

Addis Ababa
University
(Since 1950)



ADDIS ABABA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE STUDIES, SCHOOL OF LAW

ORIGINALITY IN COPYRIGHT AND THE JUDICIAL JURISPRUDENCE IN ETHIOPIA

TEKLEHAYMANOT DAGNE BELAY

JUNE 2018

**ADDIS ABABA UNIVERSITY COLLEGE
OF LAW AND GOVERNANCE STUDIES,
SCHOOL OF LAW**

**ORIGINALITY IN COPYRIGHT AND
THE JUDICIAL JURISPRUDENCE IN
ETHIOPIA**

BY: TEKLEHAYMANOT DAGNE BELAY

ADVISOR: BIRUK HAILE (PHD)

**A THESIS PAPER SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENT OF
MASTERS DEGREE IN BUSINESS LAW (LLM).**

June 2018

**ADDIS ABABA UNIVERSITY COLLEGE OF
LAW AND GOVERNANCE STUDIES,
SCHOOL OF LAW**

APPROVAL SHEET

**ORIGINALITY IN COPYRIGHT AND THE
JUDICIAL JURISPRUDENCE IN ETHIOPIA**

BY: TEKLEHAYMANOT DAGNE BELAY

Advisor's Name

Signature

Examiner's/ Reader's Name

Signature

Examiner's/ Reader's Name

Signature

DECLARATION

This thesis paper is my original work, has not been submitted in any other university and materials used in it have duly been acknowledged.

Declared by:

Name: TEKLEHAYMANOT DAGNE BELAY

Date: _____

Signature: _____

Confirmed by

Name: BIRUK HAILE (PHD)

Date: _____

Signature: _____

ACKNOWLEDGEMENT

I will praise you, Lord, with all my heart; I will tell of all the marvelous things you have done. (Psalm 9:1). For I am his creation, and for his help in all my comings and goings.

My sincere gratitude goes to my advisor Biruk Haile (PHD). His imagination and brotherly advice has a key role in this paper. From start to finish, his comments were valuable.

My extraordinary gratitude is for all authors whose writings i have read and used in my paper. As Newton rightly noted, if I have seen further it's by standing on the shoulder of these giants.

I would like to express my heartfelt gratefulness to my fiancé Mihret Teshome. Nuredin Kedir (Judge at FHC), Gideon W/yehoannes (lawyer), Yetenayet Mengistu (Database Operator), Sintayehu Hassen (Court secretary), Sintayehu Zeleke (Judge at FHC) and Belachew Anshiso (President of FHC) also deserve deep appreciation, who contributed in many ways to this paper.

ABSTRACT

Intellectual property law is part of the law that protects intellectual creations of the human mind. As such, creations assume the central part in the study of the law. Copyright, being one of the property rights in creations requires that any work to be protected should be original. The originality obligation is nothing but the mechanism through which the law ascertains the existence or otherwise of creation. Albeit there seems to be no commonly applicable standard of it, the requirement of originality in a work for protection is almost universally recognized.

Defining originality assumes greater importance in copyright law mainly because it determines which works get protection and which wouldn't. By the same parlance, the threshold of originality directly impacts the nature and types of works that get copyright protection. To this end, different jurisdictions describe the requirement based on their unique understanding of the concept and due regard to the purpose of copyright.

By virtue of the Ethiopian copyright and neighboring right protection proclamation, only original works in the fields of literature, art and culture are protected without defining what constitutes originality.

Assessment of originality by federal courts shows that they took originality to mean novelty and rule that only new works or those, which differ by their nature from previous works, are protected by copyright. Besides, the similarity test is widely practiced as a mechanism of ascertaining originality between works. Finally, courts seem to be oblivious to the existence or otherwise of creativity in a work in the calculation of originality. Such understanding of originality has detached itself from both established jurisprudence and nature of copyright.

Contents

APPROVAL SHEET.....	iii
DECLARATION	iv
ACKNOWLEDGEMENT	v
ABSTRACT.....	vi
CHAPTER ONE	1
1 INTRODUCTION.....	1
1.1. BACKGROUND OF THE STUDY	1
1.2 STATEMENT OF THE PROBLEM AND RESEARCH QUESTION	2
1.3 OBJECTIVES AND SIGNIFICANCE OF THE STUDY	5
1.4 RESEARCH METHODOLOGY.....	5
1.5 ORGANIZATION OF THE PAPER	6
CHAPTER TWO	7
2 CONCEPTUALIZING ORIGINALITY	7
2.1 INTRODUCTION	7
2.3 ORIGIN.....	7
2.3 MEANING OF ORIGINALITY	9
2.3.1 ELEMENT OF CREATIVITY.....	10
2.3.2 ELEMENT OF SKILL AND LABOR.....	13
2.3.3 ELEMENT OF AUTHOR’S PERSONALITY	15
2.3.4 INDEPENDENT CREATION.....	17
2.3.5 DIFFERENCE WITH NOVELTY	17
2.4 ORIGINALITY IN DATABASES AND DIRECTORIES.....	19
2.5 PURPOSE OF THE REQUIREMENT OF ORIGINALITY IN COPYRIGHT LAW.....	20
2.6 ORIGINALITY AND PERMISSIBLE BORROWING.....	21
2.6 THE REQUIREMENT UNDER FOREIGN JURISDICTIONS.....	22
2.6.1 UNDER THE COMMON LAW LEGAL SYSTEM.....	22
I. ORIGINALITY UNDER US COPYRIGHT LAW	22
II. THE UK EXPERIENCE.....	25
2.6.2 UNDER THE CIVIL LAW LEGAL SYSTEM	26
I. THE FRENCH EXPERIENCE.....	26
2.6.3 UNDER INTERNATIONAL INSTRUMENTS	28

2.6.4 JURISPRUDENTIAL CONVERGENCE?	29
CHAPTER THREE	31
3. ORIGINALITY IN ETHIOPIA; THE LAW AND PRACTICE.....	31
3.1 INTRODUCTION	31
3.2 ORIGINALITY UNDER THE CIVIL CODE	32
3.3 ORIGINALITY UNDER THE FDRE CONSTITUTION	33
3.4 ORIGINALITY UNDER THE COPYRIGHT AND NEIGHBORING RIGHTS PROTECTION PROCLAMATION	34
3.5 THE PRACTICAL APPLICATION OF ORIGINALITY REQUIREMENT BY FEDERAL COURTS.....	37
I. SAMUEL HAILU vs. SIMRET AYALEW AND OTHERS	37
II. PUBLIC PROSECUTOR vs. DANIEL TAFESSE AND WEB PLANET IT SOLUTIONS	40
III. FANTAHUN ENGIDA vs. TAMIRU BIRHANU AND ADDIS ABEBA CULTURE AND TOURISM OFFICE.....	45
IV. ADDIS ABEBA UNIVERSITY vs. BIRHANU G/TSADIK.....	46
V. SUMMARY OF THE FEDERAL JUDICIAL JURISPRUDENCE.....	48
CHAPTER FOUR	50
4. CONCLUSION AND RECOMMENDATION	50
4.1 CONCLUSION.....	50
4.2 RECOMMENDATION.....	52
BIBLIOGRAPHY	53

CHAPTER ONE

1 INTRODUCTION

1.1. BACKGROUND OF THE STUDY

Copyright embodies a set of exclusive or monopolistic rights over literary, artistic and cultural works to which some form of creativity could be traced. These set of exclusive rights envisage the aim by legal systems to attain equilibrium of the interest of authors to monopoly on the one hand, and free exploitation of consumers on the other. As such many subjects in copyright law like idea-expression dichotomy, fair use defenses, copyrightability or eligibility and the like directly impact how this balance is drawn.¹ The most notable instance where copyright law demarks the equilibrium between monopoly and free exploitation is the requirement of originality.

Originality, being the threshold for copyright protection, is at the heart of copyrightability. Since originality is one of the determinants of copyrightability, the concept of originality assumes great importance in the study of copyright law.

It is to this end that almost every jurisdiction of copyright requires originality as a prerequisite to accord protection to works. Even though there exists a difference in the meaning attached to and the scope of it, there seems to be a general consensus that originality is inherent and mandatory for copyright protection to persist. It defines the works to which copyright attaches and delineates the scope of protection they receive.² The meaning attached to the term originality has serious implications on the system of copyright in that jurisdiction. In this regard, Howard B. Abrams stresses the effect of defining originality in one way or another.

“If the standards for a work to be considered original, and thus qualify for copyright protection, are raised or lowered, both the number and types of works

¹ Howard B. Abrams, “Originality and Creativity in Copyright Law”, (1992), Journal of Law & Contemp. Problems, Vol. 55 No 2, p 3

² Carys J. Craig, “The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest”, (2005) University of Ottawa law & technology journal, Vol 2 issue 2, p 427

that can claim copyright protection will change. Thus what is at stake in any definition or redefinition of originality is the coverage of the copyright monopoly and the balance between copyright owners and users at its most basic level.”³

The question over the definition attached to the term becomes more demanding when one understands that it is not only used for affording protection, but also as a mechanism through which the judiciary ascertains infringement. Apart from the conceptual or theoretical appreciation, the practical understanding by legal practitioners differs to a greater extent that some apparently original works are denied protection while clear infringements evade liability. Unless the law is interpreted and applied consistently with due regard to its purpose, achieving such would be difficult.⁴ Hence, the judicial jurisprudence of originality has its implications on achieving the function of copyright law i.e. incentive to creations.

The purpose of this paper is to examine originality as a necessary condition to copyright protection in foreign legal systems and their application in the Ethiopian legal system and the jurisprudence in Ethiopian courts.

1.2 STATEMENT OF THE PROBLEM AND RESEARCH QUESTION

The problem of originality is a problem basic to and inherent in copyright law.⁵ As such, there will not be a hyperbole in saying that originality is the most problematic subject matter in every copyright law. Determining which works are original and which are not requires a careful and thorough understanding of the purposes of copyright law i.e. promotion of science and useful arts, protection of authors and encouragement of trade. Unless originality is understood in a clear and purposive way, too much of it would ultimately hamper creativity by denying protection to new creations and too less of it would promote infringement by affording protection to those, which are mere variations of existing original works.

³ Howard B. Abrams, cited above at note 1, p 5

⁴ Software Freedom Law Center (edi.), Originality Requirements under U.S. and E.U. Copyright Law, (2007), available at www.softwarefreedom.org

⁵ Richard M. Ader, “the Problem of Originality in Copyright Law,” (1952), *Intramural L. Rev. NYU*, Vol 7, p 226

Original is usually understood as something that is new or, not done before; a primary type or form, from which others are derived.⁶ Some used to believe that originality could be ascertained by showing an existence of distinguishable variation from a previous work.⁷ Still others take original to mean originating from the author being the product of his skill and labor⁸. However, contemporary literature has detached itself from the view that originality is about being a new work.⁹

In the US, though it was first stated explicitly under the 1976 Copyright Act, originality is a constitutional requirement for copyright applicability.¹⁰ In *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, which is widely accepted as showing the judicial jurisprudence of originality in the US, the Supreme Court held that the degree of creativity necessary for copyright protection is “extremely low,” such that the bulk of works make the grade quite easily.¹¹ Hence, the definition originality includes an element of creativity. In the Canadian legal system, one particular decision of the Supreme Court defined originality as requiring an exercise of “skill and judgment” on the part of the author of the work.¹²

The German scenario depicts another view on originality. The Supreme Court interpreted the originality requirement as one, which can be met by a level of creativity that allows a member of the public, which is open to art and relatively familiar views on art, justifiably to speak of

⁶ Krishna Hariani and Anirudh Hariani, “Analyzing Originality in Copyright Law: Transcending Jurisdictional Disparity,” (2011) Journal of the Franklin Pierce Center for Intellectual Property - IDEA Vol. 51 No. 3, p 1, note 2

⁷ Laurence A. Stanton, “Expression and Originality in Copyright Law,” (1972) Washburn Law Journal, Vol. 11, p 406

⁸ Nehaluddin Ahmad & Saurabh Chaturvedi, Originality requirement and copyright regime of music: a comparative overview of Indian perspective, (2013), Information & Communications Technology Law, p 135, available at <http://www.tandfonline.com/loi/cict20> accessed on 5/2/2018

⁹ Perry J. Saidman, “Copyrights: Novelty or Originality,” (1973), Journal of Patent Office Society of US, Vol 55, No. 5, p 330

¹⁰ *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)

¹¹ *Ibid*

¹² *CCH Canadian Ltd. V. Law Society of Upper Canada*, (2004), S.C.R. 339, SCC 13

“Artistic” creativity.¹³ The French droit d’auteur adopts an approach that required searching an evidence of not of skill and labor, but the mark of the authors personality in the work.¹⁴

The Ethiopian copyright law requires works to exhibit originality as a requirement for extending protection.¹⁵ Nevertheless, nowhere in the proclamation is originality defined either directly or indirectly. The legal lacuna has become the main problem in the law because; it does not give out mechanisms as to how originality will be assessed. This clearly defeats the very purpose it aspires to achieve. By the same parlance, the area is the least wrote about subject matter in the country’s literature.

The gap in the law left the issue to be resolved by courts. Determining originality, which is technical, by courts, is not devoid of its own pitfalls. In the first place, the judiciary simply lacks the capacity to establish whether a particular work is original or not. It would be a dangerous activity for persons trained only to the law to weigh up originality of a work. Some of the creative works may go unprotected if they are not appealing to the judge.¹⁶

Secondly, the lack of or under development of precedence in the country results in unarticulated and non-coherent interpretation of the term by courts. Third, complicating the problem, courts are under prohibition to assess the quality of the work. Last but not the least is the risk posed by confusing originality with novelty. Federal judiciaries in Ethiopia take originality to mean newness and decide that only new works get copyright protection. This creates a great danger to the system of copyright in the country.

It is for such obvious reasons that the paper tries to solve the academic and practical problems in the area. As such, it raises the following questions and attempts to answer them.

When is a literary, artistic and scientific work taken as being original?

What is the level of creativity required to gain copyright protection?

¹³ Decision of the Federal Supreme Court(Bundesgerichtshof), (2013)International Review of Intellectual Property and Competition Law, No. 40319

¹⁴ Daniel J. Gervais, “Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law,” (2002), Journal of Copyright Society U.S.A , p 973

¹⁵ Copyright and Neighboring Rights Protection Proclamation,(2004), Art 6-1, Proclamation No. 410, Neg. Gaz. Year 10 No. 55

¹⁶ Laurence A. Stanton, cited above at note 7, p 401

Is the requirement of originality a subjective or an objective criterion?

Does Ethiopian Federal courts take creativity in the calculus of ascertaining the originality or otherwise of a work?

Does the Ethiopian Judicial jurisprudence distinguish between originality and novelty?

To this end, the conceptual discussion on originality will be assessed in depth. From the practical aspect, it is the purpose of this paper to examine and summarize the answers offered by the Ethiopian courts to these questions in resolving cases.

1.3 OBJECTIVES AND SIGNIFICANCE OF THE STUDY

In short, the principal objective of the research is to thoroughly examine the condition of originality in Ethiopian laws and its practical application by Ethiopian courts after assessing the requirement in the common law and civil law legal systems.

The significance is multi dimensional. In the first place, the study of the requirement in other jurisdictions would help in better understanding the subject matter. Secondly, the understanding of the judicial jurisprudence of originality will be evaluated in a scientific manner. This will help in finding out the existence or otherwise of divergence or convergence between the law and the practice. Third, apart from future amendment of the law on the subject matter, recommendations will be forwarded to resolve the difficulty in the area.

1.4 RESEARCH METHODOLOGY

In the first part, i.e. conceptual discussion on originality, the law and judicial jurisprudence of foreign countries will be reviewed. Owing to time and resource constraints, experience of three countries will be evaluated. Two from the common law and one from civil law legal system will be analyzed. Appraisal of the experience of other countries in their laws and how their judiciary perceives originality is used as a framework to evaluate the Ethiopian legal regime and as indicative of what changes may be appropriate for the Ethiopian legal regime. In this regard, the study is entirely doctrinal for it relies on other countries system and theory. Copyright laws and specific cases on originality are selected purposively and examined to show the jurisprudence.

With regard to the practical application, court decisions will be studied to show the problem of originality. Cases are sampled from the Federal High Court of Ethiopia wherein, copyright cases are entertained.¹⁷ Only one case exists which was selected from the Cassation Bench decisions on the matter of originality. This decision of the Cassation Bench is the only decision by the Bench that relates to originality. Owing to its binding nature on all lower courts, the decision is more reliable and represents the judicial jurisprudence. Apart from that because cases are inaccessible, those cases entered in the Federal High Court Lideta Bench database with the search tag ‘copyright’ for civil cases and “infringement of copyright” for criminal cases are selected for the study. Out of the 23 civil cases and 387 criminal cases, only three were relevant to the study. Relevant cases, for this purpose are those wherein the court has framed originality as the issue in the decisions. The data in this regard is purely qualitative data for the reason that it is all about the rationale, explanation or logical arguments on legal provisions and decided court cases.

1.5 ORGANIZATION OF THE PAPER

The paper is structured in four chapters. The first one covers the research proposal wherein a background of the study, the research problem and question, the objective and methodology of the study will be discussed. The second chapter is all about the conceptual discussion on originality, which includes review of foreign literature and court decisions. As such, originality will be learned from international instruments and state laws. Under the chapter, the origin and development, purpose, meaning, and scope of originality in foreign jurisdiction will be scrutinized.

The third section takes the discussion on originality to Ethiopia. To this end, the current copyright and neighboring rights protection proclamation and other relevant laws will be examined with the search for any help to the matter. Besides, the understanding and application of the requirement by the judiciary to real cases will be dealt with. The fourth and the last chapter forward the conclusions from the study and gives out viable recommendation that can be of help to the problem.

¹⁷ Copyright and Neighboring Rights Protection Proclamation, Cited above at note 15, art 2-9 and federal courts proclamation, (1996), art. 5-8, proclamation no 25, Neg. Gaz. Year 2 No.13.

CHAPTER TWO

2 CONCEPTUALIZING ORIGINALITY

2.1 INTRODUCTION

Intellectual property law is a set or body of law that purports to accord protection to creations of the human intellect. In other words, it refers to the system of legal protection over useful or expressive inventions, expressions and products the generation of which typically involves the creative use of the mental faculties.¹⁸ Justin Hughes views or takes Intellectual Property as the propertization of what we call ‘talent.’¹⁹ Hence, what can be gathered from any definition of Intellectual Property law is that it only or is presumed only to protect creations.

To this effect each segments of Intellectual Property law requires the existence of a creation or an inventive step before according legal protection to the work. Patent law call for the existence of novelty before any idea could be monopolized while law of Trade Mark obliges marks to be distinguishable from other marks. These requirements are nothing but the legal mechanisms of ensuring the existence of intellectual creation, which are worth protecting.

By the same parlance, Copyright law imposes the obligation of showing originality as a necessary precondition for protection. The question of which works are protected in copyright law is answered by the originality requirement. With the aim of understanding this core issue, the origin, meaning and purpose of originality requirement in copyright will be assessed in detail under this chapter.

2.3 ORIGIN

“People in the oral age were little concerned about the origin of their saying.”²⁰ At the time those who speak or expresses their thought orally depended heavily on all that had come before them.

¹⁸ Seana Valentine Shiffrin, “A Companion to Contemporary Political Philosophy,” (2007), UCLA School of Law Research Paper No. 15-39 available at <https://ssrn.com/abstract=2679176> accessed on 2/24/18

¹⁹ Justin Hughes, “the Philosophy of Intellectual Property,” (1998), Georgetown Law Journal, Vol 77, p 287

²⁰ Terje Norderhaug and Juliet Oberding , Designing a web of intellectual property system (1995), Computer Networks and ISDN available at <https://ac.els-cdn.com> accessed on 29/3/2018

Apart from the ancient Egypt, which takes the naming as having the first and most effective intellectual property, most other oral traditions attach little significance to the origin of the expression.²¹ To that effect little weight was placed on the importance of the origin of the expression.²² Gradually with the coming in to the scene of printed books, originality of the work becomes a more important virtue.²³ Therefore, at the time before the existence of printed books, which necessitated laws to protect originality of individual expression was not an issue at all.

Similarly, McLuhan and Fiore argue that had it not been for the invention of the printing technology, authorship would not have existed.²⁴ Walter J. Ong has the following to offer on the subject.

*“Printing leads to a sense of ownership of words, paralleled by a drift in human consciousness toward greater individualism, and followed by development of the resentment of plagiarism. It was the print culture that gave birth to the notions of originality and creativity, two central concepts in today’s copyright regulations. There is thus a strong connection between media technology and the idea of authorship and copyright”*²⁵

Apart from the advent of printing, looking in to the history of copyright laws, the requirement of originality could be viewed as a pink elephant i.e. easy to recognize but cumbersome to label. Early copyrights, if at all they are called copyright, emerged in the form of privileges, which prohibited reprints. The famous example is the privilege awarded to Richard Pynson by King Henry VIII in 1518.²⁶ In the context of being a law, the first copyright law in history i.e. the English statute of Anne of 1710 did not put forward any mandatory requirement for affording

²¹ Sunelle Geyer, Determining originality in creative literary works, (2006), University of Pretoria, (unpublished)p 105

²² Joseph Sotomi, Originality in Copyright: a contested issue, (2004)p 6 (Dissertation) University of Kent available at <https://www.kent.ac.uk/law/ip/.../Joseph-Sotomi-Dissertation.doc>

²³ Yousuf Dhamee, Intellectual Property Law and the Net: an Introduction available at <http://www.cyberartsweb.org/cpace/politics/intellectual.html> accessed on 3/28/18 3:48

²⁴ Marshal McLuhan and Quentin Fiore, the medium is the message; an inventory of effects, (6th edi. 1967) p14

²⁵ Walter J. Ong, Orality and Literacy, (2nd edi. 2002) p 138

²⁶ Ibid , p 139

protection.²⁷ However, it would be very harsh to judge early acts for not putting originality and, for that matter any requirement as a precondition for protection.

Perhaps the earlier legal literatures and judicial decisions were more concerned with plagiarism. They require that a work should not be copied, plagiarized or imitated from another work.²⁸ For instance, Blackstone, who explicitly used the term “original”, take a work as original where it is not a reproduction of another work.²⁹ The requirement that the work should not be the result of plagiarism is the medieval equivalent of the term original. In short, even though the originality requirement becomes apparent and precise in recent statutes, it would be erroneous to conclude that the oral culture and the earlier acts or legislations were completely devoid of it. There remains an element of originality in most literary, artistic and cultural works in a more unorthodox fashion.

2.3 MEANING OF ORIGINALITY

*“What is originality? To see something that is yet without a name, that is yet impossible to designate, even though it stares you in the face”
Friedrich Nietzsche*

The meaning of originality is to a greater extent unclear due to obvious reasons. Within the general meaning, the word is used in many disciplines that each gives the term a definition from its own perspective. The disparity in the nature of the fields would give the term different meanings. In the legal sense too, almost all legal texts fail to define the term. Hence, resort should be made to the ordinary meaning as found under dictionaries.

The Bloomsbury reference dictionary of law define original as one which is the first copy made.³⁰ This line of interpretation attaches the term with duplication and being the first of its kind. However, this way does not elucidate any light on the technical nature of the term. The other line of defining original or originality could be from the viewpoint of authorship. A person

²⁷ Ibid , p 139

²⁸ Simon Stern, Copyright, Originality and the Public Domain in Eighteenth Century England, (2008), University of Toronto Faculty of Law, Vol 84, p 1

²⁹ William Blackstone, Commentaries on the Laws of England (Vol 4, 1765) p 17

³⁰ P.H.Collin, Bloomsbury reference; Dictionary of Law (4th edi. 2004) SV Originality

is said to be an author of a work where the work owes its origin or beginning to him. It follows that a work is original if it originates from that person and no one else.³¹

Perhaps the most comprehensive definition of originality could be found in the Black's law dictionary. It defines it as;

(1) The quality or state of being the product of independent creation and having a minimum degree of creativity (originality is a requirement for copyright protection, but this is a lesser standard than that of novelty in patent law: to be original, a work does not have to be novel or unique);

*(2) The degree to which a product claimed for copyright is the result of an author's independent creation.*³²

Generally courts and contemporary literature define originality in three different modalities. The first and widely followed line of interpretation puts creativity at the heart of originality. As such, a work is taken as being original where there exists creativity on the part of the one who made it.³³ The second one attaches originality with that of application of skill and labor.³⁴ This method, commonly referred as “sweat of the brow” requires labor on the one who claims to be the author. The third line argues that a work is original so long as it reflects the author's personality.³⁵ Lastly, some argue that original works are those which are independently created without any copying from another original work.³⁶ Under this section, these lines understanding originality will be expounded in detail. At last some points will be made on the difference between originality in copyright and novelty in patent.

2.3.1 ELEMENT OF CREATIVITY

Copyright is nothing but a property right that exists over creations of the human intellect in the literary, artistic and cultural fields. As such, a work is only presumed to be a subject of copyright

³¹ Howard B. Abrams, cited above at note 1, p 6

³² Bryan A. Garner (edi.), *Black's Law Dictionary*, (8th edi. 2004) S.V Originality

³³ ELIZABETH F. JUDGE and DANIEL GERVAI, “OF SILOS AND CONSTELLATIONS: COMPARING NOTIONS OF ORIGINALITY IN COPYRIGHT LAW,” (2009) *Cardozo arts and Entertainment Journal*, Vol 27, note 14

³⁴ Krishna Hariani and Anirudh Hariani, cited above at note 5

³⁵ Daniel J. Gervais, cited above at note 14, p 473

³⁶ Daniel J. Gervais, cited above at note 14, p 478

if and only if there exists some sort of creativity in it. The question that follows is what is creativity?

The black's law dictionary defines creativity in the realm of copyright as the degree to which a work displays imaginativeness beyond a person of ordinary talent may create.³⁷ This definition takes a work as creative where it shows an artistic element which an ordinary person in the field could not produce. The US Supreme Court in the Feist case took creativity as meaning embodiment more than an age old practice so familiar and commonplace that, it would not be expected as a matter of course.³⁸

There are some factors which build creativity. Some of them include judgment, thought, knowledge, imagination, taste, talent and so on. The putting of one or more of these elements in a work should be enough to claim creativity so long as the final product is aesthetically distinguishable.

The need to exhibit creativity for copyright protection is self evident. Copyright is there in the first place to protect intellectual or mental labor either for the good of the author or for the utility of the public. From the view point of the author, he should only be allowed to exclusively use or authorize the use of a work where he shows creativity in the work. As such, the author should be rewarded for bringing ingenuity and inventiveness in the literary, artistic and cultural field.

From the utilitarian justification, copyright is beneficial to the betterment of the society. The society accords a monopolistic right to authors mainly because it thinks that such protection would help in the growth and development of the fields of literature, art and culture, and ultimately to the economy. Such growth and development in the field would not happen if authors do not contribute something more creative than previous authors or; make a work which lacks any form of imagination. Therefore, on both authoritarian and utilitarian justifications of intellectual property, more specifically copyright, creativeness is a *sin qua non* of originality.

The need to show creativity as a basic requirement under originality is not without its critics. The first one relates about the difficulty that such requirement would entail on the level of originality of the work. It is argued that the creativity standard would elevate the originality threshold to a

³⁷ Bryan A. Garner, cited above at note 32, S.V Creativity

³⁸ Feist Publications v. Rural Tel. Serv. Co, cited above at note 10

higher level that, most works would be left unprotected.³⁹ Delimiting a demarcation between creative or non creative works is much cumbersome. The second drawback stresses the fact over evaluating creativity, hence originality. In almost every jurisdiction, it is up to the judiciary to determine the creativeness of a work under a case. Such procedure would make the judiciary subjective arbiters of literary value or worth.⁴⁰ By the same parlance, Justice Oliver Holmes noted;

“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits”⁴¹

One cannot completely over rule the possibility that courts may look in to the quality of the work before them in the pretext of assessing the creativeness of the work. Such actions clearly come against the age old rule in copyright that the purpose and quality of a work is irrelevant in affording or denying protection.

Even though the requirement of creativity exist, the level required seems to be very low. So long as the work emanates from the creative powers of a person, there is no such requirement as higher or lower creativity. In the Feist case, the court expressly noted that;

“The requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or obvious it might be..... There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent....such works are incapable of sustaining copyright protection”⁴²

The required aesthetic or artistic creativity in a work for protection has its implication on the system of copyright as a whole. When the creativity level needed is raised, many works would fail to satisfy the originality requirement and hence, are not protected. This would ultimately

³⁹ Carys J. Craig, cited above at note 2, p 430

⁴⁰ Ibid

⁴¹ Laurence A. Stanton, cited above at note 7, note 5

⁴² Feist Publications v. Rural Tel. Serv. Co, cited above at note 10

make the copyright regime a place only for the most genius ones. By the same token, when the level of creativity required is set at a very low level, almost everything made in the field of literature, art or culture would be copyrightable. These would not benefit the society for there will not be progress without or little creativity.

The creativity standard of originality is mostly revealed in the case of factual compilations. As a matter of general knowledge, facts and data's are not copyrightable for no one can create or originate them.⁴³ Nevertheless, compilations of data or facts are copyrightable where the facts or data's are selected, coordinated or arranged in a creative manner. What is recognized is not the effort or sweat of selection or arrangement of these public domain materials rather, the ingenuity or creativity the author has put in selecting and arranging the facts or data's.⁴⁴ Therefore, the main ingredient for copyright protection of factual or data compilations is the creativity in the anthology and arrangement of the inherently uncopyrightable items. Mutatis mutandis, the same holds true for almost all works.

In sum, copyright is a law over artistic, literary and cultural creations or creativity. As such, it would be impossible to think about copyright, in a situation that is devoid of creativity. Therefore, the nature and purpose of copyright law dictates originality be defined with an element of creativity.

2.3.2 ELEMENT OF SKILL AND LABOR

Having its origin in the English common law and commonly referred as the requirement of "sweat of the brow", this conception of originality gives central consideration to the effort of authors in according protection to the work. To this end, a work created by a person's effort or labor is given protection without the need to exhibit creativity.⁴⁵ The terms "skill" and "labor" are here to mean anything an author of a work has exerted or make use of for the purpose of making the work and includes time, talent, money, thought and the like.⁴⁶ Therefore, this method of understanding originality takes a work that has a person's labor or skill as an original work.

⁴³ Howard B. Abrams, cited above at note 1, p 8

⁴⁴ Daniel J. Gervais, cited above at note 14, p 980

⁴⁵ Krishna Hariani and Anirudh Hariani, cited above at note 6, p 499

⁴⁶ Sunelle Geyer, cited above at note 21, p 42

The prominent case in the UK under which the “sweat of the brow” doctrine gets recognition is *Walter v. Lane*.⁴⁷ The House of Lords reasoned that the effort, skill and time spent on taking notes were enough to justify the report of the lecture notes as original.⁴⁸ The House was not reluctant to look in to whether the notes are creative enough or not. In one Canadian Supreme Court decision, the court upheld that a work would be taken as being original where it is the product of the author’s exercise of skill and judgment.⁴⁹ Under the decision, skill is taken to mean the application of the author’s knowledge, developed aptitude or practiced ability while judgment is understood as the ability to form an opinion by comparing possible options.

The skill and or labor test of originality seems to originate from the author-centric approach of labor theory of intellectual property justification. By virtue of the reward theory, authors deserve to be protected for the fact that they have exerted intellectual labor or investment in the bringing up of the work.⁵⁰ Even though lock’s theory was not originally aimed at creating a regime of property outside the physical things, the justification is equally applicable to intellectual property for the fact that they require the exertion of labor in the form of thought or mental power.

This method of understanding originality faces critics in the name that it favors authors. In this regard the Canadian Supreme Court noted the following.

“When courts adopt a standard of originality requiring only that someone simply show industriousness to ground copyright in a work, they tip the scale in favor of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation”⁵¹

However, recently there has risen a strong counter argument against this skill and labor understanding of originality. The question posed by critics asks whether any pure rot or

⁴⁷ *Walter v Lane* (1900), AC 539. The facts of the case were that reporters from The Times newspaper took down shorthand notes of a series of speeches given by Earl of Rosbery and later transcribed and published in the newspaper. The issue was whether the reporters were to be considered as authors or not.

⁴⁸ Daniel J. Gervais, cited above at note 14, p 958

⁴⁹ *CCH Canadian Ltd. V. Law Society of Upper Canada*, cited above at note 12, pa. 25

⁵⁰ Kenneth E. Himma, “Toward a Lockean Moral Justification of Legal Protection of Intellectual Property,” (2012), *San Diego L. Rev.*, Vol. 49, p 1105

⁵¹ *CCH Canadian Ltd. V. Law Society of Upper Canada*, cited above at note 12, pa. 23

mechanical effort or labor is enough to justify a monopoly in the form of intellectual property. Nevertheless, the answer to this could be found within the court's decision itself. The court by stating "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", is impliedly telling that some form of creativity is still required from a work to be protected by copyright.⁵²

By the same token, some argue that this way of seeing originality is not a way of understanding originality but a public policy of rewarding those who take pains in making a work.⁵³ It seems the case that the law would not want to allow one person to appropriate the sweat or labor of another. Nevertheless, it is not the mandate of copyright law to protect any sweat or labor.

In short, the skill and labor or judgment understanding of originality is more of a moral justification than utilitarian one. As such, protection is accorded as a reward for the exertion of labor in the form of skill and judgment, not for the ingenuity or imaginativeness of the author. Nevertheless, marking the thin line between mental labor in the form of skill and judgment and creativeness is easier said than done.

2.3.3 ELEMENT OF AUTHOR'S PERSONALITY

This method or way of looking originality stems from the personality theory of copyright, which in turn gets its ground from Kant's philosophy of law and Hegel's philosophy of right. This theory of originality is similar with the skill and labor theory except for the later emphasizes over the author's labor while this one emphasize on the author's personality.

In its simplistic format, the personality theory dictates that an idea belongs to its creator because the idea is the demonstration of the creator's personality or self.⁵⁴ Hence, the author's personality mark in a particular work determines the originality or otherwise of it. What can be gathered from this theory is that a work would be original so long as it has the specific author's mark of personality in it.

Edward Young took authors as persons more than laborers in the field of art. He noted that;

⁵² Teresa Scassa, "Original Facts; Skill, Judgment and the Public Domain," (2006), MACGIL LAW REVIEW, Vol. 51, p 258

⁵³ Daniel J. Gervais, cited above at note 14, p 950

⁵⁴ Justin Hughes, cited above at note 19, p 23

*“Original writers are not merely craftsmen; they are creators of unique and authentic works that are produced by an inherent source of genius: the author, deserving sole credit for what springs from his personality”*⁵⁵

By the same parlance, some form of personal connection should exist between the work and the author or subjective contribution by the author in the work.⁵⁶ The cogent behind such understanding is that creations are after all, extensions of the personality of the author.

The proponent of this theory of originality includes France and to some extent, the US way before Feist. In France, originality is understood to mean a mark of the author’s personality or reflection of an irrational choice by the author.⁵⁷ In the US, Justice Oliver Holmes has reflected the personality way of understanding originality in *Bleistein v. Donaldson* as follows;

*“Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act”*⁵⁸

This conception of originality is criticized based on two grounds. Firstly, it takes a narrow conception of personality and originality. However, works are not the sole and only manifestation of the author’s personality for there are other factors. Secondly, for it gives excessive precedence or importance to the interest of authors.⁵⁹ As discussed in the first chapter, copyright is a system that tries to strike a balance between the interest of author’s for monopoly and the public interest for free exploitation of ideas and expressions. This theory of understanding originality give higher value to authors by giving copyright protection for a work that has his or her mark or personality.

⁵⁵ Stina Teilmann, Book Review, BRITISH AND FRENCH COPYRIGHT: A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS (2004), note 97

⁵⁶ Carys J. Craig, cited above at note 2, p 432

⁵⁷ Ibid, note 128

⁵⁸ *Bleistein v. Donaldson Lithographing Co.*, (1903), 188 U.S. 239

⁵⁹ Christopher S Yoo, “Copyright and Personhood Revisited,” (2012), [Pennsylvania Law; Legal Scholarship Repository](#). Paper 423, p 47

2.3.4 INDEPENDENT CREATION

In its simplest understanding, independent creation means that the work should not be copied from another or that it be created autonomously from any other work. This requirement is more utilized as a defense to infringement suits than a theory in itself. Where two or more works are created which have substantial similarity, each is entitled for protection where it is proved that each is independently produced.

Independent creation could well be explained by understanding its converse term i.e. copying. A person is said to copy a work where he duplicates the protected work or makes another one which have substantial similarity with it.⁶⁰ The existence of substantial similarity does not necessarily guarantee the happening of copying. This is so because, two authors could come up with a work, which is substantially similar and both could still get copyright protection. So long as each author reached at the final work from their unique way of understanding ideas and expressing them without copying from another, their expression is original, and hence copyrightable. Independently created similar expressions will turn out to be original ones.

A work would be unoriginal work where there is mechanical copying or conscious copying.⁶¹ The acontrario reading is that, subconscious copying does not amount as copying for the fact that there exists independent creation. In short, independent creation means that the act of creation is made by an autonomous or self-directing person who does not copy from an earlier original work.

2.3.5 DIFFERENCE WITH NOVELTY

Originality and novelty are the requirements under copyright law and patent law. As discussed earlier, these are the mechanisms through which the law aspires to ensure the existence of a creation worth legal protection.

⁶⁰ Bryan A. Garner, cited above at note 32, SV copy

⁶¹ Desrezka G Larasati, "revealing originality of song works: an analysis to the copyright law," (2014) *Indonesia Law Review*, Vol. 2, p 287

In patent law, an invention is not patentable if it was already known before the date of filing or before the date of priority if a priority is claimed, of the patent application.⁶² The main logic behind the novelty standard is not to prohibit peoples from using an idea they have known or done before patent is granted. The main mechanism of ascertaining novelty is the test of prior art i.e. that the invention is not considered novel where it can be anticipated by prior art.⁶³

The difference between the two requirements emanate from the thing over which they purport to protect. Patent law protects ideas while copyright law protects expression of ideas. Hence, an idea should be new or novel for protection while an expression is not expected to be new, but original. An idea that can be envisaged by prior art do not merit protection in patent. Nevertheless, an expression could still be known by the public and original if the way of expression has in it an element of creativity, personality or skill or labor of the author.

Two obvious things would result from these distinctions. First, a person who created an identical work with another person gets copyright protection to the extent that he proves independent or autonomous creation of the work. However, this is not the case in patent due to the fact that only one of the two inventions i.e. the one invented first gets patent. Independent creation therefore, is a defense in copyright but not in patent.⁶⁴ Secondly, an alleged inventor is required to go back and retrieve all prior inventions in the area, less his invention would be unprotected or, he could be held liable for patent infringement. In the copyright realm, an author can use what was already created in his field or even can come up with a same work by his own and get protected.⁶⁵

As a result, patent law requires a higher degree of originality in the form of newness or novelty. By contrast, copyright law only call for the existence of creativity, application of skill or labor or independent creation to grant protection and that the threshold for originality seems to be a low standard. Novelty requires a change from the status of non-existence to existence by the

⁶² Balew Mersha and G/hiwot Hadush, Law of Intellectual Property Teaching Material, 2009, p 235

⁶³ Proclamation concerning Inventions, Minor Invention and Industrial Designs, 1995, Art 3, Proc. No. 123, Fed. Neg. Gaz., year 10, No. 55

⁶⁴ Perry J. Saidman, cited above at note 9

⁶⁵ *Ibid*, p 331

inventor.⁶⁶ Originality only requires the author to originate the work from himself whether by showing creativity or his personality in it.

2.4 ORIGINALITY IN DATABASES AND DIRECTORIES

Basically copyright in databases and directories are nothing but an intersection of two well established propositions i.e. that; facts are not copyrightable and that compilations of these are generally copyrightable.⁶⁷ No one can create a fact or a data; he merely discovers its existence. As such, there will not be any authorship over such inherently uncopyrightable items. If these data or fact is uncopyrightable, the obvious question would be what makes a compilation of it copyrightable?

Prior to an answer to this question by in Feist publications, the “sweat of the brow” test was in place. In this regard the US Supreme Court in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co*, noted;

*“The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright”*⁶⁸

However, for the exact same reason as the “sweat of the brow” doctrine was declined in other types of work, it too was not applicable to factual compilations like databases and directories. This is so because courts refused to recognize exertion mere labor as being sufficient for protection. Recent decisions seem to adhere to the creativity requirement in such works as elaborated under Feist.

“The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as

⁶⁶ Desrezka G Larasati, cited above at note 61, p 282

⁶⁷ Howard B. Abrams, cited above at note 1, p 10

⁶⁸ *Jeweler's Circular Publishing Co. v. Keystone Publishing Co* in Howard B. Abrams, cited above at note 1, p 10

they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original”⁶⁹

Indeed tracing creativity in the more “artistic” works like novels, movies and the like is quite simple. Nevertheless, compilation works are only required to exhibit creativity in the selection, coordination and arrangement of the fact or data hence, tracing creativity is a little difficult. This intellectual creativity requirement in the selection or arrangement of the elements is the red line that differentiates protected and unprotected works. What constitutes creative selection and arrangement and the minimum level requirement has been discussed in the section of creativity element.

Based on this minimum creativity requirement in compilation, almost all works make the grade easily. However, some works still cannot fulfill the minimum creativity. Such works sometimes entail a substantial investment in terms of time, money, skill and the like. By studying the economic disadvantage of denying protection and merit of protection for such unoriginal works, there has raised a mechanism for according protection to these works.⁷⁰ To this end there has evolved a method of protecting unoriginal databases and directories through the instrument of *sui generis* right or through unfair competition.⁷¹

2.5 PURPOSE OF THE REQUIREMENT OF ORIGINALITY IN COPYRIGHT LAW

Most, if not all, copyright laws around the globe put both substantive and procedural requirements as a mandatory precondition for copyright protection. The substantive one relates to the need to exhibit originality and eligibility while fixation is taken as more of a procedural requirement. Looking in to the nature of works eligible for copyright protection makes the originality requirement the crucial one. Works that are the subject of copyright laws like books, articles, lectures, music’s, dramas, drawings, photographs are fruits of the human intellect. Unless a creative work of one person is differentiated from another by the originality

⁶⁹ Feist Publications v. Rural Tel. Serv. Co, cited above at note 10

⁷⁰ Study on the protection of unoriginal Databases, World Intellectual Property Office standing Committee on Copyright and Related Right, Seventh session, Geneva, 2002

⁷¹ Protection of Non-original Databases, available at <http://www.wipo.int/copyright/en/activities/databases.html> accessed on 6/4/2018

requirement, a situation of copying is inevitable to happen thereby protecting creations would be meaningless. It is to this end that originality assumes a great importance in the study of copyright law.

The purpose of the requirement differs based on the point of view one has on the copyright system.⁷² From the utilitarian justification, copyright is a system through which the society incentives authors to create works beneficial to the society. As such, only creative works benefit the society and hence, only works of higher degree of creativity are deemed original. Under this type of systems, the originality requirement ensures that only those creative and beneficial to the society are accorded protection. In a personality theory of copyright, the copyright system is nothing but the mechanism of protecting those works that has their author's mark of personality. Under this justification of copyright, originality plays the role of identifying works that show their authors personality and hence, should get protection. The same holds true in the reward justification of copyright. Originality ensures that that part of the author's own labor is rewarded in the form of copyright monopoly.

Therefore, originality serve as a filtration test for selecting works that deserve protection from those who don't. Besides, less the requirement of originality obvious public domain materials and facts would entitle one for copyright by mere inclusion in a work.

2.6 ORIGINALITY AND PERMISSIBLE BORROWING

The central issue in most copyright cases relates to demarcating the line between illegitimate copying and permissible borrowing. Carys Craig argues that borrowing is a necessary evil that it is important to the extent it helps the author in his creation or imagination. He goes on to stresses the fact that borrowing is part of the creative processes copyright law aspires to protect.⁷³ In fact art is incremental that there exists a room for making use of prior works in the process of

⁷² Manoj E Kotigala, Rethinking Originality in copyright law and Exploring the Potential for Global Threshold, (2016), available at https://www.researchgate.net/publication/311377345_Rethinking_Originality_in_Copyright_Law_and_Exploring_the_Potential_for_a_Global_Threshold , accessed on 5/9/18 8:31

⁷³ Carys J. Craig, cited above at note 2, p 430

creating one. So long as the borrowing is not a substantial part or the essence of the work is not copied, the borrowing seems to be a permissible one.⁷⁴

Determining permissible borrowing in factual compilations is troublesome. The underlying elements of the work i.e. data or fact is uncopyrightable hence, can be freely copied. What is prohibited to borrow is the way these facts are selected and arranged in the work.

2.6 THE REQUIREMENT UNDER FOREIGN JURISDICTIONS

As stated earlier, originality is a *sin qua non* in copyright law. Almost every jurisdiction has a mandatory requirement of originality before according copyright protection in the field of literature, art, science and culture. Nevertheless, the legal as well as judicial conception of the term varies based mainly on the specific purpose the copyright system is aiming to achieve and other country specific realities. Therefore, it is imperative to survey the application of the requirement in other jurisdictions.

2.6.1 UNDER THE COMMON LAW LEGAL SYSTEM

I. ORIGINALITY UNDER US COPYRIGHT LAW

The US copyright system essentially bases itself from the constitution where in under article I section 8, clause 8 the congress is empowered to promote progress in science and the useful art by securing for a limited time for authors and inventors the exclusive right over their respective writings and discoveries. To further this end, the congress has enacted the 1976 copyright act. Nevertheless, nowhere in the constitution is originality explicitly required as a prerequisite for protection.⁷⁵ Hence, besides purposive interpretation of the constitution, recourse should be made to court imposed doctrines of originality.

Starting from the constitution, the US Supreme Court in *Burrow-Giles Lithographic Co. v. Sarony* interpreted the term “author” as found in the constitution, as he to whom something owes

⁷⁴ Carys J. Craig, cited above at note 2, p 430

⁷⁵ Laurence A. Stanton, cited above at note 7, p402

its origin, originator or maker.⁷⁶ The court's interpretation unfortunately, does not go beyond defining an author and elaborate originality. Howard noted that the court was indeed trying to give the message that, if authorship is defined with regard to being an originator, it follows that a work should have the quality of being original or, should originate from the same for it to have a copyright protection.⁷⁷

The originality requirement first becomes a statutory requirement for according protection in the 1976 copyright act. The act intentionally omitted to include a definition of originality. The committee report on the act states the issue was left to be interpreted by courts.⁷⁸

Leaving the task of defining originality by courts, rather than by the legislature has its own importance. It is difficult to put a single definition that suits many different works. This subjective nature of the term is evident when considering the bulk and variety of works in copyright. Case by case analysis of originality better suits the purpose of copyright law.

In fact, the most notorious US Supreme Court decision in the issue of originality is *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* Some even call the decision as both a landmark decision and a legal bomb.⁷⁹ Before embarking upon this decision, forwarding some points on the pre Feist jurisprudence will help in understanding the development of the requirement.

Prior to the decision in the Feist, there seems to be a legal uncertainty in the decision of US courts regarding what constitutes originality. Some court decisions follow the skill and labor test and require that a work should exhibit the exertion of labor by the author to be taken as original while others oblige works to showcase judgment by the author. The first one, which later known to be the "sweat of the brow" test, accepts industry and effort by the author as fulfilling originality even the work clearly lacks little imagination.⁸⁰ What is recognized as justifications for protection is the effort, time and money spent on creating the work. The earliest of this line of

⁷⁶ *Burrow-Giles Lithographic Co. v. Sarony*, (1884) 111 U.S. 53, 60

⁷⁷ Howard B. Abrams, cited above at note 1, p 6

⁷⁸ House Report, Rep No 1476, 94th Congress, second Session 51 (1976) The committee noted that the originality requirement in no way include a level of novelty, ingenuity or aesthetic merit

⁷⁹ Ralph Oman, testimony before the House of Representatives, *quoted in* Paul Goldstein, "Copyright," (1991), *Journal of Copyright Society*, Vol 38 No. 109, p 188

⁸⁰ Howard B. Abrams, cited above at note 1, p 8

originality is found under *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, where the court noted that;

*“The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work” (emphasis added)*⁸¹

The second way of viewing originality, though not widely practiced, bases the justification for protection to the exhibition of personality of the author in the work. In *Financial Information, Inc. v. Moody's Investors Service*, the second circuit stated that effort alone never justifies copyright protection.⁸² It noted that in a work of compilation, selection, creativity and judgment in choosing the compiled materials should be displayed for it to be considered original.

Coming in to Feist, the Supreme Court stated explicitly what constitutes originality in factual compilations, and ultimately in all spheres work. The question before the court was what should be protected i.e. mere work or investment or creativity.⁸³ The facts of the case are that Rural Telephone gathered the names and addresses of its telephone subscribers directly from the subscribers. Feist publications published a directory under which they copied the listing from Rural Telephone without their consent. The suit by Rural Telephone for copyright infringement was decided in favor of Feist by the Supreme Court in a way that detaches from the previous jurisprudence.

The court held that compilations shall fulfill the requirement of originality where the choice as to the selection and arrangement is independently made and entail a minimum degree of

⁸¹ *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.* 88 (2d Cir 1922) in Howard B. Abrams, cited above at note 1, p 8

⁸² *Financial Information Inc. v. Moody's Investors Service*, 808 (2d Cir 1986) in Howard B. Abrams, cited above at note 1, p 9. The decision involves an issuance of index cards printed having an information on municipal bonds. The plaintiff has exerted a considerable amount of effort and money to gather the information. Nevertheless, the court failed to recognize such effort and accord protection to the compilation by stating that there was no originality in selection, creativity and judgment of the materials. Though the case was decided in compilations, the court in a footnote claimed that the standard applied in the case applies to all types of work in the copyright realm.

⁸³ Daniel J. Gervais, cited above at note 13, p 953

creativity.⁸⁴ The first test requires that the work be the author's own while the second one asks for creativity in the work⁸⁵ since the first test was discussed earlier, in this section some points will be made on the second one i.e. "modicum of creativity"

The unanimous decision of the court declared that only those aspects of a work which demonstrated a "modicum of creativity" would be copyrightable. The creativity aspect entails the burden of showing imaginativeness beyond the ordinary work in the field.

Obviously, the level of creativity in a work for protection is minimal by virtue of the decision. However, the question remains as to where the level should lie in the vast scale of creativity. The lack of creativity makes a work, *Mutantis mutandis*, a mere result of independent creation and application of effort while a work of extreme creativity could be taken as a novel work. It is to this end the Supreme Court pegged the level of creativity at the lower level, not at the bottom of the spectrum. Howard argues that according to *Feist*, the creativity should not be very creative after all, but must display something more than independent effort and expenditure in doing the obvious.

Therefore, the US jurisprudence unequivocally put independent creation and a modicum of creativity as essentially making up originality. The independent creation is all about lack of copying while the creativity is search for imaginativeness of the author. The level of creativity however, is put at the lower rank of the scale.

II. THE UK EXPERIENCE

Two prominent cases could well be taken as exhibiting the way UK courts used to understand originality in a work i.e. *Walter v. Lane* and *University of London Press*.⁸⁶ The courts, under the former case gives copyright protection to a note for the reason that it required an "industrious collection of effort" while in the later "skill and labor" were made part of the originality calculus besides independent creation. Different names were indeed utilized while referring this "skill and labor" like work, capital, effort, industry, time, knowledge, taste, experience, expense, investment.

⁸⁴ *Feist Publications v. Rural Tel. Serv. Co.*, cited above at note 10

⁸⁵ *Manoj E Kotigala*, cited above at note 72, p 18

⁸⁶ *Daniel J. Gervais*, cited above at note 14, p 958

Nevertheless, recent decisions seem to depart from these traditional “skill and labor” definition of originality. Particularly, the Newspaper case is worth mentioning here. In that particular case, the House of Lords insisted on the need to showcase “original artistic skill and labor” as a mandatory requirement in copyright.⁸⁷ Why does the court need to add the words “original” and “artistic” to the already established “skill and labor” jurisprudence of originality? It seems the cases that, a mere application of a skill and labor in a work don’t qualify for copyright protection. Especially the use of the word “artistic” implies the gradual incorporation of the creativity element in the assessment of originality because, the expression artistic it is defined as creative, imaginative and inventive.

The other consideration in the gradual move away from the old “skill and labor” concept of originality is to the personality concept of originality. At the time the UK was an EC member state, the ECJ’s decision in *Infopaq* has outlined that originality is nothing but an author’s own intellectual creations.⁸⁸ In this regard, Andreas Rahamatin noted that the traditional UK conception should be modified in a way to incorporate an element of “judgment” by the author to put his personal “touch”.⁸⁹

2.6.2 UNDER THE CIVIL LAW LEGAL SYSTEM

I. THE FRENCH EXPERIENCE

The intellectual property code of France, under article L 112-1 entitles authors the right in all works of the mind irrespective of the kind, form or purpose if the work is original. Like most of its counterparts, the code fails to give the elements that constitute originality. Review of case law in the country shows that the expression of the personality of the author in a work gives the work the requisite originality. Otherwise stated, a work should bear an imprint of the persona of the author. This stance of treating works as nothing more than part of the author’s personality is unique to the French jurisprudence and has got its root in the Hegelian philosophy.

⁸⁷ Newspaper Licensing Agency Ltd. v. Marks & Spencer, plc, (2001), UKHL 38

⁸⁸ *Infopaq International v. Danske Dagblades Forening* (2009) ECDR 16 (Case C-5/08)

⁸⁹ Andreas Rahamatin, “Originality in UK Copyright Law; the old “skill and labor” Doctrine under Pressure,” (2013), *International Review of Intellectual Property and Competition Law*, Vol 44 Issue 1, p 30. Andreas noted that “The author must apply her judgment to make selections and choices when she creates the work, and through these choices the author expresses original creative ability and thus stamps his personal touch: in this way the result will be an intellectual creation”.

This way of understanding originality evolved from the state of affairs in the nineteenth century France where, the dominant works of art are sculpture, painting and writing. Such types of expressions require the true expressions of the author wherein the emotional, subjective and irrational aspect or choice is reflected and hence, personality remains at the heart of a work.⁹⁰ By this means, the difference between two or more apparently similar work is the irrationality inherent in one author's mind.⁹¹ This method has long been utilized by almost all French courts.

However, the application of the personality test of originality for new works and works that exhibits little or no personality like databases and computer programs have become troublesome. The issue is that what should be exhibited in a work to show the author's personality? And the answer given by courts puts creative choices as making or revealing originality.⁹² Two recent decisions by the Supreme Court ('Cour de Cassation')utilized the words "author's own intellectual contribution" and "author's individual contribution" as forming the building blocks of originality.⁹³

The use of the word "intellectual contribution" and "creative choices" by the French courts imply that originality is being used to mean more than author's personality. The search for intellectual contribution or creative choices will ultimately require authors to prove the existence of an embodiment more than that existed in the field of that specific work. This requirement of contribution is nothing but creativity.⁹⁴ This is evidence of the gradual move from the personality perception towards the creativity understanding of originality.

A closer look in to the two approaches reveals that they convey an identical meaning. That imaginativeness required from the author in the creativity approach is labeled as the mark of personality in the personality approach. More particularly the creative choices by the author in creating a work are nothing but the reflections of his unique personality.⁹⁵ Nevertheless, the

⁹⁰ ELIZABETH F. JUDGE and DANIEL GERVAIS, cited above at note 33

⁹¹ Ibid

⁹² Ibid, note 34

⁹³ Brad Spitz, Originality of a Computer Program in French Law,(2013) available at <http://copyrightblog.kluweriplaw.com/2013/01/09/originality-of-a-computer-program-under-french-law/> accessed on 5/14/2018 11:38

⁹⁴ Feist Publications v. Rural Tel. Serv. Co, cited above at note 10

⁹⁵ Daniel J. Gervais, cited above at note 14, p 969

personality approach seems to lift the threshold of creativity a little above that required in the creativity approach where the threshold is minimal.

2.6.3 UNDER INTERNATIONAL INSTRUMENTS

The first international convention in the realm of literary, artistic and cultural work is the Berne convention. The convention neither explicitly puts originality as a requirement for copyright protection nor does it give a clarification as to what constitutes originality.⁹⁶ However, this should not mislead one to believe that Berne is devoid of any clue on originality. Terminologies used in the convention and preparatory works to the convention show that indeed only original works are protected by copyright.

The word “work” is defined as a list of categories of work. Based on this, one way of looking in to originality is that these lists of works are intellectual creations and hence, intellectual creativity assumes the central part in copyright. By the same parlance, the preparatory work to the convention puts creativity as a basic component of originality.⁹⁷

The TRIPS agreement has incorporated the substantive parts of the Berne convention.⁹⁸ Besides the inclusion of the preparatory work by virtue of the inclusion of the substantive part of Berne, the TRIPS agreement impliedly includes the requirement of originality in the form of creativity. Article 10(2) states that states should endeavor to protect literary works like data compilations which, by selection or arrangement constitute “intellectual creations”. This reference to intellectual creativity implies that copyright protection is not accorded to works where there is no element of creativity in it. Therefore, the prominent international agreements in the field of literature, art and culture adhere to the understanding that creativity is what makes a work original or not.

⁹⁶ Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on Sept. 28, 1979), [hereinafter Berne Convention].

⁹⁷ Daniel J. Gervais, cited above at note 14, p 972

⁹⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art 9(1) [hereinafter TRIPS Agreement].

Besides these two prominent conventions, other international treaties or agreements follow the creativity based notion of originality.⁹⁹

2.6.4 JURISPRUDENTIAL CONVERGENCE?

Why do we need to harmonize the originality requirement to be uniformly applied throughout states? Two reasons are forwarded to justify harmonization. The first rational relates to the treatment of copyrights as a human rights. Copyrights, as a subset of intellectual property are human rights by virtue of the Universal Declaration of Human Right (UDHR) and the International Convention on Economic, Social and Cultural Rights (ICESCR).¹⁰⁰ The universality and consistent application of human rights coupled with the responsibility of state parties to the international instruments to recognize the right of author's on their creation implies the need to harmonize copyright laws. At the heart of harmonization of copyright laws is the issue of originality. The second reason for the harmonization is the ever increasing pressure of international legal instruments. Proper application of Conventions like the Berne and TRIPS agreement require that laws and requirements be synchronized. The lack of definition for originality and the flexibility for states also dictate the need for harmonization.

As stated under the section over elements of originality, different jurisdictions utilize different methods to define originality requirement. The US jurisprudence require the exhibition of independent and a minimum creative element to make up originality; the UK asks for the exertion of artistic or original skill and labor while the continental civil law legal system, as found under France, puts the intellectual contribution in the form of author's mark of personality in the work.

A closer look at these three tests display two things expressed in varying terms. Implicit in each test of originality is the absence of copying or that the work should be the product of independent or autonomous mind of the author. The second and more complex denominator is the "creativity" in the US, the "artistic labor" in the UK and the "mark of personality" in civil law

⁹⁹ ELIZABETH F. JUDGE and DANIEL GERVAIS, cited above at note 33. In this regard the WIPO Copyright Treaty (WCT) and the North American Free Trade Agreement (NAFTA) could be mentioned.

¹⁰⁰ United Nations General Assembly, Universal Declaration of Human Rights, art 27-2, 10 December 1948 and United Nations General Assembly, International Convention on Economic, Social and Cultural Rights, art 15-1-c, 16 December 1966, United Nation Treaty Series, Vol 993

countries. The idea behind all the three tests is that the author should contribute or add to the pool of knowledge by his work which should not necessarily be a new thing.

A more comprehensive definition of originality, inclusive of all the components in the three jurisprudences could be the one Gervais forwarded in his article Feist Goes global. In the article he took a work as an original one where it is the product of creative choices. In turn a creative choice, according to him is;

“One which is made by the author and not dictated by the function of the work, method or technique used or by applicable standards or relevant good practices. Conversely, purely arbitrary or insignificant selection is insufficient. A conscious, human choice must have been made even though it may be arbitrary”¹⁰¹

The harmonization process should apply not only to the definition of originality, but also the threshold required to exhibit. As discussed earlier, a lower threshold favors authors for it helps them to get protection over works of minor contribution. Nevertheless, it should not be forgotten that it promotes disclosure of works. On the other hand, a higher threshold ultimately is beneficial to the society for it promotes and ensures progression of arts and culture. However, stagnation of art may be on the horizon due to high cost of creating a very creative works. Therefore, striking a balance between these two extremes is necessary to ensure benefits both to the society and the authors.

¹⁰¹ Daniel J. Gervais, cited above at note 13, p 977

CHAPTER THREE

3. ORIGINALITY IN ETHIOPIA; THE LAW AND PRACTICE

3.1 INTRODUCTION

Intellectual property law in general and copyright law particular is a recent development compared to other disciplines of law in Ethiopia. This is no exception to the generally accepted history of recent development of intellectual properties compared to property in physical things. Such recent history of intellectual property has its own effect on today's system; the obvious being absence of clear and articulated jurisprudence on many areas of the law of intellectual property.

The first of codified laws on copyright in Ethiopia is found under the 1960 Civil Code of Ethiopia.¹⁰² The code dealt with questions like what constitutes works of the mind, types of eligible works, right and limitation of rights of authors, assignment and the like. However, it was far from being comprehensive. More specifically and relevant to the discussion at hand, there is not mention, at least explicitly to the requirement of originality for protection. To this end a new and more comprehensive law which specifically deals with copyrights and neighboring rights was promulgated in 1996.¹⁰³ The proclamation under article 6-2 mandatorily puts originality as a precondition for copyright protection without giving any meaning to the term “original”.

Under this chapter, some remarks will be made on the interpretation of “originality” under the three legal documents i.e. the Civil Code, the 1991 FDRE constitution and the Copyright and neighboring right protection proclamation. The majority of the chapter is dedicated to the understanding and application of the requirement by Federal Courts to practical cases.

¹⁰² Civil Code of the empire of Ethiopia (1960), article 1647-1674, Proc. No. 165/1960, Gazette Extraordinary, Year 19 No. 2

¹⁰³ Copyright and Neighboring Rights Protection Proclamation, cited above at note 15

3.2 ORIGINALITY UNDER THE CIVIL CODE

The 1960 Civil Code has allocated a separate title under Book three for Literary and Artistic ownership. It is the first law in the history of the country to give recognition for property rights in the works of the mind i.e. intellectual properties. The code uses literary and artistic ownership to refer to the incorporeal right of authors over their creations i.e. today's copyright. By virtue of article 1647-2od the code, irrespective of the type, form, merit and purpose of the work the author shall have an incorporeal ownership right over what he has created.

There is no explicit requirement in the code that a work should be original to entitle its author such right. Nevertheless, article 1648, while listing out works of the mind, under sub (e) puts a fascinating remark on the subject. It reads;

The following works shall be deemed to be a work of the mind

*(e) Any other work created by the intelligence of their author
and presenting an original character¹⁰⁴*

The article requires works to exhibit the “intelligence” of the author and that they should be “original”. Intelligence is defined as the quality of being astute or clever or having a good judgment. As such it requires the existence of one's mark and a certain degree of creative contribution besides what is already known in the field. Moreover, the term “their author” is nothing but the call for a work to emanate from the author and not from somebody else. This is what the scholarship calls independent creation. Therefore, it could well be argued that the intelligence requirement is a blend of the requirement independent creation and the creativity element.

The second requirement is presentation of “an original character”. However, nowhere in the code is such “original character” is defined. Hence, resort is to be made to ordinary meaning as found under dictionaries. As detailed under the previous chapter, the ordinary meaning of the word “original” is akin to the creativity requirement.

¹⁰⁴ Civil Code of the empire of Ethiopia, cited above at note 102, article 1648(e)

The other way to search for the meaning of originality is to look for what constitutes a work. Under article 1647-1, it is stated that the author of a work of the mind shall have on the work he created, an incorporeal right of ownership by the mere fact of his creation. Two words in this sub article are particularly intruding i.e. “create” and “creation”. Obviously, the code defines works of the mind in terms of creations or creativity. The acontrario reading is that there should be a creation by the mind or creativity by a person to entitle him a right of ownership. This line of interpretation will reach us at a conclusion that creativity has been put at the heart of originality.

Therefore, the Civil Code to a greater extent accepts the creativity based notion of originality coupled with the requirement that the work is the independent product of the author. However, this should not be taken as saying other notions of originality are completely unknown.

3.3 ORIGINALITY UNDER THE FDRE CONSTITUTION

The FDRE constitution recognizes the right of individual citizens to the ownership of private property under the section on human and democratic rights. It goes on to define a private property as;

“ Any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen...”¹⁰⁵

Under this definition, intangible products are given equal recognition like those of tangible products. At first glance, the word “creativity” in separation of words “labor”, “enterprise” and “capital”, is taken to mean intellectual property. One should not be misled by the word and conclude that it is the only ingredient of intellectual property. This is so because works which are the subject of intellectual properties also require the effort of the labor, his capital and enterprise or activity besides the creativity by the author. The application of one of these ingredients and producing a work entitles an individual a right over the creation. Such right is a natural right recognized by the supreme law of the land. By this, Balew and G/hiwot argue that the natural

¹⁰⁵ Constitution of the Federal Democratic Republic of Ethiopia, (1995) art 40-1, proclamation no. 1, Neg. Gaz., Year 1 No. 1

right theory is recognized under the constitution.¹⁰⁶ This argument accords well with the Lockean justification of intellectual property and induces us to use the skill and labor notion of originality.

By the same parlance, the definition of private property in terms of inputs is not without any intent. While the constitution relates private property with the application of labor, creativity, enterprise and capital, it is saying that private property should be protected because it is an investment of these four inputs.

However, why does the constitution put creativity as an ingredient of a work which, probably refer to intellectual property. In this regard we may be right to assume that it is trying to assume intellectual property? In the view of the author, the explicit reading of the constitution shows that it puts creativity as a requirement for a person to assume property right over intangible works like works in the literary, artistic and cultural field.

The other way of looking in the issue is through the incorporation of international agreements. International agreements Ethiopia has ratified are integral part of the law of the land.¹⁰⁷ One of these international agreements the country has ratified is UDHR. The UDHR expressly recognize the right of authors over their creations and follow the author-centric justification or labor theory. This model, as widely utilized in the UK gives due credit to the skill and labor by authors and hence, anything that exhibit such effort is taken as being original.

3.4 ORIGINALITY UNDER THE COPYRIGHT AND NEIGHBORING RIGHTS PROTECTION PROCLAMATION

Under Ethiopian the copyright and neighboring rights proclamation, works of the mind in the field of literature, art, culture or science are accorded legal protection in the form of copyright where they are original and fixed in a tangible format.¹⁰⁸ These two requirements are in line with the conventional copyright laws around the globe. Like its previous counterpart and other states

¹⁰⁶ Balew Mersha and G/hiwot Hadush, cited above at note 62, p 69

¹⁰⁷ Constitution of the Federal Democratic Republic of Ethiopia, cited above at note 105, article 9-4

¹⁰⁸ Copyright and Neighboring Rights Protection Proclamation, cited above at note 15, article 6-1

laws, the proclamation does not give meaning as to what original works are. To this end, the author uses two ways to gather what the originality requirement is intended to mean.

The first way is through the definition given to the author. Under article 2-2 an author is defined as he who intellectually creates a work. The main point lies in defining the word “create” or its Amharic counterpart “ፈጠራ”.¹⁰⁹ Particularly defining the Amharic word is important for it is the working language by the judiciary. This is very demanding in that the legislative hasn’t put any means through which the judiciary may find out the intention of the former. Due to this, a look at ordinary definition is necessary.

An Amharic to Amharic dictionary defines the term as

“በምርምር በመከራ የሚገኝ የእውቀት ውጤት የሆነ አዲስ ነገር፤ ከአእምሮ በማመንጨት የሚሰራ የልብ ወለድ ወይም ስነጥበባዊ ስራ”¹¹⁰

This literarily is translated as;

“A new thing, which is a product of research and experimentation by applying knowledge; a fictional or artistic work originating from the mind” (translation mine).

The definition requires a thing to be new for it to be a creation of a mind. The requirement obliges an author to craft a work which is unknown or nonexistent in the literary, artistic and cultural work. The newness obligation in a creation puts the creativity threshold to the highest of possible levels. This ordinary meaning of the term “creation” takes it as equating to novelty. As discussed earlier, there exists a clear difference between creation in copyright and creation in patent both in the nature and threshold of the required creativity imagination. Therefore, this line of ordinary meaning of creation seems in compatible with the nature of copyright and the conventional understanding of the difference between patent and copyright.

The second line of definition i.e. originating from the mind seems more attuned with established jurisprudences of other states. So long as the work emanates from that author and not from another, it is taken as creative by its own. This is nothing but a requirement of independent

¹⁰⁹ Copyright and Neighboring Rights Protection Proclamation, cited above at note 15, article 2-2

¹¹⁰ Ethiopian Languages Research Centre, Amharic Dictionary, Addis Abeba, (2000), p 596

creation. The author believes such mode of understanding creation, and indeed originality could lead to a better result.

Apart from the search of originality in the definition of author, purposive interpretation of the proclamation may shed light on the problem. The proclamation in its preamble states that;

“WHEREAS, literary, artistic and similar creative works have a major role to enhance the cultural, social, economic, scientific and technological development of a Country”¹¹¹

The proclamation explicitly recognizes the significance of protection of works in the form of copyright to the country. The absence of any reference to author’s right over their work shows that the law unequivocally recognizes the public as the primary beneficiaries of protection of works and any gain to the author as being secondary. Therefore one can validly argue that the copyright and neighboring right protection proclamation justifies protection on utilitarian basis.

Reciting the discussion on creativity, the utilitarian justification puts creativity at the heart of copyrightability. The society would be better off in according protection to works that exhibit creativity. This is so because the added creativity in works ultimately results in progress of the science, art and culture. The US constitution also puts this utility to the public as the main reason for protection of works. This adherence to the utilitarian justification of protection requires that a work be taken as original if it demonstrates a minimum level of creativity.

In general, the proclamation’s lack of definition for the originality requirement compels us to look in to either in the ordinary meaning of the term or the purpose of the law for any help. Nevertheless, the ordinary meaning of the term to be found in Dictionaries is deeply flawed. It clearly confuses originality with that of novelty. Interpretation of the purpose of the proclamation seems more in line with what established jurisdictions understand originality. As such the purpose of copyright protection i.e. utility to the public require originality be defined with element of creativity. The indirect definition of originality through the literary meaning of creation requires an element of novelty and independent act in a work.

¹¹¹ Copyright and Neighboring Rights Protection Proclamation, cited above at note 15, preamble

3.5 THE PRACTICAL APPLICATION OF ORIGINALITY REQUIREMENT BY FEDERAL COURTS

I. SAMUEL HAILU vs. SIMRET AYALEW AND OTHERS

A. Facts of the case

Of the different issues up on which the Federal Supreme Court Cassation division passed a binding judgment which binds all the judiciary in the country¹¹², only one relates to the case at hand. The Cassation division has explicitly attempted to address the subject matter of copyright and the scope of protection in copyright. In its endeavor, the court raised the problem of originality and tried to address it.

The facts of the case is that the cassation respondents brought a civil suit in the Federal High Court alleging that their deceased father Aleka Ayalew Tamiru had created various religious works, prepared Gospel writings and gave interviews to media and that he was the rightful creator of the work.¹¹³ However, the Cassation appellant without having prior consent of the Heirs published a book entitled “Timihirte Haymanot” by collecting their deceased father’s works from magazines, newspapers and 6th month and death anniversary posters. They sought a relief from the court for moral and material damage caused by the infringement and that the published book is removed from the market.

The Cassation appellant in his statement of defense argued that the claimants did not adduce evidence that their deceased father was the originator of the work, that the writings are not the personal work of the deceased, that he merely reflected his view and stance up on current religious questions in the Ethiopian Orthodox Tewahedo Church and that he should not be taken as the originator due to the fact that the work of the deceased bases itself entirely on the church’s knowledge. Besides, the appellant admitted in his book that any revenue received from the sale of the book would be given to the deceased family. Moreover, he did not argue that he put any creativity or labor in the book. The Court after hearing both parties found the first Cassation

¹¹² Federal Courts Proclamation Reamendment Proclamation, 2005, art 2-1, Proclamation no 454, Neg. Gaz. year 11 no 42

¹¹³ Samuel Hailu Vs W/ro Simret Ayalew and others, (Federal Supreme Court Cassation Bench, Civil Case No. 68369, Tir 04/2004 E,C), Vol 13,p 576

appellant's work as infringement and give a decree up on him. On appeal, the Federal Supreme Court found the 1st appellant's work as an infringement of the deceased's work for the fact that the appellant has unlawfully used his photograph and creation. It is on appeal from the decision of lower courts that the Cassation bench gave the decision at hand.

B. Decision of the Bench

The Cassation Bench found that the book published by the appellant is an infringement of the rights of the respondents. The Bench asserted that a work should be a first or original to be protected under copyright which should be exhibited in the form of creative effort of the author. The Bench noted that the deceased has a copyright over his works which has his creative expressions hence; the appellant infringed this works and is liable to pay compensation.

C. Analysis of the decision

The Cassation Bench started examination of the facts by elaborating what a work should possess in order to get copyright protection. As such, the Bench defined what a work and what that work must contain to be original, hence copyrightable. For the purpose of clarity, giving out this part of the decision in its language seems necessary.

"...በመሰረቱ አንድን የፈጠራ ስራ በትክክል ስራ ሊያስብለው የሚችሉትና ለቅጅ መብት ጥበቃ ብቁ የሚያደርገው ስራው የመጀመሪያ ስራ ወይም በባህርይው ለየት ያለ ስራ ሲሆን መሆኑ የአዋጅ ቁጥር 410/1996 ይዘትና መንፈስን የሚያስገነዝቡን ነጥብ ነው። ስራው የመጀመሪያ ስራ / original/ ወይም በባህርይው ለየት ያለ ስራ ነው ሊያስብለው የሚችሉት ደግሞ ውጤቱ የግለሰብ የፈጠራ ጥረት መሆን ያለበት መሆኑ ይታመናል"¹¹⁴

This is literally translated as;

“Basically, the content and spirit of proclamation no 410/04 shows that a creative work is deemed to be a work in its proper meaning and fit for copyright protection where it is a first work or a different work by its nature. It is believed that what makes a work a first (original) or different by its nature is that it should be the product of application of individual creative effort (translation mine)”

¹¹⁴ Samuel Hailu Vs W/ro Simret Ayalew and others, cited above at note 98, p 578

The Cassation Bench first bases itself on the proclamation and defined original as to mean a first work or different from prior works. This assertion that works should not exist either in same or different format is not originality but novelty. Based on this, so long as the work existed in some other format it would not get protection even if created independently or entail a creative input. Numerous jurisdictions have made it clear that the originality requirement is not identical with the novelty requirement. In this first regard, the Cassation Bench's statement that only first works get copyright protection is faulty.

The decision then goes on to define what it calls "first works" or "original works". After the assertion that only first works get protection, "first works" are defined as those, which are the product of individual creative effort.¹¹⁵ This definition well accords to the established jurisprudence of attaching originality to individual creativity. Nevertheless, this notion of creativity will be rendered meaningless when it is taken in conjunction with the requirement that the work should be the first of its kind. Unless the individual creative input produces a first or different work, it seems the Bench's interpretation would leave it unprotected. This is clearly at odds with conventional copyright law and jurisprudence.

On the issue whether the deceased's work is original or not, the Cassation Bench affirmed lower courts decree that the work is indeed original.¹¹⁶ The cogent given for this was that the deceased took the religious idea and expressed it in his own creative way of communication and that the appellant literarily copied the deceased's work in to their book. The Bench does not concern itself over the level of creativity required. However, the "first work" interpretation would clearly elevate the level of individual creativity to a higher threshold that most works fail to achieve.

Generally, as evident from this decision by the highest judicial organ of the country, there exists a need to differentiate originality with novelty. Even if it clearly did not equate originality with that of novelty, it still creates room for confusion. The attempt by the Bench to define originality in terms of newness or difference with other prior works is incoherent with the purpose and

¹¹⁵ Ibid

¹¹⁶ The cassation Bench basically took for granted that the act by the appellant of including a statement in the book that the revenue from the book will be given to the deceased family as admission of the fact that the work is the creation of the successor of the respondents. However, such statement in no way guarantees admission of creation by the deceased. Even the acontrario could hold some fact in that only he who does not copy dares to admit borrowing of the work.

nature of copyright law. If lower courts abide by the decision, they should only take the “individual creative effort” terminology of originality in the decision.

II. PUBLIC PROSECUTOR vs. DANIEL TAFESSE AND WEB PLANET IT SOLUTIONS

A Facts of the case

In this case, the public prosecutor brought a criminal case on the defendants alleging that in violation of article 4-1-b; 6-1; 7-1-a, b and c and 36-1 of the copyright protection proclamation, the accused published an information and exchange directory alike that registered under the victim’s name.¹¹⁷ The accused used to work in the victim’s company which published the directories. The public prosecutor brought witnesses who testify on the fact that first, the accused worked in the victims company. Secondly that after he quits his work, he began to publish a directory identical to the one published by the victims company. Finally, that the two works are identical to the extent that a copy pastes mechanism had been used in the arrangement of the data. The specific of the violation claimed is the copying of the victim’s directory by the accused.

The accused argued that he published the directory independently by gathering freely available data from various state organs, that there are similar directories in the country prior to the victim’s, that the two works are not similar, that they organized the data in to shorter formats and that the directory does not require creativity.

B Decision of the court

As discussed earlier, directories or databases are works, which are essentially based on facts or data. These elements are part of the public domain and hence, uncopyrightable. What makes the resultant work protectable under copyright law is the way these inherently uncopyrightable items are selected, organized and presented.

Interestingly the court starts the analysis of the case with the replica of the definition of creative work or creation as found under the Cassation Bench’s decision. It noted that only first and

¹¹⁷ Public prosecutor vs. Daniel Tafesse and Web planet IT Solutions, 165026 (Federal High Court, Yekatit 14/2009 E.C)

different works are eligible to protection under the proclamation. The court found that the accused did not violate the victim's right on the ground that there were prior directories, that making a directory do not require creativity or that anyone can make a directory by assembling a freely available data and that the two directories are not similar.

C Analysis of the decision

To start with, the definition given by the court for works, it contains a basic misunderstanding of the subject matter of copyright. As elaborated on the discussion of the Cassation Bench's decision, equating originality with newness or new creation poses a great danger to the copyright system. This understanding does not differentiate between creation and invention.

Building on this notion of originality, the court decides that the directory of the victim is not original for there were directories in the country prior to it. This is deeply flawed and irrational judgment of copyright law. It is well saying that no copyright persists in a book because there are books in the country; no copyright for cinematographic works for there were cinematographic works, no right over speech for someone else has given speech on unrelated matters. Had it not been to other issue by the court, the decision would have turned out to be a chaos.

Adding more complications to the problem, the court declared that it found no creativity in making a database or directory by arguing that it can be made by any one. In this regard, giving out the exact terminology used by the court is imperative.

"... ስራው ከተለያዩ ምንጮች በሚገኝ ዳታ ላይ ተመስርቶ የሚሰራ መሆኑ በተከላሽ መከላከያ ምስክር ተረጋግጧል።ይህ ከሆነ ደግሞ ስራው የፈጠራ ጥረት ውጤት ሳይሆን በቀላሉ በማንኛውም ግልሰብ በነጻ ሊገኝ በሚችል መልኩ ተደራጅቶ የሚሰራ በመሆኑ....."

This is translated as

"It was proved by the accused witnesses that the work is produced based data gathered from different sources. If this is the case the work could easily be assembled by anyone by gathering freely available data and could not be the result of creative effort..."

Databases or directories are protected not by the data or information contained in them, but by reason of selection and arrangement of this contents.¹¹⁸ This is in line with the an established jurisprudence that databases, directories, encyclopedias and other similar collection works get protection by their unique compilation and arrangement of the inherently uncopyrightable items i.e. data or facts. What the law protects is the creative choices made by the author in assortment, arrangement and appearance of these data or fact.

In the case at hand, the court first gives its verdict that no originality be assumed on a work where a prior work exists and later that the employment of data to produce a work may not entitle the resultant work a copyright protection. The first statement is not a requirement for protection of copyright.¹¹⁹ Not only does copyright law allow one to use a stock of knowledge in the literary, artistic and cultural field, but it also recognize the possibility of coming up with identical work by affording protection to both such works so long as one do not copy from another. The ultimate progress to science and art could not materialize if one author does not get input from other works. Effective research and study requires there should be information on the findings and opinions of others and the opportunity to dig out those materials prepared by others.¹²⁰ By detaching the author from using and building upon previous work, such decision would ultimately result in stagnation of science and art. In this regard, the decision comes against the purpose and text of the law.

The second limb of the decision asserts that when one utilizes freely available data to create a work, there won't be creativity because anyone could do so. The court does not particularly cite the work in the dispute and declare that the selection and arrangement of the data lacks creativity. It took all data compilation works in general and decided that they are not creative for anyone could assemble the data and do the work.¹²¹ This is so because directories and databases

¹¹⁸ Copyright and Neighboring Rights Protection Proclamation, cited above at note 15, article 4-1-b

¹¹⁹ Amazingly, the court listed three prior directories in information and exchange and concluded that there was indeed prior work of directories. Such listing would have been right to evaluate the creativity or originality of the victim's directory. However, the court erred by concluding the existence of directory works show the non originality of the work at hand.

¹²⁰ Balew Mersha and G/hiwot Hadush, cited above at note 62, p 115

¹²¹ In this regard, the court explicitly stated that "works of the type in hand are not the result of creative effort". Such "works of the type at hand" reference is to directories.

are nothing but a display of data or fact in some way. Indeed it is an established jurisprudence that data alone is uncopyrightable unless compiled in a certain format.¹²²

In this regard it's imperative to look in to Feist wherein an identical issue of law and fact are raised. Nevertheless, the US Supreme Court framed the issue in a more admirable fashion than the Federal High Court.

*“This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree”*¹²³

The High Court should have concerned itself more on the manner of compiling the data which entitles the work protection and not on the comportment of gathering them. The data could be easily or freely available to anyone which is irrelevant to copyright protection. If a person having such freely available data makes a directory independent of others and entails a level of creativity in selecting and arranging such data, by virtue of article 4-1-b of the proclamation.

The data, consisting of the telephone numbers, postal number, fax, email and websites of business companies was organized in 12 main sections of business like bank and insurance, construction, recreation, service and the like. Such selection in no way exhibit creativity because grouping businesses data in its natural business category is an age old practice. Moreover, one can not envisage a business directory without the ordinary contact details comprised of telephone, fax, email and website. As noted from the witness's testimony, all the freely available data has been included in both works. Besides these facts, there was no mention by the parties, the Ethiopian Intellectual Property Office in its expert testimony and the court regarding the way the data is presented. Nevertheless, based on the facts of the case the directories hardly get protection for they have not put any creativity besides selecting all the data and organizing it in a elementary manner.

If the defendants were to be exempted from violation of literary ownership, there still remains a possibility that they will be responsible for using the data. By virtue of article 706 and 707 of the

¹²² Howard B. Abrams, cited above at note 1, p 10

¹²³ Feist Publications v. Rural Tel. Serv. Co, cited above at note 10

criminal code, whosoever accesses a computer and takes or uses data is punishable with simple imprisonment.¹²⁴

Lastly, the court based its non infringement decision on the fact that there exists no similarity between the work of the accused and the victim. Accordingly, the court stated that the accused proved by his expert witnesses that there exists a difference in content and in shape. Besides, interestingly the court visually observed that there was no similarity between the two works. In this regard, the court took the similarity test to ascertain the existence or otherwise of copying.

Putting the similarity test in the calculus of copyright infringement is a risky undertaking by the court. Similarity is inherent and an unavoidable activity in copyright subject matters, especially in data and fact based works. A database of information in similar fields ought to exhibit similarity mainly due to their content. Taking the case at hand, both works are directories of information and exchange data. Adding to this the data used is available to all who need freely and more pertinently both works used this same data. Hence, similarity is presumed to exist and could not in any way ascertain copying. What would have the court pronounced had it found similarity between the works?

One particular thing to take from the case, had the court elaborated it was the argument by the accused that there exists difference between the two works on the structure, font and color of the data in the directory. This argument is line with established jurisprudence and article 4-1-b of the proclamation. Because, such differences can show the creativity of the accused on the selection and arrangement of the data

To sum up, in these case the court made various assertions that are inconsistent with the text and purpose of the law and foreign jurisprudences. Notably, it took originality to mean a requirement that the work be a new one; that directories are not the result of creative effort hence, uncopyrightable and that similarity could be used in the calculation of originality.

¹²⁴ The criminal code of the Federal Democratic Republic of Ethiopia, (2004), article 706 and 707, proc. No. 414

III. FANTAHUN ENGIDA vs. TAMIRU BIRHANU AND ADDIS ABEBA CULTURE AND TOURISM OFFICE

A Facts of the case

The plaintiff brought the case to the court by alleging that the defendant copied the original manuscripts of the play entitled “Wulo Geb” which was created by the plaintiff.¹²⁵ The details of the allegation are that the theater presented by the first defendant is identical on its history with that of the plaintiff. Besides, they claimed that the similarity is reflected on the number of actors, their role’s and personality. The defendant was sued for presenting this original work by changing only the title to “Baletidarochu” and showing the adaptation of the work in a theatre format.

The first defendant argued that the theater was his original work which was created through time. He reasoned that the theme of wife swapping is previously made and widely used mode in theater that it could not be taken as the original work of the plaintiff. Moreover, he denied the existence of any similarity between the two works.

B Decision of the court

The court decided that the defendant infringed the plaintiffs copyright by copying the original work. The originality of the plaintiff’s work was presumed because the defendant did not prove that he has created the work before the plaintiff. Besides, the court based its decision of infringement on the similarity of the two works on their issue, appearance, number of characters, paradigm and conflict. The court found the similarity based on expert testimony called by the defendant.

C Analysis of the decision

A closer look of the decision reveals that two mechanisms have been employed by the court to ascertain the existence of the originality of the plaintiffs work and the unoriginality of the defendants work. The first affirmation is that the defendant did not create the work before the

¹²⁵ Fantahun Engida vs. Tamiru Birhanu and Addis Abeba Culture and Tourism Office, 116946 (Federal High Court, Yekatit 10/2006 E.C)

plaintiff. There is no clear indication in the judgment what this fact proved or is intended to prove. Is the court making note that the defendant, by not creating his work before the plaintiff lacked any originality? If so, the court is recognizing the fallacious argument that only first works are protected by copyright.

In the more direct approach to identifying the life of originality in the work of the plaintiff and the act of copying by the defendant, the court employed the notion of similarity. In the first place, the plaintiff's work is declared original for it exhibits no similarity in on issue, appearance, number of characters, characters role, reason for the main act i.e. Wife Swapping, the meaning, paradigm and conflict from prior works. By the same parlance, the court declared that the defendants work is a copy of the plaintiff's for it is similar in these traits.

One thing worth noting here is that, the qualities the court listed in the judgment could be used to assess whether there exists creativity in the work or not. As the creativity required is in the form of expression and not ideas, these traits are anything but a way through which the creativity or imaginativeness of the author is exhibited. As discussed earlier, the similarity notion of originality is defective. The proclamation did not prohibit protection for the fact that there exists similarity between works. It only rules out protection where there is no creativity in them.

IV. ADDIS ABEBA UNIVERSITY vs. BIRHANU G/TSA DIK

A. Facts of the case

The plaintiff brought a civil case by alleging that the defendant has infringed the copyright of the former.¹²⁶ Ethiopian Language Academy, which is an institution under the plaintiff, published a book entitled "Amharic proverbs" which is a book consisting of proverbs organized in a certain manner. The defendant was sued for infringement of literary ownership by virtue of article 1647 and 1649 of the civil code by copying the proverbs and their presentation as found under the original work of the plaintiff and publishing a book entitled "Amharic Proverbs collection". The basis for the infringement claim was the literary copying of the plaintiff's book. The case was seen *ex parte*.

¹²⁶ Addis Abeba University vs. Birhanu G/tsadik, 46096(Federal High Court, Hidar 27/1999 E.C)

B. Decision of the court

The court first inquires whether the plaintiff's published work is protected under the law. To this end, it concluded that the law protects the work because, there was no contrary evidence that any one has published an earlier compilation of proverbs. Besides, the court reasoned that the two works could well be taken as being identical.

C. Analysis of the decision

On the analysis of protection of the plaintiff's work, the court quoted article 4-2-1 of proclamation number 410/04 and reasoned that only original compilations are protected. The court then goes on to define what these "original compilation" are. The reasoning used is as follows.

"ይህ ስብስብ በመጀመሪያ በሌላ ሰው እንደተሰራ የቀረበ ማስረጃ የለም.....ምሳሌያዊ ንግግሮችን በማሰባሰብ በመጀመሪያ የተሰራ ስራ እንዳለ መረጃ እስከሌለ ድረስ ከላሽ በመጀመሪያ የምሳሌያዊ አነጋገሮችን በማሰባሰብ አራጅናል ስራ የሰራ መሆኑ ይገመታል.....የሳተመው መጽሐፍ የመጀመሪያ(አራጅናል) እስከሆነ ድረስ የህግ ጥበቃ አለው".

The translation being;

"No evidence was brought that this work of compilation has been done previously by another person. Since no evidence was adduced that there exists a first work of compilation of proverbs, the plaintiff's work of compilation is deemed to be original....the published book is protected by law where it is first (original)"

The proclamation protects works of compilations that are original by reason of their selection and arrangement of their contents.¹²⁷ It does not require any knowledge to consider the possibility of having many compilations. The proclamation is recognizing the possibility or even the reality of having works of compilations that contain the same contents like data or facts. The basis for protection or denial of the same is the way the inherently unprotected data or facts are elected, arranged and presented. In the case at hand, the proverbs are uncopyrightable and public domain elements.

¹²⁷ Constitution of the Federal Democratic Republic of Ethiopia, cited above at note 91, article 4-1-b

The ultimate decision of the court lies in the conception that a compilation is original where there is no prior work of compilation in that particular category. Clearly, the court equated originality with that of being the first. What would have the court decided had it been proven that there was a work of compilation of proverbs done prior to the work of the plaintiff? Will it declare that the plaintiff's work is unoriginal? Or will it inquire in to the selection and arrangement of the proverbs in search for originality? The way the decision is structured, more pertinently the use of the word "first work" makes us believe that the former would be the verdict.

This impression of originality would have a consequence unimaginable and undesirable by the law i.e. stagnation of literature and art. We would have one compilation of proverbs, to that effect one works of compilations like directories, databases or anthologies.

V. SUMMARY OF THE FEDERAL JUDICIAL JURISPRUDENCE

In all the above cases, the courts were required to define what constitutes an original work. To this end, all the courts define original works as those, which are first in their nature. The notion of assimilating originality with being first work seems to emanate from the courts adherence to the decision by the cassation bench.¹²⁸ The decision unequivocally equates the originality requirement with that of novelty. Particularity in Public prosecutor vs. Daniel Tafesse and Addis Abeba University vs. Birhanu G/tsadik, the courts assessed the originality or otherwise of the work solely on the ground of existence of works in that particular sector. On the other two decisions, the courts clearly stated that only first works get copyright protection. These shows that federal courts are following a pattern of decisions that associate originality with novelty or newness.

On the other hand, the courts utilize the similarity test in the computation of originality of a work. As such, if there exist similarity between the plaintiffs and defendant's work, the court would decline to consider the originality of the defendant's work.

Clearly there exists a pattern of understanding originality by Federal courts. Firstly, they take originality to mean newness or first. As such, only new works or those which differ by their

¹²⁸ Samuel Hailu Vs W/ro Simret Ayalew and others, cited above at note 113

nature from previous works are taken as being original. Secondly, the similarity of two works is used as the major factor in deciding the originality or otherwise of works. Third, the courts seem to be oblivious to the existence of creativity in works while inquiring in o their originality.

CHAPTER FOUR

4. CONCLUSION AND RECOMMENDATION

4.1 CONCLUSION

Intellectual property law is that part of the law that seeks to protect the intellectual creations of the human mind. Copyright, being that segment of Intellectual property requires that protection is only given for creations in the literary, artistic and cultural spheres of life. Copyrightability is the most central aspect of copyright law that define the nature and types of works to which protection is accorded. One component of this copyrightability is the notion of originality. This is nothing but a way of ascertaining an existence of creativity worth protection.

Recognizing the importance of ascertaining creation, the originality requirement is mandatorily put as a requirement for protection in most laws. However, most such legal instruments fail to define what constitutes original work or the method of proving its existence.¹²⁹ The legal lacuna has been and is being filled by the judicial interpretation of the notion.

A review of the conventional judicial experience shows that there are three predominant understandings of the originality requirement. The first one takes originality as a requirement that necessitates an independent creation and creativity. Applicable in the US, this notion basis itself in the utilitarian justification of copyright and require only a “modicum of creativity” for protection. The sweat of the brow doctrine, on the other hand stress the fact that industriousness or effort in creating works should be enough for getting protection. This traditional UK doctrine has its root in the author-centric justification of intellectual property. The personality based justification on its part, followed by the civil law jurisprudence dictates that the author’s personality reflected in the work is what makes it original.

In fact all the three doctrines as applicable these days require that there should be something done or created by the author worth protection apart from independent creation. The recent decision by UK courts that mere labor or skill is not enough and that there should be “artistic”

¹²⁹ ELIZABETH F. JUDGE and DANIEL GERVAIS, cited above at note 33. In a survey of 93 different national copyright laws, the author’s found that only three contain a definition of originality.

labor or skill is a clear testament here. Besides the civil law tradition of France and the EU gradually transformed the “author’s personality” requirement to “intellectual contribution” and “creative choices”.¹³⁰ Therefore, there exists a clear convergence of defining originality in terms of creativity by authors.

Like most copyright legislation, the Ethiopian Copyright and Neighboring Right Protection proclamation require originality as a requirement of protection without giving any meaning to it. However, indirect search of the meaning of originality through the definition of author’s and creations in literary understanding bares a poisonous fruit. This is so because such would entail the requirement that works be the first of their kind i.e. novel. Nevertheless, purposive interpretation of the proclamation gives a clear view of originality which puts creativity at the heart of originality.

Survey of the application of originality by federal courts shades some light on how courts interpret originality. The analyzed court’s decision took originality to mean novelty and rule that only new works or those which differ by their nature from previous are protected by copyright. Especially, the decision by the Cassation Bench that confused originality with novelty is very risky in that all courts in the country are bound by it. This notion of originality seems incompatible with established jurisprudences and the nature of copyright.

¹³⁰ Brad Spitz, cited above at note 80

4.2 RECOMMENDATION

- ❖ It would be imperative to give out a definition of the requirement of originality that at least differentiate it with that of novelty. Besides there should be some room for flexibility for courts to apply to specific cases of originality in legislation owing to lack of well entrenched judicial jurisprudence.
- ❖ The originality requirement in the proclamation should be viewed separately from the requirement of novelty. To that effect, the prevalent understanding of originality by Federal courts that only new or first works are protected by copyright should be abandoned. The quality of being first or new must not be taken as meaning original.
- ❖ The Federal Supreme Court cassation bench has to review its interpretation of originality in the case Samuel Hailu Vs W/ro Simret Ayalew and others. The Bench should define originality in a manner distinct from novelty. Until then lower courts should interpret originality in a manner discussed above.
- ❖ Originality in copyright should be defined in a manner consistent with established jurisprudence in foreign countries. As such any work in the field of literature, art and culture should be accorded copyright protection if it exhibits creativity or imagination and if it is independently created.
- ❖ The ordinary meaning of the term “original” should not be applied in assessing the originality of a work. It does not elucidate any light on the technical nature of the subject.
- ❖ The required threshold of creativity for originality of a work should be minimal. But the author should do more than trivial creativity which won't help in progress of literature, art or culture.
- ❖ The mechanism of ascertaining creativity in a work should be left to experts who have a professional knowledge in the subject matter of the work.

BIBLIOGRAPHY

Books

- Marshal McLuhan and Quentin Fiore, the medium is the message; an inventory of effects, (6th edi. 1967)
- Walter J. Ong, Orality and Literacy, (2nd edi. 2002)
- William Blackstone, Commentaries on the Laws of England (Vol 4, 1765)
- P.H.Collin, Bloomsbury reference; Dictionary of Law (4th edi. 2004)
- Bryan A. Garner (edi.), Black's Law Dictionary, (8th edi. 2004)
- Ethiopian Languages Research Centre, Amharic Dictionary, Addis Abeba, (2000) Artistic Printing Press

Journal articles

- Howard B. Abrams, "Originality and Creativity in Copyright Law," (1992), Journal of Law & Contemp. Problems, Vol. 55 No 2,
- Carys J. Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest,"(2005) University of Ottawa law & technology journal, Vol 2 issue 2 Richard M. Ader, the Problem of Originality in Copyright Law, (1952), Intramural L. Rev. NYU, Vol 7
- Laurence A. Stanton, "Expression and Originality in Copyright Law," (1972) Washburn Law Journal, Vol. 11
- Daniel J. Gervais, "Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law," (2002), Journal of Copyright Society U.S.A
- Krishna Hariani and Anirudh Hariani, "Analyzing Originality in Copyright Law: Transcending Jurisdictional Disparity," (2011) Journal of the Franklin Pierce Center for Intellectual Property - IDEA Vol. 51 No. 3
- Justin Hughes, "the Philosophy of Intellectual Property," (1998), Georgetown Law Journal, Vol 77
- Simon Stern, Copyright, "Originality and the Public Domain in Eighteenth Century England, (2008), Journal of University of Toronto Faculty of Law, Vol 84
- Kenneth E. Himma, "Toward a Lockean Moral Justification of Legal Protection of Intellectual Property," (2012), San Diego L. Rev., Vol. 49

- Teresa Scassa, “Original Facts; Skill, Judgment and the Public Domain,” (2006), MACGIL LAW REVIEW, Vol. 51
- Stina Teilmann, Book Review, BRITISH AND FRENCH COPYRIGHT: A HISTORICAL STUDY OF AESTHETIC IMPLICATIONS (2004)
- Christopher S Yoo, “Copyright and Personhood Revisited,” (2012), Pennsylvania Law: Legal Scholarship Repository. Paper 423
- Desrezka G Larasati, “revealing originality of song works: an analysis to the copyright law,” (2014) Indonesia Law Review, Vol. 2
- Perry J. Saidman, “Copyrights: Novelty or Originality,” (1973), Journal of Patent Office Society of US, Vol 55, No. 5
- Manoj E Kotigala, “Rethinking Originality in copyright law and Exploring the Potential for Global Threshold,” (2016), available at https://www.researchgate.net/publication/311377345_Rethinking_Originality_in_Copyright_Law_and_Exploring_the_Potential_for_a_Global_Threshold , accessed on 5/9/18 8:31
- Paul Goldstein, “Copyright,” (1991), Journal of Copyright Society, Vol 38 No. 109
- Andreas Rahamatin, “Originality in UK Copyright Law; the old “skill and labor” Doctrine under Pressure,” (2013), International Review of Intellectual Property and Competition Law, Vol 44 Issue 1
- ELIZABETH F. JUDGE and DANIEL GERVAI, “OF SILOS AND CONSTELLATIONS: COMPARING NOTIONS OF ORIGINALITY IN COPYRIGHT LAW,” (2009) Cardozo arts and Entertainment Journal, Vol 27, note 14

Laws

- Constitution of the Federal Democratic Republic of Ethiopia, (1995) proclamation no. 1, Neg. Gaz., Year 1 No. 1
- Copyright and Neighboring Rights Protection Proclamation (2004) Proclamation No. 410, Neg. Gaz. Year 10 No. 55
- Federal courts proclamation, (1996) proclamation no 25, Neg. Gaz. Year 2 No.13.
- Proclamation concerning Inventions, Minor Invention and Industrial Designs, 19 95, Proc. No. 123, Fed. Neg. Gaz., year 10, No. 55

- Civil Code of the empire of Ethiopia (1960) Proc. No. 165/1960, Gazette Extraordinary, Year 19 No. 2
- The criminal code of the Federal Democratic Republic of Ethiopia, (2004) proc. No. 414

International agreements

- Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on Sept. 28, 1979)
- Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C,
- United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948
- United Nations General Assembly, International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nation Treaty Series, Vol 993

Foreign Court cases

- CCH Canadian Ltd. V. Law Society of Upper Canada, (2004), S.C.R. 339, SCC 13
- Feist Publications v. Rural Telephone Service Co., (1991), 499 U.S. 340, 345
- Decision of the German Federal Supreme Court (Bundesgerichtshof), (2013) International Review of Intellectual Property and Competition Law, No. 40319
- Walter v Lane (1900), AC 539
- *Bleistein v. Donaldson Lithographing Co.*, (1903), 188 U.S. 239
- Burrow-Giles Lithographic Co. v. Sarony, (1884) 111 U.S. 53, 60
- Jeweler's Circular Publishing Co. v. Keystone Publishing Co. (2d Cir 1922)
- Financial Information Inc. v. Moody's Investors Service, (2d Cir 1986)
- Newspaper Licensing Agency, Ltd. v. Marks & Spencer, plc, (2001), UKHL 38
- Infopaq International v. Danske Dagblades Forening (2009) ECDR 16 (Case C-5/08)

National court cases

- Samuel Hailu Vs W/ro Simret Ayalew and others, (Federal Supreme Court Cassation Bench, Civil Case No. 68369, Tir 04/2004 E.C), Vol 13,
- Public prosecutor vs. Daniel Tafesse and Web planet IT Solutions, 165026 (Federal High Court, Yekatit 14/2009 E.C)

- Fantahun Engida vs. Tamiru Birhanu and Addis Abeba Culture and Tourism Office, 116946 (Federal High Court, Yekatit 10/2006 E.C)
- Addis Abeba University vs. Birhanu G/tsadik, 46096(Federal High Court, Hidar 27/1999 E.C)

Online materials

- Software Freedom Law Center (edi.), Originality Requirements under U.S. and E.U. Copyright Law, (2007), available at www.softwarefreedom.org
- Nehaluddin Ahmad & Saurabh Chaturvedi, Originality requirement and copyright regime of music: a comparative overview of Indian perspective, (2013), Information & Communications Technology Law, p 135, available at <http://www.tandfonline.com/loi/cict20> accessed on 5/2/2018
- Seana Valentine Shiffrin, A Companion to Contemporary Political Philosophy, (2007),UCLA School of Law Research Paper No. 15-39 available at <https://ssrn.com/abstract=2679176> accessed on 2/24/18
- Terje Norderhaug and Juliet Oberding , Designing a web of intellectual property system (1995),Computer Networks and ISDN available at <https://ac.els-cdn.com> accessed on 29/3/2018
- Sunelle Geyer, Determining originality in creative literary works, (2006), University of Pretoria, (unpublished)
- Joseph Sotomi, Originality in Copyright: a contested issue, (2004) (Dissertation) University of Kent available at <https://www.kent.ac.uk/law/ip/.../Joseph-Sotomi-Dissertation.doc>
- Yousuf Dhamee, Intellectual Property Law and the Net: an Introduction available at <http://www.cyberartsweb.org/cpace/politics/intellectual.html> accessed on 3/28/18 3:48
- Balew Mersha and G/hiwot Hadush, Law of Intellectual Property Teaching Material, 2009, available at <https://chilot.me/wp-content/uploads/2011/06/intellectual-property.pdf> accessed on 24/2/2018

Other materials

- House Report, Rep No 1476, 94th Congress, second Session 51 (1976).