

**SURVEY OF COPYRIGHT LAWS
REGARDING
LOW BAR TO COPYRIGHT**

**Copyright Policy of INTA Subcommittee
of the
Copyright Committee**

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The Copyright Policy Committee of INTA Subcommittee (the “Subcommittee”)* conducted the survey reported herein to determine the bar to copyright protection imposed by various nations in key regions around the world. As shown in the following country-specific summaries, the Subcommittee found that the majority of countries apply a low bar to copyrightability. In other words, to qualify for protection, a work need not necessarily have artistic merit or aesthetic value, so long as the work is the author’s own creation and reflects a minimal level of creativity. Accordingly, the various copyright laws described herein accord with, and provide support for, INTA’s position that the bar to copyright should be low.

I. AFRICA

A. SOUTH AFRICA

In South Africa, copyright subsists in a work upon complying with certain eligibility requirements in terms of the Copyright Act.¹ Copyright subsists where there has been a work, by an author, which is original and has been reduced to material form.² The primary requirement for the subsistence of copyright is that the work must be “original.”³ In addition, for subsistence of copyright, South Africa requires that the author of the work be a qualified person, and for the work to be published.⁴

For the originality requirement, the Copyright Act does not provide any definition or guidelines to clarify the meaning of the term “original,” but the authorities and case law have

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¹ Act No 98 of 1978.

² See, e.g., *Designers Guild Ltd v Russel Williams (Textiles) Ltd* [2000] 1 W.L.R 2416 (stating the principle of copyright law that anyone who, by his or her own skill and labour, creates an original work of whatever character shall enjoy an exclusive right in that work).

³ Section 2 of the Copyright Act 98 of 1978, as amended.

⁴ A qualified person is an individual who is a citizen of, or is domiciled or resident in, South Africa or a ‘convention country’, or in the case of a juristic person, a body which is incorporated under the applicable laws of South Africa or the applicable laws of a convention country. See Section 3(1) of the Copyright Act. To satisfy the publication requirement, the copyright holder must show that copies of the work (with the exception of cinematograph film and a sound recording) are issued to the public in sufficient quantities so as, having regard to the nature of the work, to satisfy the public’s reasonable requirements. A cinematograph film or sound recording is considered to be published when copies of the film are sold, let for hire or offered for sale or hire to the public. See *id.* at Section 1(5).

provided guidance on how to interpret this term. Originality refers to original skill or labour in execution: It demands that work should emanate or originate from the author and not be copied from an existing source. This does not necessarily mean that a work will be regarded as original only where it is made without reference to existing subject-matter. An author may make use of existing material and yet achieve originality. In that event, the produced work must not be more than a slavish copy; it must in some measure be due to the application of the author's own skill, judgment or labour.⁵

Moreover, originality does not require that the work should embody a new or inventive thought or should express a thought in a new or inventive form.⁶ It is also generally accepted that creativity is not required to make a work original.⁷ Save where specifically provided otherwise, a work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.

The court in *Waylite Diaries CC v First National Bank* made clear that the threshold for originality, and thus copyrightability, is low when it held:

The application of (the authors) knowledge, skill and labour must produce a result which is not merely commonplace. It must have a quality of individuality not necessarily requiring intellectual novelty or innovation but which is at least sufficient to distinguish the work from the merely common place. It must be apparent from the work itself that the author has made such a contribution. *The standard required is not high*, and is not capable of precise definition. It is a matter for judgment according to the facts of the particular case.⁸

South African courts also consider the “sweat of the brow” test, but whether or not a work is original is a factual enquiry which a court will decide after evidence of the originality has been adduced. If a work comprises or is derived from pre-existing material, that work must be distinguished by the author's own contribution and endeavours.

South African copyright law is accordingly in line with the low originality threshold test set out in main copyright treaties, including the Berne Convention, maintaining that originality is not assessed against artistic merit or creativity, but rather that the author or qualified person has exercised his or her own skill and labour to create an original work.

B. KENYA

⁵ See, e.g., *Saunders Valve Co Ltd. V Klep Valves (Pty) Ltd*, 1985 (1) SA 646 (T) (finding that a work need not be inventive or new to be original; the work should, however, be the product of one's own endeavours, independent skill, and effort, and that it should not have been copied from another source).

⁶ *Appleton v Harnischfeger Corporation* [1995] 2 All SA 693 (A).

⁷ *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* [2006] ZA 40 (SCA); 2006 (4) SA 458 (SCA).

⁸ 1993 (2) SA 128 (W) at 133 (emphasis added).

In Kenya, copyright protects the original expression of an idea or concept. It does not protect the idea or concept itself.⁹

Originality is therefore a requirement for the subsistence of copyright. Works must be reduced to material form to be eligible for copyright protection. A work need not be novel or unique to receive copyright protection.¹⁰ The author need only demonstrate that he was the first to create a particular expression embodied in his work. It is possible that the same ideas and themes may have appeared in earlier works. The standard of originality required, therefore, is low.

In circumstances where a work has been copied from an earlier work, the resultant work can be denied originality on the basis that insufficient skill, labor and judgment has been exercised in its creation. While it is clear that a certain degree of skill and effort must have been expended, a work that results of the application of sheer effort only is unlikely to qualify for copyright protection.¹¹

C. NIGERIA

A work is eligible for copyright protection in Nigeria if (a) sufficient effort has been expended on making the work to give it an original character; and (b) the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.¹² This is reflected in section 1(2) of the Copyright Act.

Once a work has been reduced to material form and sufficient effort¹³ has been expended on the work to give it an original character, it qualifies as a work as envisaged by the Copyright Act and is eligible for protection. Whether “sufficient effort” has been applied is a matter of degree and will be assessed objectively on a case-by-case basis. Courts are not precluded from making value judgments and investigating the level of creative input or intellectual contribution made to a work, but inventiveness is not a requirement for a work to qualify as original. This is underscored by section 1(4) of the Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004, which provides that a work is not ineligible for copyright

⁹ *Ladbroke Limited v William Hill, Limited* as per Lord Reid [1964] 1 All E.R.

¹⁰ *J.W. Seagon and Company Insurance Brokers Kenya Limited v Liaison Group (I.B) Limited and 2 Others* [2017] eKLR (Civil Suit 512 of 2016).

¹¹ This view has been endorsed by the Kenyan courts in various decisions i.e. *Newton Oirere Nyambariga v KCB Bank Kenya Limited & another* [2017] eKLR; *J.W. Seagon & Company Insurance Brokers (Kenya) Limited v Liaison Group (I.B) Limited & 2 others* [2017] eKLR; *OXFORD UNIVERSITY PRESS (E.A) LIMITED v LONGHORN PUBLISHERS (K) LIMITED & 4 others* [2010] eKLR; *Nairobi Map Service Limited v Celtel Kenya Limited (Zain Kenya) & 2 others* [2016] eKLR.

¹² Section 1 (1) & (2) of The Copyright Act Chapter C28 Laws of the Federation of Nigeria 2004.

¹³ *Oladipo Yemitan v Daily Times of Nigeria Limited* 23 NIPJD[FHC. 1980] 1/1980 and *Offrey v S.O. Ola* 12 NIPJD [HC. 1969] H/23/1968 (cited in Oriakhogba, 2014, 27).

protection because the making of the work involved an infringement of copyright in some other work.

Originality within this context, therefore, does not connote novelty. It simply means that the work was not copied. Accordingly, copyright does not protect ideas and is acquired by expending skill on a work and not by invention. The threshold for originality, therefore, is low.

D. OTHER AFRICAN NATIONS

Many other nations in Africa also impose a low bar to copyright protection, adopting a similar approach as the South African law, whereby a work must be original to qualify for copyright protection, but the threshold for originality is low.¹⁴

II. ANDEAN COMMUNITY

Decision 351 of the Andean Community of Nations (the “Law”)—applicable in Colombia, Ecuador, Peru, and Bolivia—sets the requirements for copyrightability. According to Article 3 of the Law, a work can be protected by copyright if it is an original literary or artistic creation produced by a human being, which can be disclosed to the public.¹⁵ Protection does not extend to works that are not distinguishable from existing works.

The “originality” criterion means that the work must reflect the author’s personality, and the competent authorities are not allowed to analyze the artistic merit or the aesthetic features of the work, in order to recognize the protection granted by the law. According to an opinion from the Andean Justice Tribunal, Prejudicial Interpretation 181 from 2015:

When evaluating the originality of a work, the merit or the intellectual, artistic, technical, technological or scientific qualities may not be taken into consideration. In other words, someone may write something fake, poorly argued or lacking of research, but if it is a creation produced by a human being and it can be clearly identified from the other existing writings, it is an original work. The same happens if a drawing lacks the required plastic technique, the originality is not granted by means of the artistic quality or the correct use of the technique, it is granted

¹⁴ See, e.g., Botswana Copyright and Neighbouring Rights Act, 2000 (Act No. 6 of 2006), at Section 6(1) (copyright protection available for any original intellectual creation in the literary or artistic domain irrespective of its mode or form of expression, content, quality, and purpose); Lesotho Copyright Order 1989 (Order No. 13 of 1989) (granting authors of original literary, artistic, and scientific works copyright protection by the sole fact of the works’ creation, irrespective of their form of expression, and the purpose for which they were created); Namibia Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994), at Section 2(1) (requiring originality but adopting a low standard consistent with the Berne Convention); Mozambique Copyright and Neighbouring Rights Act, 2000 (Act No. 6 of 2006) (originality requirement satisfied so long as the work is the author’s own intellectual creation); Zimbabwe Copyright and Neighbouring Rights Act 11 of 2000 (Chapter 26:05) (requiring originality to qualify for copyright protection, meaning some labour, creativity, time, and skill in creating the work, which case law indicates is a low bar).

¹⁵ Decision 351 of the Andean Community of Nations. Sept. 17, 1993. Article 3.

because [the work] is a reflection of the spirit of that human being who produced the drawings on the canvas or paper.¹⁶

The widespread protection of works, regardless of their simple techniques, encourages authors to create.

II. AUSTRALIA AND NEW ZEALAND

New Zealand and Australian copyright laws require a work to be “original” to qualify for copyright protection.¹⁷ Copyright protects only the *expression* of an idea, not the idea itself. Similarly, the originality requirement applies only to the expression of an idea and not to the underlying idea.¹⁸ Authors do not have an exclusive right in the subject-matter of works, others are able to produce the same result so long as it was independently derived¹⁹ and is not the result of copying. A work that meets these two requirements will still be deemed original.²⁰

Whether a work is original will be determined by whether sufficient skill and labor were exercised in its creation.²¹ The threshold for skill and labor is low. Examples of work which have been deemed original include, a photograph of a picture,²² a translation of a work into English,²³ and a report about a speech.²⁴

Under Australian law, copyright exists in two types of content: works—meaning a literary, dramatic, musical or artistic work—on the one hand, and “subject matter other than works,” on the other hand. This second category is aimed at protecting new technology and resources produced by media, and includes protection for sound recording, television and sound broadcast. The content protected by copyright in “subject matter other than works” does not have a

¹⁶ The Court of Justice of the Andean Community, is the supra-national court with authority to render non-binding interpretations of the Andean Community legislation, applicable throughout the member countries of the Andean Community (Colombia, Ecuador, Peru and Bolivia). Process 181-IP-2015.

¹⁷ (CTH) Copyright Act 1968, s 32 (Australia); The Copyright Act 1994, s 14 (New Zealand).

¹⁸ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (Australia); *Husquarna Forest & Garden Ltd v Bridon NZ Ltd* [1997] 3 NZLR 215 (New Zealand).

¹⁹ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Metricon Homes Pty Ltd v Barrett Property Group Pty Ltd* (2008) 248 ALR 364 (Australia); *Glogau v Land Transport Safety Authority of New Zealand* [1997] 3 NZLR 353 (New Zealand).

²⁰ *Achohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 174 (Australia); *Law of New Zealand Intellectual Property: Copyright* (online ed) at [38] (New Zealand).

²¹ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 (Australia); The Copyright Act 1994, s 14 (2) (New Zealand).

²² *Graves' Case* (1869) LR 4 QB 715.

²³ *Byrne v Statist Company* [1914] 1 KB 622.

²⁴ *Sawkins v Hyperion Records Ltd* [2005] 3 All ER 636 (CA).

requirement of originality. Thus, the threshold for copyrightability for “subject matter other than works” is low, as well.

IV. BRAZIL

The Brazilian Copyrights Law broadly protects creations of the spirit, as long as they can be expressed by any means, either tangible or not, known or to be invented in the future. There is no legal requirement that the work be original.

Article 7 of the Brazilian Copyrights Law not only defines copyrightability, but also exemplifies those works, namely: (i) texts of literary, artistic or scientific works; (ii) conferences, types of greetings, sermons and other works alike; (iii) dramatic and musical plays; (iv) choreographies and pantomime, expressed by any means; (v) musical compositions with or without lyrics; (vi) audio-visual works, with or without sound, including cinematographic works; (vii) photographic works and those produced by similar techniques; (viii) drawings, paintings, engravings, sculptures, lithography and kinetics art; (ix) illustrations, geographic maps and other works of the same nature; (x) projects, drafts and plastic works in the realm of geography, engineering, topography, architecture, gardening; scenography and science; (xi) adaptations, translations and other transformations of original works, presented as new intellectual creation; (xii) computer programs; (xiii) collection of works, compilations, encyclopedias, dictionaries, database and other works that constitute intellectual work, except data *per se*.

By contrast, ideas, normative procedures, systems, methods, mathematic projects and concepts, tables, plans, or rules for mental acts, games and business cannot be protected. Neither can blank forms, texts of treaties, bills, decrees, rules, judicial decisions and official acts; information of common use, such as, calendars, schedules, registers, legends; isolated names and titles; industrial or commercial advantages of ideas contained in works.

Any evidence of ownership can be used for actions (e.g., exchange of e-mails, printed material, publications in magazines, and journals). Registrations are recommendable to avoid discussions about the veracity of evidence and to fix dates. In sum, there is low bar in Brazil to copyright.

V. CANADA

Canadian copyright law requires a work to be “original” in order to qualify for copyright protection. Because copyright protects only the expression of an idea, not the idea itself, the originality requirement similarly applies only to the expression and not to the underlying idea.

In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada determined what is meant by the “original work” requirement.²⁵ Although the Court eschewed any requirement of “creativity,”²⁶ finding instead that that an “original work” under the Copyright Act “is one that originates from the author and is not copied from another work,” it also rejected the notion that the mere expenditure of effort—the so-called “sweat of the brow” test—was sufficient to

²⁵ [2004] 1 SCR 339.

²⁶ The Court observed that that “a creativity standard implies something must be novel or non-obvious – concepts more properly associated with patent law than copyright law.”²⁶*Id.* at para. 24.

establish originality.²⁷ It held that “an original work must be the product of an author’s exercise of skill and judgment.”²⁸ It defined “skill” as “the use of one’s knowledge, developed aptitude or practised ability in producing the work” and “judgment” as “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.”²⁹

At the same time, the Court emphasized that the amount of skill and judgment required to obtain copyright in a work cannot be defined in precise terms and depends on the facts and context of each case. This contextual approach leaves it open for courts to apply a “workable yet fair standard”³⁰ to determine whether copyright subsists in a work. Thus, Canadian copyright law recognizes that the bar to protection should not impose requirements of creativity or artistic merit, but should create a framework that is flexible enough to make protection available to a wide array of authors.³¹

VI. CHINA

In China, the threshold to copyright protection is low. To illustrate, in the 2012 case *Mega Brands Inc. v. Shantou Shun Sheng Toy Industry Co., Ltd.* the Shantou City Intermediate People’s Court overruled the defendant’s claims that the design of plaintiff Mega Brands’s toy cars failed to meet the required standard of creativity to justify copyright protection. The Court stated as follows:

In contrast to the emphasis placed on the independence of creation, the level of independent creativity required [for protection] under the Copyright Law is low. A work will be afforded copyright protection as long as the author expended some intellectual effort in the course of its creation which reflects the author’s choices, arrangement, and design.

Since Mega Brands’s product was designed for preschool children, the design inevitably focused on the utility functions of the toy cars. In creating the toy cars, however, Mega Brands also paid great attention to the physical and mental characteristics of preschool children, and as a result, chose a design that was smooth, soft, and colorful. The court ruled that the level of creative effort met the minimum standard for artistic creation required under the Copyright Law

²⁷ See also *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222 (CanLII) at para. 95.

²⁸ *Id.* at para. 25.

²⁹ *Id.* at para. 16.

³⁰ *Id.* at para. 24.

³¹ See, e.g., *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230 (CanLII), 38 Alta LR (6th) 48; aff’d 2017 ABCA 125 (CanLII), 51 Alta LR (6th) 259; leave to appeal to SCC refused [2017] SCCA No 260 (holding that raw seismic data was sufficiently original to qualify for protection as a literary compilation); *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236 (CanLII), leave to appeal to SCC refused 2018 CanLII 78753 (SCC) (finding Toronto Real Estate Board’s Multiple Listings Service (MLS) database, a compilation of information about real estate properties listed for sale, protectable); *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222 (CanLII) (holding Canadian Standards Association (CSA) Electrical Code, which sets out safety standards for installation and maintenance of electrical equipment in Canada, copyrightable).

and, as such, the design was copyrightable. Accordingly, the standard for copyrightability in China is low.

VII. EURASIAN ECONOMIC UNION

A. Russia

Article 1259 of the Russian Civil Code provides a non-exhaustive list of works of science, literature, and art that can be protected by copyright. This list includes literary works, dramatic and musical works, audio-visual works, and figurative art. There is no explicit mention of “originality” as a requirement for copyright subsistence, but the Civil Code provides two thresholds that a work must meet in order to be protected.

First, in order to be protected, the work must be expressed in a material form, including but not limited to written, oral, depiction, sound, video recording or a three-dimensional form.³²

Second, only works produced as a result of the author’s creative labor—*i.e.*, as a result of intellectual activity—are subject to copyright.³³ Persons who have not made “personal creative contribution” to the work cannot be recognized as authors and their contribution will not give rise to copyright. This requirement imposes a low bar to copyrightability, as the creative nature of the work is presumed by default unless otherwise is established.³⁴ Moreover, the joint Plenary Decision №5/29 of the Russian Supreme Court and the Higher Arbitration Court of 2009 held that absence of novelty, *originality* and/or uniqueness on its own does not prove that the work is not a result of the creative labor and, thus, that it should not be protected by copyright. This position has been subsequently upheld in numerous court cases and, in 2015, was included in the Higher Arbitration Court Review of the Cases Related to IP Protection Disputes. The position is also reflected in the approach of some federal executive bodies, such as the Federal Archival Agency (Rosarkhiv).

B. Other Members

A review of the copyright laws of Armenia, Belarus, Kazakhstan and Kyrgyzstan—the remaining members of the Eurasian Economic Union—shows that these countries all protect works that have a material form. All EEU countries directly stipulate “creative nature” of the work as a requirement for protection, along the lines of Russian Law. Additionally, Law on Copyright and Related Rights of Armenia reflects the originality³⁵ requirement.

³² Civil Code of the Russian Federation, art. 1256, 1259.

³³ Civil Code of the Russian Federation, art. 1228, 1257.

³⁴ The Russian Supreme Court Plenary Decision №5; The Higher Arbitration Court Plenary Decision №29, 2009.

³⁵ The Law of the Republic of Armenia on Copyright and Related Rights (15 June 2006) Art. 3 prescribes “unique outcome of creative activity” as a copyrightability condition.

VIII. EUROPEAN UNION

Copyrightability in the European Union's Member States requires originality in the sense that the work at issue is the author's own intellectual creation.³⁶ This means on the one hand that the author must have had room for creative freedom, and the work must be a form of expression in the literary, scientific, and artistic domain.³⁷ This leaves ideas, procedures, methods of operation or mathematical concepts as such outside of copyright protection, so that, e.g., neither the taste of a cheese nor a football match as such can qualify as a work.³⁸ On the other hand, no other criteria than that of originality is to be applied.³⁹ The originality standard in the EU is therefore low.

In *Infopaq International A/S v. Danske Dagblades Forening*, Court of Justice for the European Union or "CJEU" interpreted EU Directive 2001/29/EC on the harmonization of copyright to make this low originality threshold applicable across directives, and decided that even an 11-word extract of a news article could be protected as a work under copyright law if it expresses the author's own intellectual creation.⁴⁰ This jurisdiction of the CJEU has harmonized the originality standard for the courts of the EU Member States, and sets the basic criteria which the national courts in the EU Member States have to apply when assessing the copyrightability of a work.⁴¹ Therefore, the originality standard will be low throughout the European Union and its national copyright laws.

³⁶ CJEU, judgement of July 16, 2009 in case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, para. 37; later confirmed in CJEU, judgment of November 13, 2018 in case C-310/17, *Levola Hengelo BV v. Smilde Foods BV*, para. 36; CJEU, judgment of May 2, 2012 in case C-406/10, *SAS Institute Inc. v. World Programming Ltd.*, paras. 65 and 67; CJEU, judgment of December 1, 2011 in case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, para. 87; CJEU, judgment of October 4, 2011 in cases C-403/08 and C-429/08, *Football Association Premier League and Others*, para. 159.

³⁷ CJEU, judgment of October 4, 2011 in cases C-403/08 and C-429/08, *Football Association Premier League and Others*, para. 98; CJEU, judgment of November 13, 2018 in case C-310/17, *Levola Hengelo BV v. Smilde Foods BV*, para. 39.

³⁸ CJEU, judgment of November 13, 2018 in case C-310/17, *Levola Hengelo BV v. Smilde Foods BV*, para. 39; CJEU, judgment of October 4, 2011 in cases C-403/08 and C-429/08, *Football Association Premier League and Others*, para. 98.

³⁹ CJEU, judgment of March 1, 2012 in case C-604/10, *Football Dataco. Ltd. and Others v. Yahoo! UK Ltd. and Others*, para. 40.

⁴⁰ CJEU, judgment of July 16, 2009 in case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, para. 51.

⁴¹ CJEU, judgment of July 16, 2009 in case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, para. 51; see also CJEU, judgment of November 13, 2018 in case C-310/17, *Levola Hengelo BV v. Smilde Foods BV*, para. 46 (deciding on a request for a preliminary ruling by a Dutch court that the taste of a food product could not be eligible to protection under EU and Dutch copyright law).

IX. HONG KONG

Copyright law in Hong Kong requires “works”—which include literary, dramatic, musical and artistic works, and performers’ performances—to be “original” in order for copyright to subsist.⁴² An author needs only to show that he has expended his skill and judgment in order to justify copyright protection. The subsistence of copyright does not require the work to have an aesthetic value nor to be clever, nor very creative. Therefore, the threshold to satisfy originality is low and simplicity does not prevent originality.

In the 2007 case of *Tai Shing Diary Ltd v Maersk Hong Kong Ltd.*, the court rejected the defendants’ argument that the plaintiff’s diaries lacked sufficient originality because they subsisted of elements common to all diaries and calendars. In coming to this judgment, Cheung J said:

Based on [the plaintiff’s] very detailed account of authorship of the works in question, there could be no doubt that the requirement of originality had been satisfied, and thus the question of subsistence of copyright overcome. The author might draw on existing material, so long as more than negligible or trivial effort or relevant skill and judgment had been expended in the creation of the work. The standard required was a low one, but the effort must not be so trivial as to be characterised as a purely mechanical exercise. The skill and effort protected was not only that expended on its manner of presentation, but of collecting, selecting, arranging and presenting the available information in an intelligible manner.⁴³

Copyright also subsists in sound recordings, films, broadcasts, cable programmes,⁴⁴ and typographical arrangement of published editions.⁴⁵ Originality is not a requirement for copyright to subsist in these types of content. Accordingly, the threshold for copyrightability for these types of content is also low.

X. INDIA

The copyright law, as articulated in the Copyright Act, 1957, aims to strike a balance between the interests and rights of the author and that of the public. Per Section 13(1)(a) of the Copyright Act, 1957, Copyright subsists in original literary, dramatic, musical and artistic works. A fundamental element of copyright law is that it does not grant the author of a literary work protection on ideas and facts and, thus, the pertinent bar to copyright in the Indian context is that copyright subsists in expression and not ideas.⁴⁶

⁴² Copyright Ordinance (Chapter 528 of the Laws of Hong Kong), s.2(1)(a).

⁴³ [2007] 2 HKC 23, [23].

⁴⁴ Copyright Ordinance (Chapter 528 of the Laws of Hong Kong), s.2(1)(b).

⁴⁵ *Id.* s.2(1)(c).

⁴⁶ *RG Anand v. Deluxe Films* RFA No.627/2018 (holding held by the Hon’ble Court that there can be no copyright in an idea, principle, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the

Still, the law does not protect every such expression. The law affords protection to expressions that are fixed in a medium and are “original.” The term “original” does not mean that the work must be an expression of original or innovative thought. For a work to attain copyright protection, it must fulfill the criterion of originality inasmuch as it must be an independent creation involving a minimal degree of creativity and must be fixed in a tangible medium.

In *Eastern Book Company And Others v. D.B Modak And Another*⁴⁷ the Hon’ble Supreme Court of India in its endeavor to establish the test and standard for determination of originality for a work to qualify for copyright protection under the Indian Copyright law, held that to claim copyright in a derivative work, the author must produce the material with exercise of his skill and judgment with a flavor of creativity which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. Therefore, work must be original in the sense that by selecting, coordinating, arranging pre-existing data contained in the work, somewhat different character of work is produced by the author. In so doing, the Hon’ble Supreme Court rejected the age old concept of the “sweat of the brow.”

Thus, in India, the test for originality establishes a higher threshold than the “sweat of the brow” doctrine, but not as high as the “modicum of creativity.”

XI. JAPAN

The Copyright Act of Japan defines a “work” as “a production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain.”⁴⁸ “Thoughts or sentiments” means a human being’s thoughts or sentiments, and provides that creations by animals other than humans, facts and data are not subject to protection. “Express” provides that simply ideas will not be protected.

The requirement that expression be done “in a creative way” to receive copyright protection does not demand a high level of creativity; it is sufficient so long as the work is a result of some intellectual activity. Therefore, in general, the creativity requirement is thought to be satisfied as long as the work is not a commonplace expression. For example, with respect to photographs, copyrightability is widely recognized for product catalog photos⁴⁹ and portrait photos taken by an ordinary person,⁵⁰ as long as they are not ID photos that are taken mechanically. On the other hand, for items that have practical functions, such as Applied Arts⁵¹ and typeface,⁵² to

idea by the author of the copyrighted work); *Sanjay Kumar Gupta & Anr. v. Sony Pictures Networks India Pvt. Ltd.* (holding that a concept is not entitled to any copyright protection)

⁴⁷ (2008) 1 SCC 1.

⁴⁸ Copyright Act, article 2(1)(i).

⁴⁹ Tokyo District Court decision, January 29, 2015, Supreme Court HP [IKEA Case].

⁵⁰ IP High Court decision, May 31, 2007, *Hanji* No. 1977, p. 144 [Tokyo Outsiders Case].

⁵¹ IP High Court decision, October 13, 2016, Supreme Court HP [Chopsticks for Children Case].

⁵² Supreme Court decision, September 7, 2000, *Minshu* Vol. 54, No. 7, p. 2481 [Gona U Case].

be protected as works, they are required to have a level of creativity that can be subject to aesthetic appreciation, and a high level of creativity is required.

XII. MEXICO

Under Mexican copyright law, a work is protected if “originally created” and fixated on a material medium, regardless of its merit, purpose, or form of expression.

Although there are certain advantages in case a registration is obtained, the recognition of copyright does not require registration or documentation of any kind, nor is it subject to compliance with any formalities. That is, a registration only constitutes a presumption of the existence of the right and that it pertains to the recorded right-holder.

As to what is meant by “originally created,” the Mexican copyright system perceives this as simply requiring that a work be a creation of the author, as opposed to being copied from another work in its entirety or in an essential part. Copyright protection does not depend on any specific requirement that the work reflect a certain level of creativity or the personality of its author. Similar to other countries, whether or not a work is considered original is a factual inquiry which a court will ultimately decide after reviewing the evidence submitted.

In short, Mexico, as a Berne Convention member, implements a low bar to copyright protection.

XIII. UNITED KINGDOM

The bar to copyright in the UK is low, as well, and likely will remain low after the UK’s departure from the EU. The EU standard of originality for Berne Convention works, as embodied in line of cases starting with *Infopaq*,⁵³ currently applies in the UK.⁵⁴ After “exit day” (11:00 P.M. on 29 March 2019⁵⁵ or such later date as may be determined), UK courts other than the Supreme Court will be bound to continue to apply the EU’s case law on originality.⁵⁶ The Supreme Court will not be so bound. In deciding whether to depart from the EU’s case law, the Supreme Court will be obliged to consider whether it “appears right to do so”.⁵⁷ Post-exit day case law of the CJEU will not be binding on any UK courts but they will be able to have regard to it where relevant.⁵⁸

⁵³ *Infopaq International A/S v Danske Dagblades Forening* (C-5/08).

⁵⁴ See, e.g., *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482 at paras [29] – [37], [112] and [113].

⁵⁵ European Union (Withdrawal) Act 2018 (“Withdrawal Act”), s. 20(1), (3), (4).

⁵⁶ Withdrawal Act, s. 6(3).

⁵⁷ Withdrawal Act, s.6(4), (5). *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234. This is the approach the Supreme Court adopts when considering whether to depart from its own previous decisions and such departures have been infrequent.

⁵⁸ Withdrawal Act, s.6(2).

It is conceivable that after exit day, the UK Supreme Court will decide to depart from the EU's case law on originality and return UK law to the pre-*Infopaq* position. Such a decision seems unlikely and in any event would not occur until a suitable case happened to reach the Supreme Court.

Whether such a decision would affect the originality threshold is a matter for debate. Prior to the decision in *Infopaq*, UK law held that a work was original if (a) it had not been copied, and (b) more than negligible or trivial skill (or judgment) and labour had gone into the form of its expression.⁵⁹ The UK courts have not yet been established whether the *Infopaq* test involves any difference of approach.⁶⁰ The English Court of Appeal has held, however, that if it changed anything, the decision in *Infopaq* raised the originality threshold.⁶¹

Another conceivable development after “exit day” is that the UK's lower courts will decline to follow post-exit day CJEU case law on originality. This too seems unlikely because such case law will build on and elucidate binding pre-exit day case law. If that approach were taken, the UK and CJEU bodies of case law would diverge in some respects. Again, however, it seems unlikely that this would result in a higher originality threshold.

Brexit will not affect the UK's existing international obligations under the Berne Convention or the WIPO Copyright Treaty.

XIV. UNITED STATES

In the United States, originality is a requirement for copyrightability. The United States Supreme Court made clear in *Feist Publications v. Rural Telephone Service Co.* that the bar for originality, and thus copyrightability, is low:

To qualify for copyright protection, the work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least **some minimal degree of creativity**. To be sure, 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.⁶²

Pursuant to this directive, courts throughout the United States find works sufficiently original to merit copyright protection even when the works appear to be composed of standard or familiar elements. For example, Mondrian-esque clothing designs with simple geometric

⁵⁹ *Copinger and Skone James on Copyright* 17th ed. (“*Copinger*”) para. 3-208, 3-227, 3-229. In respect of compilations, mere labour was enough (see *Copinger* para. 3-266) until the EU originality threshold for copyright databases was incorporated into UK legislation, where it will remain after exit day.

⁶⁰ The fact that the point has not had to be addressed in any decision suggests that the question may be academic.

⁶¹ *SAS Institute In.c v World Programming Ltd* [2013] EWCA Civ 1482 at paras [37], [112] and [113].

⁶² *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345 (1991) (internal quotations and citations omitted) (emphasis added).

shapes,⁶³ floor plans,⁶⁴ Chinese yellow pages,⁶⁵ estimates of coin values,⁶⁶ a Chinese restaurant menu,⁶⁷ and even baseball pitcher's statistics have been found worthy of copyright protection.⁶⁸ So long as the author independently created the work—*i.e.*, it is the product of the author's own expressive efforts—and the work is modestly expressive, copyright protection should follow.

Relatedly, the United States Supreme Court has long held that copyright protection does not depend on the amount of artistic merit a work possesses, as it is not the judiciary's role to determine a work's value, only whether it was independently created by the author and contains at least a small amount of creativity.⁶⁹ Courts assess creative value only within the "narrowest and most obvious limits."⁷⁰ In addition, United States courts consistently find that the text and structure of the United States Copyright Act demonstrates Congress's belief that imposing a low threshold to copyright protection is the best way to advance the constitutional goal of promoting societal progress.⁷¹ Accordingly, it is now settled law in the United States that copyright protection is available to any author who makes an original work bearing a minimal creative spark.⁷²

In sum, United States copyright law is rooted in the idea that the best way to promote progress and creative development is to impose a low bar to copyright protection, thus making protection attainable for authors regardless of skill, expertise, maturity, or effort.

⁶³ *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1035 (9th Cir. 1992).

⁶⁴ *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 101 (2d Cir. 2014).

⁶⁵ *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters.*, 945 F.2d 509, 514 (2d Cir. 1991).

⁶⁶ *CDN Inc. v. Kapes*, 197 F.3d 1256, 1257-58, 1260-61 (9th Cir. 1999).

⁶⁷ *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 548 (S.D.N.Y. 2001).

⁶⁸ *Kregos v. Associated Press*, 937 F.2d 700, 702, 704 (2d Cir. 1991).

⁶⁹ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) ("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 of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.").

⁷⁰ *Id.* at 251.

⁷¹ See *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 856-60 (5th Cir. 1979) (explaining that "[t]he absence of content restrictions on copyrightability indicates that Congress has decided that the constitutional goal of encouraging creativity would not be best served if an author had to concern himself not only with the marketability of his work but also with the judgment of government officials regarding the worth of the work").

⁷² See, e.g., *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 281 (5th Cir. 1970) (finding simple filigree pattern sufficiently creative as "lack of artistic merit is no bar to copyright"); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) ("[N]othing in the Constitution commands that copyrighted matter be strikingly unique or novel No matter how poor artistically the 'author's' addition, it is enough if it be his own.").

