The Fragility of the Idea/Expression Dichotomy

by

Kobby Afari Yeboah

Abstract

In this article, the writer critiques the *Idea/Expression Dichotomy* under Copyright Law. The concept provides that Copyright law protects "expressions of ideas" and not "ideas". The article discusses the weak foundation of this principle and its failure to protect the interests of creators of Intellectual Property. It reveals the difficulty faced by the English courts in distinguishing "ideas" from "expressions of ideas". The writer explores this theme in a case law approach, and looks at the current yardstick for Copyright protection in the Copyright, Designs and Patents Act, 1988 of the United Kingdom.

1. Introduction

At common law, a person acquires exclusive rights in respect of published writings. This has been judicially recognized since 1769 by the King's Bench in *Millar v. Taylor*[1], where it was stated that authors and publishers of writings are entitled to traditional Copyright protection. The court ruled that this common law right subsists even after the expiration of the statutory period[2] granted by the Statute of Anne[3].

Notwithstanding the outcome of the *Millar* case, with the passage of the Statute of Anne, the complete enjoyment of Copyright was fettered. The lawmakers were motivated to reduce the monopoly in Copyright exercised by booksellers and stationers in England.[4] This agitation against monopoly was laid to rest by the House of Lords in *Donaldson v. Beckett*[5] which overruled *Millar v. Taylor*. The House of Lords rejected the perpetual common law copyright argument and held that once a work is published, the limited statutory period applied. In addressing the monopoly of booksellers, the anti-monopoly devices[6] deployed by Parliament affected the Copyright of creators. Chief of these anti-monopoly devices was the *Idea/Expression Dichotomy.*

The long-standing rule of the Idea/Expression Dichotomy is that, copyright law only protects an author's particular expression of idea and never the idea itself. International recognition of this rule is reflected in *the Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS)[7] and *the World Intellectual Property Organization Copyright Treaty* (WCT)[8].

It is admitted that Copyright must encourage the exchange of ideas amongst creatives. The writer does not oppose this rationale. It is the contention of the writer, however, that the Idea/Expression

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[1] *Millar v. Taylor* (1769) 98 ER 201.
[2] The term was fourteen (14) years from the date of publication and a further fourteen (14) years if the author was alive after the expiration of the first term. Books in print before the statute were granted twenty-one (21) year Copyright—8 Anne, c. 19(1710)
[3] The Statute of Anne of 1710 of England is noted in History as the first statute on Copyright protection.
[4] The Stationers' Company had a monopoly on printing of books prior to the Statute of Anne.
[5] *Donaldson v. Beckett* (1774) 98 ER 257.
[6] These include authorship, limited term, non-discriminatory registration, price control, legal deposit, importation of foreign works. *See* Dennis W.K. Khong, 'The Historical Law and Economics Of The First Copyright Act'. Erasmus Law and Economics Review 2, no. 1 (March 2006): 35–69.
[7] Article 9(2).
[8] Article 2.

Dichotomy makes a mockery of the labour of artists by consciously enabling free-riding and duplication of their hard-earned works.

The article is divided is divided into three main parts. First in this article, the writer questions the foundation of the Idea/Expression dichotomy by exposing its unjust connotations. The writer proceeds to explain how the courts have grappled with clearly justifying this concept and the inconsistencies in judicial thinking. The last part is dedicated to discovering the appropriate test that should replace the dichotomy. The article leverages on the Copyright, Designs and Patents Act, 1988 of the United Kingdom and case law to foment an appropriate and equitable test.

2. Questioning the Basis of the Idea/Expression Dichotomy

The Idea/Expression dichotomy was well-established by the United States Supreme Court in its decision in *Baker v Selden*[9]. The US Supreme Court held that although copyright may exist in a book, it did not extend to ideas and art illustrated in a book.[10] By this decision, the defendant, Baker, who had produced a book describing a very similar system of book-keeping forms authored in *Selden's Condensed Ledger* had committed no wrongful act against Copyright law.[11]

Some many years before *Baker v. Selden,* in England, Justice Yates in a compelling dissenting opinion in *Millar v. Taylor*[12] remarked that "ideas are free"[13] This statement, though not *ratio decidendi*, presented an opportunity for the development of the Idea/Expression Dichotomy in subsequent English decisions.

The United States Supreme Court again, in *Harper & Row, Publishers Inc v National Enterprises*[14] expressed that, Copyright's idea/expression dichotomy "strikes a definitional balance between the First Amendment [freedom of expression] and the Copyright Act by permitting free

[9] *Baker v. Selden* 101 U.S. 99 (1879)
[10] https://cyber.harvard.edu/people/tfisher/IP/1879_Baker.pdf (accessed 11 June 2020)
[11] *Ibid.*

[12] *Op.cit., Millar v. Taylor* (1769) 98 ER 201.
[13] "Handbook on the Economics of Copyright: A Guide for Students and Teachers", Richard Watt (ed.) Edward Elgar, 2014 at page 52.

[14] Harper & Row, Publishers Inc v. National Enterprises 471 U.S. 539 (1985).

communication of facts while still protecting the author's expression".[15] In essence, the concept fundamentally protects the originality of works and encourages creativity from ideas all at the same time.

It is the argument of the writer that the underpinnings of the Idea/Expression Dichotomy destroys originality. Whilst straddling the divide between public policy and private claims, the doctrine has suppressed individual uniqueness of creative works, denying artists of their guaranteed Copyright protection. The writer shall demonstrate how.

A. Vagueness of the Bridge between Idea and Expression of Idea

Copyright law insists that it shall not protect ideas. This article does not set out to resist this position of the law; rather, it seeks to explain to its readers that the distinction between an idea and the expression of that idea is vague.

The first problem encountered in divorcing an idea from the expression of that idea lies in the meaning and scope of the word 'idea'. Policy-makers and the legislature have been confident to defend the doctrine as a stimulus for creativity yet but have not quite defined what an idea in this context means The consequence of this loophole is that the substance of an "idea" within the space of the Idea/Expression Dichotomy is glossed over.

Two suggestions are submitted to determine the legal definition of an idea in this doctrine:

a. *idea* as a thought or a proposal which was yet to be fleshed out into a tangible medium or;

b. *idea* as way of doing something which is released for public consumption.

In respect of the first suggestion, Justice Farwell may have given us an instructive guide. In *Donoghue v. Allied Newspapers Ltd*[16], the learned judge outlined this analogy in relation to the Idea/Expression Dichotomy:

> *"A person may have a brilliant idea for a story, but if he communicates that idea to a playwright, the production which is the result of the communication*

[15] https://www.bitlaw.com/source/cases/copyright/harper.html (accessed on 13 June 2020)

[16] *Donoghue v Allied Newspapers Ltd.* [1938] 1 Ch. 106

> *of the idea to the playwright is the copyright of the person who clothed the idea in form and not the communicator"*[17]

The learned judge sought to inform the common law courts that the talented man or woman who conceives a theory about a venture conceives an idea. And, unless that visionary makes that idea a reality by expressing it to the human senses, his brilliant theory is not copyrightable. An idea here is a thought or innovation yet to be expressed. The perception of idea introduced in the *Donoghue* decision is relatable and accords with the common meaning of the word "idea". Nonetheless, there is a second meaning to "idea"

The second suggestion of what could be an idea under the Idea/Expression Dichotomy is that an idea is the theory that is generated into an original work produced and circulated into public domain. The application of this second line of thinking was adopted in *Designers Guild Ltd v Russell Williams (Textiles Ltd)*[18]. In the decision of the House of Lords, Lord Hoffman observed that every element in the expression of an artistic work is an expression of an idea of an author.[19] The learned judge took the position that the expressions of ideas are protected to the extent to which they form a substantial part of the work.[20]

As proven by case law evidence, Copyright law grapples with a universal standard of what should constitute an idea. One is abstract and the other is real. The consensus is that, the first conception of an idea—an imagination communicated to another person—is plainly an idea *simpliciter* and until it is expressed, Copyright laws cannot protect it. The law of Confidentiality[21] under Intellectual Property would handle any grievances relating to this. The second conception of idea, the more expressive of the two, is perhaps what the framers of the law actually had in mind at the outdooring of this principle, so that an originator would be disenfranchised of the novelty in that

[17] *Id.,* [109]
[18] *Designers Guild Ltd v Russell Williams (Textiles Ltd)* [2000] 1 WLR 2416

[19] *Id.,* [2422]
[20] *Ibid.*
[21] The law protects information that a person would wish to keep behind closed doors and to injunct the receiver of the information from using it to the detriment of the communicator. See *Coco v. Clark (Engineers) Ltd* [1969] RPC 41.

idea.[22] Both ideologies of idea make sense and this is the nerve centre of the calamity befalling the doctrine. There is a disturbing lack in judicial coherence of how to simply differentiate "ideas" communicated by a medium [23] and "expression of ideas". [24] By itself, the distinction is unsatisfactory.

Even in its formative years, the uncertainty of the concept was so worrying that the Justice Learned Hand in *Fitch v. Young*[25] confronted the uncomfortable situation by declaring that, "it has never been very satisfactorily established, and probably never can be, at what point a plagiarist ceases to copy the expression of an author's ideas and steals only the ideas themselves".[26]

It is firmly submitted therefore that the Idea/Expression Dichotomy has no reasonable defence to upset these allegations against it. The rule is obscured by a thick fog and the line between idea and expression is visibly blurred. The bridge caves in.

B. Breach of Moral Rights

A moral right is the personality of a creator infused with his work.[27] This right is an offspring of the Reward Justification (Personality) Theory of Intellectual Property Law [28] which regards copyright as the extension of the personality of the individual creator of the subject-matter;

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[22] Senthil Kumar, "India: Idea-Expression Dichotomy Under Copyright Law". https://www.mondaq.com/india/copyright/536650/idea-expression-dichotomy-under-copyright-law (accessed 11 June 2020)

[23] This is the doctrine of fixation which provides that creations of the mind must be expressed in a permanent medium to be copyrightable.

[24] Richard H. Jones, "The Myth of The Idea/Expression Dichotomy in Copyright Law" (1990) 10(3) Pace Law Review, 551 at page 569. The writer points out that the courts have not consistently defined the basic terms "idea" or "expression".

[25] *Fitch v. Young* 230 F. 743, (S.D.N.Y. 1916)

[26] *Id.*,[745]-[746]. *See* also *op.cit.,* Richard H. Jones at page 557.

[27] Stanford Encyclopedia of Philosophy, "Intellectual Property" (2018). Revised. https://plato.stanford.edu/entries/intellectual-property/ (accessed on 11 June 2020)

[28] Mikhalien Du Boi, "Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism', PER/PERLJ 2018 (21)-DOI at page 24.

consequently, protection should be given out of respect for the individual's creative act of production. The theory establishes two core moral rights[29]:

i. The right to be identified as the creator of a work[30];
ii. The right to have the integrity of a work preserved[31].

The right to be identified concerns the moral right of authorship to work produced. This is styled as the *Paternity Right*[32] in the UK Copyright Law. Under this right, the author of work has the prerogative to insist that anytime his or her work is broadcast, he or she must be given the necessary credit and acknowledgment.[33] The moral right of integrity entitles the creator to object to a derogatory treatment of his work. The work must be given the utmost respect it deserves and be shielded from distortion and unwanted modification prejudicial to his reputation.[34]

Seized with knowledge of the moral right vested in copyright, we proceed to illustrate how the Idea/Expression Dichotomy upsets the moral right of an author.

The purely subjective assessment carried out by judges in resolving a conflict between idea and expression invariably produces two results: either the Plaintiff (the original disseminator of the idea) is granted judgment or the Defendant (the person alleging to be inspired by the idea only) succeeds. One party must lose. The declaration of judgment by the court for either arm of the contest whilst subscribing to the Idea/Expression Dichotomy is manifestly grave.

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[29] In the legislative context, the Copyright Designs and Patent Act 1998 of UK captures four types of moral rights. In addition to these two moral rights are: the right to object to false attribution of the work and the right to the privacy of privately commissioned photographs or films. For the purposes of our discussion, these moral rights are not relevant. *See* Roman Deazley and Kerry Patterson. "Moral Rights: Attribution". https://www.digitisingmorgan.org/uploads/BN9-attribution_DigiMorgan.pdf (accessed on 14 June 2020)

[30] Copyright, Designs and Patents Act, 1988, section 77.
[31] *Id*., Section 80.
[32] Locke Lord LLP~Ben Hitches. "Copyright in the United Kingdom".
[33] Society of Authors. "Before you Sign|Moral Rights" (2019).

https://www.societyofauthors.org/News/Blogs/Before-you-Sign/February-2019-(1)/Before-You-Sign-Moral-Rights#:~:text=Paternity,translators%20must%20be%20properly%20credited. (accessed 12 June 2020)

[34] Treiger-Bar-Am, Leslie, "The Moral Right of Integrity: A Freedom of Expression". *NEW DIRECTIONS IN COPYRIGHT*, Vol. 2, Fiona Macmillan, ed., Edward Elgar (2006).

If by the standard of the Dichotomy a judge rules in favour of the Defendant, the Plaintiff, who prior to judgment had his or her name embossed on the artwork, loses his paternity right. This injustice would arise where the work of the Defendant is substantially the same as that of the Plaintiff's work, but to convey that the "idea" and not its "expression" was utilized, the Defendant merely reorganizes the words or the pattern. The Defendant by remodeling the work would have violated the integrity right of the Plaintiff. The Idea/Expression Dichotomy maims the moral right of the author.

If judgment was to be awarded to the Plaintiff on the score of the Dichotomy, the Defendant, who by objective evaluation of his work had actually produced a design which was original, would be disappointed by the impropriety of the decision. The judge,would find justification for his ruling on the premise that the expression of the idea was copied.

Renowned authors, Laddie, Prescott and Vitoria[35] describe the Dichotomy as suspect. The writers state that if it were really true that copyright is confined to the form of expression, one would expect to find that anyone was at liberty to borrow the contents of the book provided he took care not to employ the same or similar language.[36] They assert that with the Dichotomy copyright would exist even if the form of expression is recast by another. The trio conclude that,

> "*it is an infringement of the copyright to make a version of a novel in which the story or action is conveyed wholly by pictures; or to turn it into a play, although not a line of dialogue is similar to any sentence in the book".*[37]

[35] Laddie, Prescott and Vitoria, "The Modern Law of Copyright and Designs", 2nd Edition (Butterworths, 1995) pp. 61-61.
[36] *Id.,* 2.75.
[37] *Ibid.*

3. Judicial Wrestle between Idea v. Expression of Idea

Judicial interpretation of the Idea/Expression Dichotomy is rife with controversies.[38] The confusion lies not in the restatement of the law, which is done almost perfectly, but in the absence of a neat formula for the application rule.

Baigent and Leigh v. The Random Group Ltd (The Da Vinci Code)[39] epitomizes the battle between an idea and expression of the idea. The plaintiffs were two of the three authors of a book titled "The Holy Blood and the Holy Grail". The defendant was the publisher of a book Da Vinci Code written by Dan Brown. The plaintiff claimed, Dan Brown had infringed their copyright by copying a substantial part of their books. The defendant admitted that the book was the source of the work.[40] The trial court judge held, reiterating the general rule, that an author had no copyright in the idea or facts of his work. The court reasoned that notwithstanding that what was relevant material in the plaintiffs' books were also contained in the Central Theme elements of the Da Vinci Code, what Dan Brown took from the text were generalized parts of the texts of the plaintiff, and since the Central Theme of the Da Vinci Code could not be said to be a substantial part of the work of the plaintiffs, they was no copying.[41] On appeal by the plaintiffs, the Court of Appeal upheld the decision of the trial court.[42]

In applying the Dichotomy, *Lord Justice Lloyd* acknowledged the deep concern of this entire essay which has been hammered almost to a fault. The learned judge stated:

> *"No clear principle is or could be laid down in the cases in order to tell whether what is sought to be protected is on the ideas side of the dividing line, or on the expression side".*[43]

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[38] *I.* Paul Kimani, "Reformulating the Idea/Expression Dichotomy to Encourage Creativity: A Comparative Review of the Law in the United States of America, the United Kingdom and Kenya". (University of Exeter Law School, Chapter of Thesis) at page 12 & 26.

[39] *Baigent and Leigh v. The Random Group Ltd (The Da Vinci Code* [2007] EWCA Civ 247 http://www.bailii.org/ew/cases/EWCA/Civ/2007/247.html (accessed on 12 June 2020).

[40] *Id.,* [Para 1]-[para 3].

[41] *Id.,* [Para 99].

[42] *Id.,* [Para 100].

[43] *Id.,* [Para 5].

Lord Justice Rix agreed with his learned brother when he indicated that, a line could not be drawn between the legitimate use of the ideas expressed and the unlawful copying of their expression.[44]

The sentiments expressed by judges of the Court of Appeal expose the weak legs of the Dichotomy. The maxim does not provide a sustainable standard to establish whether the latter work is a borrowed idea or an unfortunate re-expression of the idea.

Long before the above-cited case law, in the 1960s, the Dichotomy was hewn to the ground by *Lord Denning MR* in the Court of Appeal decision of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*[45]. The revered judge noted that once an idea is written down it is a subject of copyright.[46] He cautioned to the whole world that, "no one is entitled to copy it on the plea that it was only an idea".[47]

The court seemingly began to examine the alleged copied work for its substance and worth unconnected to the Dichotomy. In *Harman Pictures NV v. Osborne*[48] the author of work claimed copyright infringement against the defendant, a writer of a film script and was successful. The script of the defendant had much in common with the original copyright work. The court held that there were 'many similarities of detail' in film script for which there was a lack of explanation on the defendant's side.[49] *Justice Goff* in approaching this matter was influenced not by the Idea/Expression Dichotomy, but the test of whether Osborne's work was the product of his independent work and skill.[50]

At least four (4) decades later, the Idea/Expression Dichotomy was fully resurrected by Lord Hoffman in *Designers Guild Ltd v. Russell Williams (Textiles).* The learned judge believed in the potency of the doctrine and indicated that the distinction between idea and expression was not

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[44] *Id.,* [Para 147].
[45] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1980] RPC 539

[46] Casey Neistat, "The Death of Copyright Law's Idea/Expression Dichotomy" (2018). http://www.keepcalmtalklaw.co.uk/the-death-of-copyright-laws-ideaexpression-dichotomy/# (accessed 13 June 2020)

[47] *Id.* extracted from *Ladbroke.*
[48] Harman Pictures NV v. Osborne [1967] 1 WLR 72.
[49] *Op. cit.,* Paragraph 157 of *Baigent* case.
[50] "Protection of Copyright Under Copyright Law", Chapter III. https://shodhganga.inflibnet.ac.in/bitstream/10603/174800/10/10_chapter%204.pdf (accessed 12 June 2020)

trivial. He brought forth two propositions of what may constitute "*uncopyrightable"* expression of an idea:

> *"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. .....The other proposition 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 so commonplace as not to form a substantial part of the work*".[51]

Lord Hoffman labelled the latter category as an "abstraction" and theorized that at a high level of abstraction (i.e. where the product was *not* of the application of skill and labour of the plaintiff) the work would not constitute a substantial part.[52] That work would not be entitled to Copyright protection.

These are the deductions drawn from the theory laid down by Lord Hoffman:

1. That there are expressions of idea that are not linked to artistic work.
2. That there are works that may be not be protected because they are common knowledge.

On the first deduction, the writer agrees that there can be ideas that produce inventive steps. As mentioned by Lord Hoffman, in the absence of patent protection, one is free to express it in their own way.[53] There is a catch.

In the realm of ideas and expression of ideas under copyright, case law enunciates clearly that the connection between the idea and expression of idea is literary or artistic work and not an invention. It would follow that every idea expressed by a copyright work is by all means a work of literary or artistic nature. Respectfully, Lord Hoffman's first categorization cannot stand since a copyright work would integrally have a connection with a literary work, otherwise it cannot be called a "copyright" work.

[51] *Designers Guild Ltd v Russell Williams (Textiles Ltd)* [2000] 1 WLR 2416 at page 2422.
[52] *Id.*
[53] *Id.*

The second proposition states that a work that is unoriginal or common to all can be copied by all and sundry. The writer humbly disagrees.

Adapted formats of other works are themselves copyrightable if it is done without infringing the copyright of the work from which the adaptation was made[54]. They are granted protection against copying because they are a product of independent creation. These works are derivative qua original as they are original in character. The work will equally have a substantial part of its work. According to Lord Lyndhurst in *D'almaine v Boosey*[55], as regards music, it is when the appropriated music is still recognized by the ear when compared with the original (first) that the work is substantially pirated. The reasoning is that where the adapted work is radically different, it cannot be reproduced freely by anyone on the basis that it is not quantitively original.

Again, substantial part of work or substantiality as stressed by Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*[56] is a qualitative test.[57] Inferably, whether or not there is a wealth of literary works on a particular subject, matters not. It is the assessment of the inherent originality of that work which must be looked at.

An application of Lord Hoffman's proposition under the Dichotomy would suggest that an individual writing a piece on Idea/Expression Dichotomy can effortlessly publish an article by absorbing and reproducing central themes of another person's work on the internet, motivated by the belief that that person's work is common knowledge or quantitively unoriginal. This, mildly put, is unthinkable.

Apart from the inconsistent pattern on the law on this concept, it is evident that an attempt to justify the concept by limiting the notion of expression idea in order to stimulate creativity is desperate.

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[54] Section 21 of the Copyright, Design and Patent Act, 1988 proscribes the making of adaptation subject to section 76 of the Act which provides that "An act which by virtue of this Chapter may be done without infringing copyright in a literary, dramatic or musical work does not, where that work is an adaptation, infringe any copyright in the work from which the adaptation was made."

[55] *D'almaine v Boosey* (1835) 1 Y & C Ex 288.
[56] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 W.L.R 273.
[57] *Id.*

4. The Copyright, Designs and Patents Act

Spanning centuries, Copyright law in England had always been forward thinking. The focus on copyright development in the UK led to the promulgation of monumental Acts by the UK parliament which took cognizance of the growth in copyrightable materials—from books to computer software programmes (electronic works).

The Statute of Anne of 1710[58] was enacted to cover the copyright in books, at a time when print literature was the order of the day.[59] Between this period and 1911, the United Kingdom, in keeping abreast of the new dawn of the arts, passed a number of Acts that offered protection to producers of engravings[60], the fine arts[61], musical compositions[62], amongst others.

In 1911, the Copyright Act of 1911, a major legislation, consolidated all the existing laws into one single statute for copyright[63] and abolished the common law Copyright.[64] The purpose and intent of the Copyright Act of 1956[65] was to bring the laws of England up to scale with international regulations[66] and to amend other Acts related to copyright.

1988 saw the birth of a turning point legislation: The Copyright, Designs, Patents Act of 1988 (hereinafter called the CDPA). The Act restates the law of copyright in the United Kingdom by unifying all the rules, conventions and regulations affecting Copyright.[67] It invents shields for the

[58] 8 Anne, c. 19(1710)
[59] Long Title: "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned."

[60] The Engraving Copyright Act, 1734/35 (8 Geo 2 c 13) and the Engraving Copyright Act, 1766.
[61] Fine Arts Copyright Act, 1862 (25 & 26 Vict c 68).
[62] Copyright (Musical Compositions) Act, 1882 and the Copyright (Musical Compositions) Act, 1888.
[63] Michael Coyle, "The History of Copyright".

https://lawdit.co.uk/readingroom/the-history-of-copyright/ (accessed on 12 June 2020).

[64] *Id.*
[65] 4 & 5 ELIZ. 2 CH. 74.
[66] *Op. cit.,* Michael Coyle.
[67] Also *See* Dinusha Mendis, "The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*"*, vol 7.5 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2003). http://www.ejcl.org/ejcl/75/art75-8.html (accessed on 10 June 2020)

rights of performers[68] and stiffens the protection of copyright over electronic works.[69] Under the CDPA, copyright subsists in original literary, dramatic, musical or artistic works[70]; sound recordings, films or broadcasts[71]; and the typographical arrangement of published editions[72]. The Act also encapsulates laws on Designs and Patent; it is all-embracing in all respects.

A fine comb run through the provisions of the CDPA did not bring to light the Idea/Expression Dichotomy.[73] Are we therefore permitted to believe that the lawmakers have finally rid themselves of the troubles of the Dichotomy? The Idea/Expression Dichotomy concept had been incorporated by the common law of England and Wales. The English courts had made several pronouncements on its applicability or otherwise. The concept was known. The writer submits that the omission of the Dichotomy was a deliberate act of Parliament.

The absence of the Dichotomy in the CDPA calls for celebration, however, it should not be viewed as a carte blanche to disregard the copyright in one's work, and neither is it an elbow room to foster monopoly. The CDPA approves an objective standard to keep an eye on violations of copyright alongside the monopolistic tendencies of copyright.

A. The Appropriate Test

The test for advancing community creativity and protecting individual ingenuity at the same time is not a freshly minted one. It is notorious to the common law. The CDPA reinvigorates the test of "Originality" in section 1(1)(a) of the Act. Copyright would automatically subsist in a work if it is expressed in a medium[74] and satisfies the requirement of "originality". What is original is not defined in the Act.

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[68] This is outlined in the Long Title of the Act.
https://www.wipo.int/edocs/lexdocs/laws/en/gb/gb229en.pdf
[69] *Ibid.*
[70] Copyright, Designs and Patents Act, 1998, section 1(1)(a)
[71] *Ibid.*, section 1(1)(b)
[72] *Ibid.*, section 1(1)(c)
[73] *Op.cit.*, Casey Neistat
[74] Copyright, Design and Patent Act, 1998, section 3(2).

A good place to start would be to delimit the misconceptions regarding what originality is. It is of huge importance to note from the onset that originality here ought not to be taken in literally.[75] Originality in Copyright law is not analogous to novel or new. Originality means the work originated from the author and was not copied. The dictum of Justice Peterson in *University of London Press Ltd v University Tutorial Press Ltd*[76] frequently quoted by Intellectual Property commentators, neatly sums up test of originality:

> *"The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author".*[77]

The import of this dictum is that an author of literary or artistic work must prove that the work is the product of his mind or his initiative.

The purview of "originate from the author" was further clarified by the House of Lords in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*[78]. Lord Reid assembled the criterion for establishing originality, namely: skill, judgment and labour. This minimum value for originality is the "sweat of brow" doctrine.

This English mark for originality, however conciliatory, has received its fair share of critique in United States jurisdiction. In *Feist Publications Inc v Rural Telephone Service*[79], the United States Supreme Court declined to apply the "sweat of brow" doctrine. Justice O'Connor, delivering judgment on behalf of the Supreme Court, held that selection or independent arrangement alone

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[75] Shuchi Mehta, "Analysis of Doctrines: Sweat of the Brow & Modicrum of Creativity Vis-à-vis Originality in Copyright". https://www.indialaw.in/blog/blog/law/analysis-of-doctrines-sweat-of-brow-modicum-of-creativity-originality-in-copyright/ (accessed 14 June 2020)

[76] *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.
[77] *Ibid.*, [608]-[609]
[78] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 W.L.R 273.
[79] *Feist Publications Inc v Rural Telephone Service* 499 U.S. 340 (1991)

without *minimum creativity* cannot be protected by Copyright.[80] The new yardstick established by the US Court was that: a work must in addition to its independence, represent an appreciable amount of creative authorship: the "modicum of creativity approach"[81]

In Canada neither *the sweat of brow* approach nor the modicum of creativity approach is warmly accepted. A reasonable compromise between the two dissimilar thresholds was made by the Supreme Court of Ontario in *CCH Canadian Ltd v Law Society of Upper Canada*[82]. Chief Justice McLachlin posited that the correct position fell between the two extremes. In the considered opinion of the Chief Justice, an original work must be more than a mere copy, but it need not be creative in the sense of being unique.[83] The original work must be a product of the author's skill and judgment.[84] The appropriate middle ground was that "*the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise*".[85]

This reconciliation of the contending UK and US positions is profitable to both the conservatives and the liberalists. It excludes the unrealistic demarcation between idea and expression and brings focus to the originality lens. In addition, it sifts out any elements that could justify a breach of Copyright or limit creative expression.

5. Conclusion

The article criticizes the Idea/Expression Dichotomy by outlining controversies in judicial opinion. Judges and text writers have all emphatically stated that the fictional separation of ideas from expression of ideas is problematic for Copyright protection.

In this paper, it is recommended that the test of originality should be used as the overarching test in determining whether a copyright infringement has occurred and that the Idea/Expression

[80] *Id.,* [Para 53]-[Para 57]

[81] *Id.,* [Para 55]
[82] *Feist Publications Inc v Rural Telephone Service* [2004] 1 SCR 339

[83] *Id.,* [Para 16]
[84] *Ibid.*
[85] *Ibid.*

Dichotomy doctrine should be abolished. The test of originality is not without its own problems; however, the standard of originality, preferably a settlement between the "sweat of brow" and "modicum of creativity" theories, is more practical to weigh the competing interests of parties. By endorsing this standard, creativity is promoted, and illicit copying is subdued.

Where an allegation of Copyright infringement is raised, it is incumbent on the court to assess the *copyrightability* of the Defendant's work independent of the Plaintiff's work. After an examination of the law and evidence of the parties, the court must *acquit* the Defendant if and only if he/she has conquered the acceptable magnitude of "originality".