).
[380] [2002] FCAFC 112 at para 16.
[381] *Idem* para 17.
[382] 1998 2 SA 965 (SCA).
[383] "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." 677 JOC (T) at 690-691.
[384] 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. Because a judgement to the said effect would have sanctioned reverse engineering, 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.
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.
[385]*Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* [2002] FCAFC 112 at para 164.
[386] Dean *op cit* 1-5.
[387] Keeping in mind that South African copyright law follows British copyright law principles.
[388] Dean *op cit* 1-16.
[389] 1920 WLD 35 at 37.
[390] *Idem* 39.
[391] 1972 1 SA 470 (WLD) at 470G.
[392] *Idem* 471H.
[393] *Idem* 472G.
[394] *Idem* 471H.
[395] 1978 2 SA 184 (CPD) at 186H-187F.
[396] *Idem* 190E.
[397] *Idem* 191A.
[398] 1981 4 SA 123 (CPD) at 129A-B.
[399] *Idem* 130C.
[400] *Idem* 134H.
[401] *Idem* 132G – 132H.
[402] 1944 AC 329.
[403] 1981 4 123 (CPD) at 132H –134E.
[404] 1944 AC 329 at 340, as quoted in 1981 4 123 (CPD) at 134E.
[405] 1981 4 SA (CPD) at 134F.
[406] *Idem* 134G.
[407] *Idem* 134H.
[408] 89 JOC (W) at 105-106.
[409] *Idem*.

[410] *Idem* 106.
[411] *Idem* 105.
[412] *Idem*.
[413] 71 JOC (A) at 83.
[414] *Idem* 72.
[415] *Idem* 83-84.
[416] 84 JOC (A) at 84.
[417] 1985 4 SA 882 (CPD) 884E-F.
[418] *Idem* 887B.
[419] *Idem* 886C.
[420] In *Fichtel & Sachs Aktiengesellschaft v Road Runner Services Ltd* 174 JOC (W) at 191 Weyers J quoted the following passage from the affidavit by Gerhart Baume: "Reverse engineering can be effected without undue trouble by either, eg making a mould or plaster cast, or making a two dimensional drawing from the three-dimensional part and then reproducing the part".
[421] In this regard see 2.3.1.4 (f).
[422] 1985 4 SA 882 (CPD) at 891J.
[423] *Idem* 893B-C.
[424] 174 JOC (W) at 188.
[425] *Idem* 187-188.
[426] *Idem* 188.
[427] *Idem* 188-189.
[428] *Idem* 189-190.
[429] 1985 1 SA 646 (TPD) at 649E.
[430] *Idem* 649F.
[431] *Idem* 649G – 649H.
[432] "Where, in an action brought by virtue of this chapter with respect to a literary, musical or artistic work, it is proved or admitted that the author of the work is dead, the work shall be presumed to have been an original work unless the contrary is proved."
[433] 1985 1 SA 646 (TPD) at 649I-650A.
[434] 195 JOC (C) at 196-197.
[435] *Idem*.
[436] 202 JOC (N) at 215-216.
[437] 243 JOC (W) at 244.
[438] *Idem* 281-282.
[439] *Idem* 273.
[440] *Idem* 257.
[441] *Idem* 261-263, 281.
[442] *Herbert Rosenthal Jewellery Corp v Kalpakian* 446 F 2d (1971) at 738, on appeal to the US Court of Appeals, 9th Circuit, at page 740.
[443] *Idem* 279.
[444] 1987 2 SA 1 (AD) at 23.
[445] *Idem* 25.
[446] 1989 1 SA 276 (AD) at 279F read with 283C.
[447] *Idem* 280E,G.
[448] 1989 1 SA 276 (AD) at 281F.
[449] *Idem* 281H – 282A.
[450] *Idem* 282A – 282B.
[451] *Idem* 282B – 282C.

[452] *Idem* 282D-F.
[453] *Idem* 286F.
[454] *Idem* 286F, 288E.
[455] *Idem* 286G.
[456] *Idem* 289E.
[457] *Idem* 292J.
[458] *Idem*.
[459] *Idem* 294E.
[460] *Idem* 293H-I.
[461] *Idem* 293I.
[462] *Idem* 293I-J.
[463] *Idem* 294A.
[464] *Idem* 294E.
[465] See Section 2(3) of theAct.
[466] *Idem* 294E-F.
[467] *Idem* 284E.
[468] *Idem* 284B-D.
[469] 335 JOC (W) at 336-337.
[470] *Idem* 339.
[471] *Idem* 337-338.
[472] *Idem* 343.
[473] 346 JOC (W) at 347.
[474] *Idem* 348.
[475] *Idem* 349.
[476] *Idem* 351.
[477] 1989 4 SA 427 (TPD) at 449G.
[478] *Idem* 437F-G.
[479] *Idem* 437G.
[480] *Idem* 438H.
[481] *Idem* 438B.
[482] *Idem* 450B-E.
[483] "The first respondent does not accept that the preparation of patterns which are used to cut the fabric for covering the sofa involves a lengthy period. It would be approximately one day." 1991 2 SA 455 (WLD) at 463G-H.
[484] 1991 2 SA 455 (WLD) at 461D – 462A.
[485] *Idem* 465B-C.
[486] 1993 4 SA 479 (WLD) at 489D-F.
[487] 1994 3 SA 499 (TPD) at 501C.
[488] *Idem* 501I.
[489] *Idem* 502E, 503D.
[490] *Idem* 505G.
[491] *Idem* 505H-I.
[492] *Idem* 512H-513B.
[493] 399 JOC (T) at 400, 401.
[494] *Idem* 409.
[495] *Idem* 409-410.
[496] *Idem* 408.
[497] *Idem* 410.

[498] *Idem*.
[499] 1993 2 SA 128 (WLD) at 131A-B.
[500] *Idem* 133G-H.
[501] *Idem* 136C.
[502] 1993 4 SA 279 (AD) at 288B.
[503] 488 JOC (T) at 491-494.
[504] *Idem* 508.
[505] *Idem* 489.
[506] *Idem* 508-509.
[507] *Idem* 508.
[508] *Idem*. 509.
[509] 1994 2 SA 464 (WLD) at 470E, 473E.
[510] 1995 2 SA 247 (AD) at 262 (E-H).
[511] 1995 1 SA 401(D & CLD) at 400.
[512] 1995 1 SA 645 (AD) at 649.
[513] [1940] AC 112 (PC) at 123 (also reported at [1939] 4 All ER 192).
[514] 1995 1 SA 645 (AD) at 650A-C.
[515] *Idem* 650D-E.
[516] 1997 1 SA 405 (AD) at 409I-410D.
[517] 624 JOC (T) at 626.
[518] *Idem* 626.
[519] *Idem* 630.
[520] *Idem* 629.
[521] [1917] 23 CLR 49 at 52-53.
[522] 1998 2 SA 965 (SCA) at 973C-E.
[523] *Idem* 973C.
[524] 677 JOC (T) at 696.
[525] *Idem* 696.
[526] *Idem* 683.
[527] *Idem* 682-683.
[528] 1999 BIP 392 (TPD) at 399C.
[529] *Idem* 400E – 400F.
[530] *Idem* 402A.
[531] 759 JOC (T) at 767E-F.
[532] *Idem* 768A.
[533] [2000] 3 All SA 367 (C) at 369*i*.
[534] 2002 3 All SA 652 (T) at 657[8].
[535] *Idem* [23].
[536] *Idem* 656[6].
[537] Butcher *Copy-Editing: A practical guide* (1996) 41-42.
[538] Van Vuuren "Helize van Vuuren oor *Die mooiste liefde is verby*" http://www.litnet.co.za/seminaar 2, quoting from Van Gorp *Lexicon van literaire termen* (1986) 311.
[539] "Mnr. Nico Vermaak, 'n direkteur van die prokureursfirma DM Kisch wat spesialiseer in patent en intellektueelgoedereg, gee die volgende definisie van plagiaat: In beginsel is plagiaat niks anders nie as inbreuk op outeursreg." *Die Burger* (2001-05-01) 9.
[540] Ulmer *Encyclopedia of Comparative Law Volume XIV: Copyright and Industrial Law* (1987) 2-2.
[541] The facts surrounding the DPM Botes case as portrayed here are taken from an overview of the case provided by Van Vuuren *in "Helize van Vuuren oor Die mooiste liefde is verby"op cit* 4-5.

[542] Marais "In Gesprek met D.P.M. Botes" *Spilpunte* Augustus 2004 10.
[543] Van Vuuren *op cit* 7.
[544] "**Lamento**
He put aside his pen
It lies motionless on the table.
It lies motionless in the void.
He put aside his pen.

Too much that can neither be written nor suppressed!
He is paralyzed by something happening far away
though the mysterious traveling bag beats like a heart.

Outside it is early summer.
From the bushes a whistling – is it men or birds?
And cherry trees in bloom fuss over the trucks returned home.

Weeks pass.
Night inches up on us.
Moths fix themselves to the windowpane
small pale telegrams from the world."
- Tranströmer

"**lament**
hy het sy pen neergesit
roerloos op die tafel die pen
roerloos op die tafel die skryfblok die pen
hy het sy pen neergesit

soveel dinge wat nie geskryf durf word nie
hy is geboei deur gebeurtenisse elders ver
en die misterieuse reissak doef soos 'n hart

buite is dit byna somer
in die bosse fluite – is dit voëls of jagters
en bome bloei in tooi die teerpaaie

weke gaan verby
en nag word ons meester kry 'n vaste greep
motte plak hulself teen die ruite
klein grys telegramme van die wêreld"
- Botes
[545] Van Vuuren *op cit* 7.
[546] Marais *op cit* 15.
[547] *Idem*.
[548] Van Vuuren *op cit* 7.
[549] Marais *op cit* 11. "Aan D.P.M. Botes,wat vroeër met verswyging bestraf is nadat hy twee baie vry vertaalde gedigte uit Sweeds (via Engels) sonder erkenning in *Klein grys telegramme van die wêreld* (1967) opgeneem het, is literêre amnestie verleen."

[550] *Idem* 10.
[551] *Idem* 12.
[552] *Idem* 14.
[553] *Idem* 10.
[554] "Metaphor in Afrikaans Language and Literary Science".
[555] *Weekend Post* (1975-07-26) 1.
[556] *The Weekend Argus* (1975-07-26) 1; *Die Burger* (1975-07-26) 1.
[557] *Beeld* (1975-07-29) 1.
[558] *Beeld* (1975-07-28) 1.
[559] *Volksblad* (1975-07-27) 1.
[560] *Daily Dispatch* (1975-07-28) 1.
[561] *Volksblad* (1975-07-28) 1.
[562] "redelik negatief".
[563] *Volksblad* (1975-07-27) 1.
[564] *Vaderland* (1975-07-28) 3.
[565] *The Argus* (1975-07-29) 3.
[566] E-mail from Professor Ina Gräbe (University of South Africa) to myself dated 16 November 2004.
[567] According to Dr. Francis Galloway and Dr. Charles Malan, who used to know Verster well.
[568] Cellphone conversation between Dr. Malan and myself, November 2004.
[569] As a textbook or treatise in terms of paragraph *(c)* or a compilation in terms of paragraph *(g)* of the definition of "literary work" in Section 1 of the Act.
[570] This is discussed further in relation to the dispute over *Metronoom* under para.3.6
[571] *De Kat* (January 1998) 50-55.
[572] "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."
[573] (1874) LR 9 QB 523.
[574] [1894] 2 Ch I, CA.
[575] [1899] I Ch 836; on appeal [1900] I Ch 122, CA.
[576] [1905-10] MCC 216.
[577] Halpern, Nard & Port *op cit* 2.
[578] In terms of section 106 the owner of copyright has the exclusive right to reproduce, produce derivative works, distribute copies, perform and display the copyrighted work.
[579] Section 102.
[580] For the purposes of whether a state law claim has been pre-empted, two aspects of section 301 have proved problematic in federal case law: what rights are "equivalent" to the exclusive rights of the copyright owner and what comes within the subject matter of copyright for the purposes of determining whether a state law claim has been pre-empted. Whether a state law claim is "equivalent" to a federal claim depends on whether the claim contains essential elements in addition to those necessary for a copyright claim, but there is no unanimity as to how those elements are to be determined. What is clear, however, is that if the matter involved in the state law claim is generally within the subject matter of copyright, the case would be pre-empted, even if the material itself in uncopyrightable. (Halpern Nard & Port *op cit* 2-3, with extensive reference to federal case law.)
[581] *Murray v National Broadcasting Co*., 844 F. 2d 988 (2nd Cir. 1988).
[582] Brennan & Christie "Spoken words and copyright subsistence in Anglo-American Law" *Intellectual Property Quarterly* 2000. Although the prevailing rule in US common law is that publication requires the original work or tangible copies thereof to be made available to the public, merely speaking words will not constitute a "publication" so as to divest common law protection. Brennan & Christie *op cit*, with reference to the British cases of *Jefferys v. Boosey* and *Caird v. Syme*,

as well as *Estate of Hemingway v. Random House* (1968) 32 A.L.R. 3d 605 at 611-612 and *Williams v Weissner* (1969) 38 A.L.R. 3d 761 at 775-776.
[583] *Jenkins v News Syndicate* (1926) 219 N.Y. Supp. 196, as referred to by Brennan & Christie *op cit*.
[584] *Columbia Broadcast System Inc. v Documentaries Unlimited* (1964) 248 N.Y.S. 2d 809, as referred to by Brennan & Christie *op cit*.
[585] *Current Audio v RCA Corporation* (1972) 337 N.Y.S. 2d 949, as referred to by Brennan & Christie *op cit*.
[586] *Falwall v Penthouse International* (1981) 521 F. Supp. 1204, as referred to by Brennan & Christie *op cit*.
[587] *Rowe v Golden West TV* (1982) 445 A 2d 1165, as referred to by Brennan & Christie *op cit*.
[588] *Estate of Ernest Hemingway v Random House* (1968) 32 A.L.R. 3d 605, as referred to by Brennan & Christie *op cit*.
[589] In line with its residual common law copyright jurisdiction, California has enacted legislation asserting the protection of unpublished, unfixed works: "The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representasiont or expression thereof as against all persons except one who originally and independently creates the same or similar work. A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device." California Civil Code, s. 980(a)(1), as quoted by Brennan & Christie *op cit*.
[590] Garon "Media & monopoly in the information age: slowing the convergence at the marketplace of ideas." *Cardozo Arts & Entertainment Law Journal* (1999).
[591] Halpern, Nard & Port *op cit* at 11.
[592] "[I]nstead of developing a uniform set of standards to occupy the 'middle ground', the courts of New York and California have taken positions diametrically opposed to each other." Swarth "The law of ideas: New York and California are more than 3,000 miles apart" 13 *Hastings Communications and Entertainment Law Journal* (1990).
[593] "Under the express contract theory of idea protection, an idea-person has an enforceable contract and may sue for damages if the idea-recipient expressly promises to pay for an idea if it is used." Garon *op cit.*
[594] "The implied-in-fact contract theory of idea protection is essentially no different from the express theory; properly understood, an implied-in-fact contract 'differs from express contract only in that the consent of the parties is expressed by conduct rather than words.' Accordingly, 'a contract will be implied in fact when the parties clearly intended payment to the extent of the use of the plaintiff's idea, though they did not set forth that intention in express language.' Courts find an intent to contract from the relationship of the parties, the circumstances of the submission, and the parties' conduct. Courts also find implied-in-fact contracts based on industry custom: that is, the plaintiff may establish the existence of an implied-in-fact contract if he can show that people in the idea-recipients line of work generally pay for ideas received if they use them." Garon *op cit*.
[595] Liebman & Carton "Protecting ideas: more than a penny for your thoughts?" *Entertainment Update: Law and Entertainment* 5.
[596] Garon *op cit*.
[597] Swarth *op cit.* Swarth refers to *Stone v Marcus Loew Booking Agency* 63 N.Y.S.2d 220 (N.Y. Sup. Ct. 1946) and *Carneval v William Morris Agency* 124 N.Y.S. 2d 319 (N.Y. Sup. Ct. 1953), aff'd, 284 A.D. 1041, 187 N.Y.S. 2d 612 (1954). In both the said cases the courts seem to require only a written expression of the idea in question.

[598] Reitenour "The legal protection of ideas: is it really a good idea?" *William Mitchell Law Review* Winter 1992.
[599] Winteringham "Stolen from stardust and air: idea theft in the entertainment industry and a proposal for a concept initiator credit" *Federal Communications Law Journal* March (1994).
[600] "The definition of narrative crux refers to well-defined ideas that, if fixed in an expression, would be sufficiently original to warrant copyright, without being invalidated by the merger doctrine. The content of a narrative crux does not extent beyond the sole expression of the idea itself. If the idea can be fixed in more than one expression, the narrative crux criteria is not met. Under this definition, a plot-line synopsis… is a narrative crux. A general theme such as boy meets girl, however, does not meet the definition because it can be fixed in more than one expression." Winteringham *op cit*.
[601] "As with copyright infringement, exact copying is not needed for concept initiator infringement to occur. The author of the second work must only use the original idea 'quantitatively and qualitatively' in the adaptive expression." Winteringham *op cit*.
[602] "This requirement addresses the issue of access. Access in the concept initiator context is proven by evidence such as contract, documentation, or striking similarity. To accommodate the new standard, the traditional meaning of access must be broadened to include situations such as overhearing a narrative crux and taking the fully developed idea, or stealing the idea from a short synopsis or screen treatment." Winteringham *op cit*.
[603] "The Rescue of Vuyo Stofile".
[604] "The Most Beautiful Love has Gone".
[605] The M-Net bursary for outstanding writer's talent was awarded to Du Plessis in 1996. *Beeld* (1999-12-13) 4.
[606] *Beeld* (1999-12-21) 11.
[607] *Beeld* (1999-12-13) 4; *Beeld* (1999-12-21) 11.
[608] *Beeld* (1999-12-13) 4.
[609] De Vries "'n Vergelyking van 'Die redding van Vuyo Stofile' en 'The magic barrel'" 2000 http://www.litnet.co.za/seminaar
[610] *Die Burger* (1999-12-30) 8.
[611] "The conversation between literary works of art with specific reference to …"
[612] *Die Burger* (1999-12-30) 8.
[613] *Idem.*
[614] *Beeld* (1999-12-21) 11.
[615] *Idem*.
[616] *Die Burger* (1999-12-24) 4; *Beeld* (1999-12-21) 11.
[617] *Die Burger* (2000-01-08) 4, read with section 2(3) of the Act: "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."
[618] *Die Burger* (1999-12-24) 4.
[619] *Die Burger* (2000-01-08) 4.
[620] Of the magical elements that appear in Malamud's text there is no trace in Du Plessis's story. Whereas the main character's psyche receives a lot of attention in *The magic barrel*, Vuyo Stofile's innermost environment receives little attention in "Die Redding van Vuyo Stofile". While the realistic narration of the Jewish story forms only one of the layers of Malamud's story, Du Plessis's story can be classified as a realistic narrative. The Afrikaans story is also much shorter: about 5 400 words (14 pages) compared to the about 7 700 words (20 pages) by Malamud. Further, many of the apparent parallels between the two stories are skillfully brought about – the Jewish matchmaker smells of fish, his Xhosa counterpart of cow's milk. While Du Plessis's version centers around the tensions between Western and traditional Xhosa culture, the power of Malamud's text lies in the mingling of the

magical, psychological and realistic combined with dialogue and the complex, open ending. Du Plessis' text is characterised by an unambiguous ending with an ambiguous title. Probably the most ironic argument in favour of the originality of Du Plessis's text is the fact that, although it overshadows the literary quality of the other contributions to *Die mooiste liefde is verby*, the literary skill expended is not nearly in the same class as that which is evident in *The magic barrel*. *Die Burger* (1999-12-30) 8.
Philip John observes that at the end of Malamud's story the main character, Leo Finkle, reaches a state of self-knowledge and acceptance in that he seems to accept the prostitute daughter of the marriage broker into his life, maybe as his wife. The story speaks of a whole, magical cosmos where good and bad co-exist. In Du Plessis's story the prostitute rejects Vuyo. In the Afrikaans story isolation, loneliness and a fragmented cosmos are accentuated. *Die Burger* (1999-12-14) 4.
[621] *Beeld* (1999-12-21) 11; *Die Burger* (1999-12-30) 8.
[622] John "Hoe moet ons liegfabriek lyk? 'n Meditasie oor simptome van 'n ontwikkelende (postnasionalistiese) patologie in die hedendaagse Afrikaanse literêre bedryf." http://www.litnet.co.za/seminaar 8.
[623] *Idem* 9.
[624] *Idem* 6.
[625] *Idem* 8-9.
[626] Van Vuuren "Helize van Vuuren oor *Die mooiste liefde is verby*" http://www.litnet.co.za/seminaar 2, quoting from Grové *Letterkundige sakwoordeboek vir Afrikaans* (1988) 107.
[627] The first part of this volume consists of 23 poems wherein long passages translated from three historical and three anti-fascist works appear. Van Wyk Louw did not acknowledge the said sources, with which Afrikaans readers were unfamiliar. As *Tristia* was a focal point of the Afrikaans literature for decades, Van Wyk Louw's sources came to light over a term of thirty years and more. He was nevertheless never accused of plagiarism (Van Vuuren *op cit* 5-6).
[628] Van Vuuren *op cit* 2, 6-7.
[629] "Metronome".
[630] *Beeld* (2001-04-23) 5.
[631] *Die Volksblad* (2001-04-26) 5.
[632] *Beeld* (2001-04-23) 5.
[633] *Die Burger* (2001-05-01) 9.
[634] *Die Burger* (2001-05-03) 8.
[635] *Die Volksblad* (2001-05-03) 3.
[636] *Die Volksblad* (2001-04-26) 5.
[637] *Rapport* (2001-04-29) 5.
[638] *Die Burger* (2001-04-30) 2.
[639] For example: "Ek is jammer dat dit gebeur het. Die les wat ek geleer het is dat dit plagiaat is as jy afskryf en vertaal as daar wel iemand is wat kopiereg het. Dit is nie goeters wat ek doelbewus gedoen het nie." *Rapport* (2001-04-29) 5: "Ek het nie doelbewus bronne weggelaat nie. Al wat ek kan sê, is dat ek in die toekoms baie versigtiger moet wees." *Die Burger* (2001-05-01) 9.
[640] *Die Burger* (2001-04-30) 2.
[641] *Die Burger* (2001-05-01) 9. Also see section 26(3) of the Act.
[642] Telephone conversation with Louise Steyn of Tafelberg, 19 November 2004.
[643] *Die Burger* (2001-05-01) 9.
[644] Saamgestel deur Petrovna Metelerkamp (2003), Hemel en See Uitgewers, Vermont.
[645] *Rapport* (2003-08-24)5.
[646] *Sarie* (November 2003) 252.
[647] *Die Burger* (2003-05-15) 12.

[648] *Rapport* (2003-08-24) 5.
[649] As Metelerkamp describes it: "'Al wat Catherine [de Villiers] gehad het, was 'n eksemplaar van haar ma se jeugbiografie van Ingrid, wat vroeër in die *Tydskrif vir Letterkunde* verskyn het.' Sy het ook dokumente wat sy wederregtelik bekom het, soos briewe en fotostate van briewe, gehad." *Die Burger* (2003-08-27) 3.
[650] Grundling "Dennebos-herinnering gestroop van biograaf se byvoeglike naamwoorde" http://www.litnet.co.za
[651] *Die Burger* (2003-05-15) 12.
[652] *Rapport* (2003-08-03) 6.
[653] *Idem*.
[654] *Volksblad* (2003-08-06) 8.
[655] *Rapport* (2003-08-10) 20.
[656] *Sarie* (November 2003) 252.
[657] *Idem*.
[658] Beeld (2003-08-04) 11.
[659] Volksblad (2003-06-30) 6.
[660] *Die Burger* (2003-08-04) 13.
[661] Grundling *op cit.*
[662] *Idem.*
[663] Meggs *A History of Graphic Design* (1998) 58.
[664] Landow, G.P. *Hypertext:The Convergence of Contemporary Critical Theory and Technology* (1997) 67.
[665] Ploman & Hamilton *Copyright:Intellectual Property in theIinformationAge* (1980) 6.
[666] With reference to Hazan.
[667] Ploman & Hamilton *op cit* 6.
[668] Landow *op cit* 66-67.
[669] *Idem* 66.
[670] *Idem* 66-67.
[671] *Idem* 67.
[672] *Idem* 89 (read with Ong's observation on Landow 82).
[673] Ploman & Hamilton *op cit* 7.
[674] *Idem*.
[675] Garnett, James & Davies *Copinger and Skone James on Copyright* (1999) 32.
[676] Ulmer *Encyclopedia of Comparative Law Volume XIV: Copyright and Industrial Law* (1987) 2-2.
[677] Ploman & Hamilton *op cit* 7.
[678] Ploman & Hamilton *op cit* 8; Garnett, James & Davies *op cit* 32.
[679] Ulmer *op cit* 2-2; Ploman & Hamilton *op cit* 8.
[680] Ploman & Hamilton *op cit* 8-9.
[681] Meggs *op cit* 58.
[682] *Idem*.
[683] *Idem* 23.
[684] *Idem* 59.
[685] Garnett, James & Davies *op cit* 32.
[686] *Idem.* Garnett, James & Davies use the word "no". In the light of my aforegoing discussion, I prefer using "little", as it seems that the existence of economic rights before the invention cannot be conclusively outruled.
[687] Seignette *Challenges to the Creator Doctrine* (1994) 7 n2.
[688] Meggs *op cit* 26.

[689] *Idem* 61.
[690] *Idem* 64-65.
[691] *Idem* 63.
[692] *Idem*.
[693] Seignette *op cit* 8.
[694] Ulmer *op cit* 2-2.
[695] *Idem* 2-3
[696] *Idem.*
[697] Ploman & Hamilton *op cit* 9.
[698] *Idem* 10.
[699] Ulmer *op cit* 2-3.
[700] *Idem.*
[701] Seignette *op cit* 11-12.
[702] Ulmer *op cit* 2-2.
[703] *Idem* 2-3.
[704] *Idem* 2-7.
[705] Laddie, Prescott & Vitoria *The Modern Law of Copyright* (1980) 7.
[706] Rose *Authors and Owners: The Invention of Copyright* (1994) 129.
[707] Ulmer *op cit* 2-13.
[708] Seignette *op cit* 27.
[709] *Idem*.
[710] Landow *op cit* 21.
[711] Gleick *Chaos: Making a New Science* (1998) 180.
[712] Landow *op cit* 31.
[713] *Idem*.
[714] http://www.publishsa.co.za/general.htm
[715] Altbach *The Knowledge Context: Comparative Perspectives on the Distribution of Knowledge* (1987) 16.
[716] *Idem*.
[717] Unesco/Book House Training Centre *The Business of Book Publishing: A Management Training Course* (1990) 58-59.
[718] pasa@icon.co.za - copyright section.
[719] NB-Uitgewers "Notule van Vergadering van NB-Uitgewers en Skrywers, 6 Maart 2002, Sentrum vir die Boek, Kaapstad." 2002 *uitgewershttp://www.mweb.co.za/litnet/seminaar/notule.asp* 6-8.
[720] Van Zyl "NB-Uitgewers: Waarom herskik, waarheen vorentoe?" 2002 *http://www.mweb.co.za/litnet/seminaar/07hannes.asp* 4.
[721] Van Rooyen *How to Get Published in South Africa* (1996) 115.
[722] Davies *Book Commissioning and Acquisition* (1995) 39.
[723] Van Rooyen *op cit* 115.
[724] Landow *op cit* 68.
[725] *Idem* 109.
[726] Seignette *op cit* 8, referring to Larese.
[727] Scheepers *Koos Prinsloo Die skrywer en sy geskryfdes* (1998) 10.
[728] *Idem* (with reference to Hutcheon) 19.
[729] *Idem* 7.
[730] Hambidge "Postmodernisme (Deel I)" *Tydskrif vir Letterkunde* Mei 1992 68.
[731] Scheepers *op cit* 20.
[732] *De Kat* (Augustus 1997) 49.

[733] *Idem* 51.
[734] Scheepers *op cit* 19.
[735] *Idem* 20.
[736] *Idem* 29.
[737] Hambidge "Post-modernisme (Deel I)" 62.
[738] Viljoen "Joan Hambidge – Postmodernisme" (1995) Unpublished review for the SABC obtained from NALN.
[739] Scheepers *op cit* 21.
[740] *Idem* 33.
[741] *Idem* 20
[742] Hambidge, as quoted in INSIG (April 1996) 37.
[743] Hambidge "Postmodernisme (Deel I)" 68.
[744] *Idem* 66.
[745] Maartens *op cit.*
[746] *Idem* 89.
[747] *De Kat* (August 1997) 50.
[748] Maartens *op cit* 16.
[749] Hambidge "Postmodernisme (Deel II)" *Tydskrif vir Letterkunde* Augustus 1992 48.
[750] Hambidge "Postmodernisme (Deel I)" *op cit* 63.
[751] Scheepers *op cit* 28.
[752] *Idem* 29.
[753] Van der Merwe & Viljoen *Alkant Olifant – 'n Inleiding tot die literatuurwetenskap*(1998) 47.
[754] Hambidge "Postmodernisme (Deel II)" *op cit* 48.
[755] *Idem* 53.
[756] *Idem* 49.
[757] *Idem*.
[758] *Idem* 48.
[759] Maartens *op cit* 5.
[760] Van der Merwe *op cit* 46.
[761] Hambidge "Postmodernisme (Deel II)" *op cit* 54.
[762] Please note that these comments about *Judaskus* are not aimed at Joan Hambidge personally, but serve as an example to indicate how the self-consciousness of an author, as a characteristic of postmodernism, relates to copyright.
[763] *Insig* (April 1996) 37.
[764] *Beeld Boekewêreld* (Junie 2001) 4.
[765] Conradie "Resensie-artikel: Post-modernisme, Joan Hambidge" *Tydskrif vir Literatuurwetenskap* Desember 1997 403.
[766] Maartens *op cit* 14.
[767] Hambidge "Postmodernisme (Deel II)" *op cit* 54.
[768] *Idem* 48.
[769] *Idem* 56.
[770] *Idem* 53.
[771] *Idem* 55.
[772] *Idem* 52.
[773] *Idem* 53.
[774] *Idem* 51.
[775] *Idem* 50.
[776] *Idem* 55.

[777] BEELD BOEKEWêRELD (Junie 2001) 4.
[778] Hambidge "Postmodernisme (Deel II)" *op cit* 53.
[779] Conradie *op cit* 397.
[780] *Idem* 402.
[781] Taken from *Om Beaufort-Wes se beautiful woorde te verlaat*, as quoted in DE KAT (August 1997) 51.
[782] *Idem*.
[783] Hambidge "Postmodernisme (Deel II)" *op cit* 48.
[784] *Beeld* (1996-04-08) 10. It is important to note here that, when non-lawyers speak of "originality", the term is usually used in the sense of "new".
[785] Van der Merwe *op cit* 45.
[786] Scheepers *op cit* 28.
[787] Hambidge "Postmodernisme (Deel I)" *op cit* 62.
[788] Scheepers *op cit* 32.
[789] Van der Merwe *op cit* 43-44.
[790] *Idem* 35.
[791] *Idem* 38.
[792] *Van der Merwe* 45.
[793] According to Scheepers *op cit* 20, the definition of postmodernism most frequently referred to is that of Brian McHale, which focuses on the ontological aspect of postmodernism.
[794] See 2.2.
[795] *Beeld Boekewêreld* (Junie 2001) 4.
[796] *Idem* 53. Hambidge refers to Brian McHale, who uses the term following Christine Brooke-Rose.
[797] *Mail & Guardian* (1995-08-25) 25; Hambidge "Postmodernisme (Deel II)" *op cit* 55.
[798] *Beeld Boekewêreld* (Junie 2001) 4.
[799] "her poems are churned too heavily"". *Beeld Kalender* (1989-04-27) 3.
[800] Van der Bank "Sangiro: 'n Lewenskets van A.A. Pienaar" *SA Tydskrif vir Kultuurgeskiedenis* Jg. 8 Nr.2 1994 54.
[801] Van der Bank refers to P.J. Eybers, F.V. Lategan, Leila Isabel Nienaber, J.C. Kannemeyer, André P. Brink, Jan Kromhout, Rob Antonissen en G. Dekker.
[802] Van der Bank *op cit* 61.
[803] "Where Sangiro strikes out in his own direction, often constitute the most successful parts."
804 Adair In Tangier we Killed the Blue Parrot (2004).
[805] *Rapport* (14 November 2004) *Perspektief* p.IV.
[806] Hambidge "Postmodernisme (Deel II)" *op cit* 53.
[807] *Idem* 450.
[808] *Idem* 48.
[809] Van der Merwe *op cit* 32.
[810] *Idem* 99.
[811] Landow *op cit* 110.
[812] *Idem* 1.
[813] *Idem* 7-8.
[814] *Idem* 8.
[815] Nielsen *Hypertext and Hypermedia* (1990) 1.
[816] Van Heerden "Hiperteks of Hipermark? 2002 LitNet en die www" *http://www.mweb.co.za/litnet/seminaar/10www.asp* 6.
[817] Landow *op cit* 3.
[818] Nielsen *op cit* 3 (with reference to Halasz).

[819] *Idem* 3-4 (with reference to K. Eric Drexler).
[820] *Idem* 4 (with reference to Drexler).
[821] *Idem*.
[822] *Idem*.
[823] Landow *op cit* 82.
[824] *Idem* 64.
[825] 677 JOC (T).
[826] At 677.
[827] 1995 (1) SA 645 (A).
[828] *Waylight Diary CC v First National Bank Ltd CC* 677 JOC (T) 690-691.
[829] Van Vuuren "Plagiaat, Navolging en Intertekstualiteit by die Vorming van Literêre Reputasies" 2002 *http://www.mweb.co.za/litnet/seminaar/helize.asp* 7.
[830] Landow *op cit* 83.
[831] *Idem* 56.
[832] *Idem* 64.
[833] Toffler *The Third Wave* (1980) 168.
[834] *Idem*.
[835] *Idem* 169.
[836] *Idem* 167.
[837] *Idem* 169-176 (as Toffler's work appeared in 1980, DVD's and the internet had to be added to Toffler's "list").
[838] *Idem*.
[839] *Idem* 177.
[840] Landow *op cit* 35-36.
[841] *Idem* 65.
[842] *Idem* 105.
[843] *Idem* 78.
[844] Landow *op cit* 3. (A node is defined as each unit of information that hypertext consists of. Nielsen *op cit* 2.)
[845] *Idem* 36-37.
[846] *Idem* 37.
[847] *Idem* 87.
[848] *Idem* 99.
[849] *Idem* 90.
[850] *Idem* 33.
[851] *Idem* 87.
[852] *Idem* 64.
[853] *Idem* 56.
[854] Demastes *Theatre of Chaos: Beyond Absurdism, into Orderly Disorder* (1998) 1-3.
[855] *Idem* 1.
[856] *Idem* 2.
[857] *Idem* 3.
[858] *Idem* 4.
[859] *Idem* 5.
[860] *Idem* xi.
[861] *Idem* xiii.
[862] *Idem* 5.
[863] Gleick *op cit* 8.

[864] *Idem* 24.
[865] *Idem* 4.
[866] Demastes *op cit* xii.
[867] *Idem* xvi.
[868] Cloete (red.) *Literêre Terme en Teorieë* (1992) 397-398.
[869] See 4.2.1.
[870] Gleick *op cit* 24.
[871] According to Gleick, Chaos is a science of the global nature of systems, which has brought together thinkers from previously widely separated fields. *Idem* 5.
[872] Swenson *Hurtling Toward Oblivion* (1999) 81.
[873] Demastes *op cit* xiii.
[874] *Idem* 10.
[875] *Idem* 8.
[876] Ibsch "Fact and Fiction in Postmodern Writing" *JLS/TLW* June 1993 185.
[877] Russ *The Edge of Organisation* (1999) 37-38
[878] Cambel *Applied Chaos Theory – A Paradigm for Complexity* (1993) 30.
[879] *Idem* 30-31.
[880] Gleick *op cit* 305-306.
[881] See 4.2.5.
[882] Especially the fact that originality is a *matter of degree*. Dean *op cit* 1-15 – 1-16.
[883] As Gleick puts it: "The choice is always the same. You can make your model more complex and more faithful to reality, or you can make it simpler and easier to handle." Gleick *op cit* 305-306. In the words of Jerome B. Wiesner: "Some problems are just too complicated for rational, logical solutions. They admit insights, not answers." Cambel *op cit* xi.
[884] See 2.1 in this regard.
[885] *GA Cramps & Sons Ltd v Frank Smythson Ltd* 1944 AC 329 as discussed in the South African case *Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein* 1981 4 SA 123 (CPD) at 132H – 134E. See 1.2.
[886] See Table 5 "The degree of skill and/or labour required".
[887] See 2.1.
[888] See 4.4.2.
[889] See Table 4 "Aspects of skill and labour".
[890] See 2.3.1.3.
[891] See 2.3.1.3 (e).
[892] *Juta & Company v De Koker* 1994 3 SA 499 (TPD) at 512-513.
[893] It is a clear principle that the skill and/or labour expended must be *relevant*. 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 mere copying*.
[894] The notorious meritorious distinctiveness requirement requires a value judgment as to whether the skill and/or effort expended did indeed bring about *something that is distinguishable from the commonplace*.
[895] In this regard, see 2.3.1.4.
[896] In the words of Chrisman Baard: "Dis die klein verdraaiinkies wat tel. Soos destyds, met oom Fanus Rautenbach noch, wat êrens geskryf het (was dit in sy *Stoutobiografie*?) oor die song *Guantanamera*. Iemand vertaal dit, skryf hy, met *Jan van der Merwe*. Die klanke ry reg langs die oorspronklike, wat dié "vertaling " mýle gee. *Rapport* (2005-01-05) *Perspektief* p. III.
[897] In this regard see 3.7 (tightly woven) and 4.2.5 ("churning"). Johnson spoke of "the writer who learns from his predecessors 'not as a creature that swallows what it takes in, crude, raw, or

undigested; but that feeds with an appetite, and hath a stomach to concoct, divide and turn all into nourishment'". Cuddon *A dictionary of literary terms and literary theory* (1998) 671.
[898] Refer to 3.2 regarding D.P.M. Botes, 3.3 regarding Jack Verster, 3.5 regarding Wilhelm du Plessis and 3.6 regarding Terblanche Jordaan.
[899] Van Vuuren "Helize van Vuuren oor *Die mooiste liefde is verby*" http://www.litnet.co.za/seminaar 2, 6-7.
[900] See 4.2.2.
[901] See 4.2.1 (a).
[902] See 4.2.1 (b).
[903] See 4.2.1 (d).
[904] Refer to 4.2.4 in this regard.
[905] See 4.2.3.
[906] See 4.3.2.
[907] See 4.4.1.
[908] See 4.4.2.
[909] See 3.4.1 and 3.4.2.
[910] *Die mooiste liefde is verby*, as discussed under 3.5, is an excellent example of such a scenario.
[911]Print Industries Cluster Council & Publishers' Association of South Africa *PICC Report on Intellectual Property Rights in the Print Industries Sector* May 2004 137. Available at www.publishsa.co.za.
[912] The PICC Report *op cit* is riddled with phrases such as "promote copyright issues" (Recommendation 1), "creation of an effective copyright regime" (Recommendation 2), "[s]upport for and promotion of the rights of authors" (Recommendation 3), "the value of copyright" (Recommendation 3), and "training in copyright" (Recommendation 4).
[913] 1985 4 SA 882 (CPD).
[914] Chapter 3 of the Act deals with the Copyright Tribunal. It has jurisdiction to deal with all types of licenses under copyright in respect of all types of works eligible for copyright and to be granted by a copyright owner. Dean 4-149 fn 44C.
[915] In *SAFA v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and another* [2003] 1 All SA 274 SCA the court stated that, in terms of section 24(1) of the Trade Marks Act 194 of 1993 an "interested person" has the *locus standi* to bring an application (regarding rectification of entries in register). The phrase "interested person" further appears in Act 194 of 1993 relating to *locus standi* in sections 21, 25(2)(b), 26(1) and 27(1).
[916] Such as the episodes discussed in Chapter 3.