

# ANALYZING “ORIGINALITY” IN COPYRIGHT LAW: TRANSCENDING JURISDICTIONAL DISPARITY

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## INTRODUCTION

Recent discussions have brought forth an unfortunate disharmony in modern copyright law. There is an ever-increasing need to protect original expression by copyright, however across national boundaries, the law regarding “originality” in copyright is as diverse as the countries themselves. Copyright protection is granted for the purpose of protecting a person’s creative expression and in order to further encourage creative expression. Another school of thought claims that copyright protection is granted as a sort of reward for the effort put in by the person seeking a copyright.<sup>1</sup> A work’s susceptibility to copyright is important to understand the policy objectives copyright protection achieves.

Creative works are afforded copyright protection only if they are original. “Original” is usually understood as something that is new or not done before; a primary type or form, from which others are derived.<sup>2</sup> The only part of a work that is protected by copyright is that which is original to the author. Thus,

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<sup>1</sup> See *infra* Part IV.

<sup>2</sup> Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., 945 F.2d 509, 512 (2d Cir. 1991) (“Simply stated, original means not copied, and exhibiting a minimal amount of creativity.”); WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1015 (rev. ed. 1994).

“the *sine qua non* of copyright is originality.”<sup>3</sup> Since originality is one of the determinants of copyrightability itself, the concept of originality assumes great importance in the study of copyright law.

In attempting to strike a balance between diverse notions of originality, this article looks into the meaning of the term originality as it is understood in copyright law across jurisdictions today, as well as the degree to which a work needs to be “original,” in both qualitative and quantitative terms, in order to qualify for copyright protection. More importantly and controversially, the article analyzes the question of *where* this originality is required—in the form of the work or in the substance of the work? Because it is the most contested, this article will focus on this last question, with an analysis of the law of different countries, as well as the international treaties and conventions on the topic.

### **I. ORIGINALITY DISTINGUISHED FROM ‘NOVELTY’: CAN ANYTHING EVER BE TRULY ORIGINAL?**

Originality is an essential requirement for the copyrightability of any artistic, literary or dramatic work. This requirement is reflected in legislation across borders, with the copyright laws in most countries specifying that protection will be given to “original” works or “original expression” by copyright.<sup>4</sup> None of these statutes, however, define originality.<sup>5</sup> In each jurisdiction, therefore, the requirement of originality is understood according to judicial interpretation of the concept.

The common understanding of originality is that the work should originate from the author. In other words, the work need not be original in the sense that it must involve any original or inventive thought. Copyright does not protect an idea, but instead protects the form of the expression of the idea.<sup>6</sup> There is no requirement that the idea itself be new in order for copyright protection to be given. An idea can be expressed in a number of ways, and it is only the modes of expressing the idea that are given protection.

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<sup>3</sup> Feist Publ’ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

<sup>4</sup> Section 102 of the United States Copyright Act, 17 U.S.C. § 102 (2006), section 1(1) of the U.K. Copyright, Designs and Patents Act, 1988, c. 48, §1(1), and section 13 of the Copyright Act, No. 14 of 1957, INDIA CODE (1993) all contain this requirement of originality.

<sup>5</sup> In fact, the original English Act did not even contain a requirement of “originality.” The Copyright Act, 1842, 5 & 6 Vict., c. 45 (Eng.). This was inferred from the reference in the Act to authorship. However, “author” was also not defined under the Act.

<sup>6</sup> Dunlap v. G. & L. Holding Group, Inc, 381 F.3d 1285, 1296 (11th Cir. 2004); WhelanAsocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir. 1986); Custom Dynamics, LLC v. Radiantz LED Lighting, Inc., 535 F. Supp. 2d 542, 548 (E.D.N.C. 2008).

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As Justice Peterson represented in *University of London Press, Ltd. v. University Tutorial Press, Ltd.*,<sup>7</sup> when determining whether question papers, which contained ideas taken from the public domain, were original works, “[t]he word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought . . . . The originality which is required relates to the expression of the thought.”<sup>8</sup> All that was required was that the expression “should originate from the author.”<sup>9</sup>

Though we see that copyright protects the expression of a work, it is not even necessary that the work involve novel expression of a thought. All that is required for originality of expression is that the expression should not be copied from another work.<sup>10</sup> Thus, the form of expression need not be novel it must only be composed by the author independently.

Therefore, it is technically quite possible for two authors to produce the exact same work and for both to possess copyright in their respective works, provided neither of them copied the work of the other.<sup>11</sup> “Novelty,” which is an essential requirement of patent law, and which requires that the creation represent some inventive step beyond the prior state of the art,<sup>12</sup> is thus not at all re-

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<sup>7</sup> [1916] 2 Ch. 601 (Eng.).

<sup>8</sup> *Id.* at 608–09.

<sup>9</sup> *Id.* at 609.

<sup>10</sup> *Sawkins v. Hyperion Records Ltd.*, [2005] EWCA Civ. 565 at para. 31; *see Mag Jewelry Co., Inc. v. Cherokee, Inc.*, 496 F.3d 108, 116 (1st Cir. 2007); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 270 (2d Cir. 2001); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977); *Merrit Forbes Co. v. Newman Inv. Sec., Inc.*, 604 F. Supp. 943, 951 (S.D.N.Y. 1985).

<sup>11</sup> Judge Learned Hand provided a classic example of this scenario in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903); *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927)); *see also* I PAUL GOLDSTEIN, COPYRIGHT 2:7 (2002).

<sup>12</sup> *See* 35 U.S.C. § 102 (2006).

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quired for copyright.<sup>13</sup> In this light, we may quote one Ezra Pound, “[u]tter originality is, of course, out of the question.”<sup>14</sup>

**II. MEASURE OF INDEPENDENT INPUT/“SKILL AND LABOR”**

For originality, it is essential that the author of the work acts independently. The law considers originality to be a combination of skill, labor and judgment. The author must put some of their own skill or labor into the work and must show that they put in a minimum amount of work into the expression, or created some independent expression. There must therefore be a “distinguishable variation” created in the work, as compared to the work that the author previously knew,<sup>15</sup> based on the author’s independent efforts.<sup>16</sup>

What amount of variation is necessary is a question of degree and cannot be expressed in absolute terms. The standard by which this variation is judged is not very high, though. This is because copyright protection varies based on the extent of the independent effort of the author, or the variation produced due to the work of the author himself.<sup>17</sup>

As Circuit Justice Story noted in *Emerson v. Davies*,<sup>18</sup> an author does not

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<sup>13</sup> LAL, THE COPYRIGHT ACT 109 (2d ed. 1989). Novelty, however, will play a role in proving that a particular work is original and not copied. Thus, in the Keats example there will be a high presumption of copying and an inference that there has been no original thought by the author, and the author will bear a heavy burden of proving otherwise. See *Sheldon*, 81 F.2d at 49.

<sup>14</sup> Letter from Ezra Pound to William Carlos Williams (Oct 21, 1908), in *SELECTED LETTERS OF EZRA POUND, 1907–1941*, at 6 (New Directions Pub. Corp. 1971) (1950).

<sup>15</sup> *Best Medium Publ’g Co v. Nat’l Insider, Inc.*, 385 F.2d 384 (7th Cir. 1967). *Twentieth Century Fox Film Corp v. Marvel Enters. Inc.*, 155 F. Supp. 2d 1 (S.D.N.Y. 2001); *Dolori Fabrics, Inc. v Ltd., Inc.*, 662 F. Supp. 1347, 1353 (S.D.N.Y. 1987); Thus, we see that the test of originality is subjective, with the contribution of the author being significant, while the test of novelty in patent law is objective, with the state of the art in the world at large being important.

<sup>16</sup> *Id.* at 141-142. This standard is to be applied not only to new works created by authors, which may or may not copy ideas from preexisting works but do not copy expressions, but also to derivative works, works which build on expressions already created by other works. *Id.* at 146. In all cases, the copyright protection is given to the value-creation or value-addition made by the author in the expression. See *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).

<sup>17</sup> PARAMESWARAN NARAYANAN, *LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS* 26 (2d ed. 1995).

<sup>18</sup> 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).

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acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations, or combinations; for these are strictly his own.<sup>19</sup>

Therefore, where a work is a compilation of a number of preexisting works or a combination of different elements of expression, while the different parts of the work may not be copyrightable, the sum of the work may be. This is because the act of putting together the different un-copyrightable elements and expressing the whole involves a degree of independent input (judgment exercised in selection and arrangement) from the person putting the parts together. While the individual components of the work are likely not copyrightable, the manner of the selection and arrangement, and the form of the completed work, are original and therefore might be copyrightable.<sup>20</sup> Thus, for originality in any part of a work, there must be some independent input and the amount of protection then depends on the level of the input.

All that is required is that the input (also referred to as the "skill and labor" of the author) of the author not be merely "trivial."<sup>21</sup> Therefore, where the expression of an idea is changed only very slightly from a previous expression, the second expression will not receive copyright protection.<sup>22</sup> The requirement of a degree of originality is hence a quantitative one. This is the reason why very short expressions (such as words, titles, single sentences and slogans) do not generally receive copyright protection.<sup>23</sup> The amount of independent contribution of the author cannot be trifling.<sup>24</sup>

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<sup>19</sup> *Id.* at 619.

<sup>20</sup> *See* Karyalaya v. Koshal, A.I.R. 1970 MP 261 (India) (allowing a copyright in a mathematics textbook on the grounds that creating a compilation involves the exercise of judgment and skill); *see also* C.A. 2790, 2811/93, Eisenman v. Qimron, 54(3) P.D. 817 [2000] (Isr.) (allowing a Hebrew scholar a copyright for an interpretation of one of the Dead Sea Scrolls, on the basis of the fact that he interpreted the Scroll by piecing together fragments and filling in missing pieces through external research, thus exercising skill, labor and judgment).

<sup>21</sup> This is known as the "*de minimis*" requirement in copyright law. I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.06 (2010).

<sup>22</sup> *See id.*

<sup>23</sup> *Infopaq International A/S v. Danske Dagblades Forening*, Case C-5/08 [2009] ECR I-6569, para. 45.

<sup>24</sup> However, if an author produces a very original expression, where it is unlikely that another person will express it independently, even if it is a single line, it may derive copyright protection. This is because the *de minimis* rule is present in order to ensure that the free speech of people is not unnecessarily curbed. If therefore, the expression in question is one which not too many people would think of, it could receive copyright protection. Of course, like other copyrighted works, if another person were to produce the same expression independently, he

There is no qualitative requirement with respect to the input of the author of a work seeking copyright protection. This is because such qualitative requirements are highly subjective.<sup>25</sup> A work that one judge finds lacking in quality may in fact be a work which others (the public or experts) may find to be of high quality and vice versa. In recognition of this, there is no qualitative requirement with respect to the input of an author for a work to be original.

This position is clearly demonstrated in *Bleistein v. Donaldson Lithographing Co.*,<sup>26</sup> in which the question before the U.S. Supreme Court was whether certain lithographs prepared as advertisements by the plaintiff company were copyrightable (and whether the defendants had therefore infringed this copyright).<sup>27</sup> Delivering the majority opinion, Justice Holmes stated: “[i]t 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.”<sup>28</sup>

This also means that the nature of the independent contribution to the expression by the author need not be of a particular type. The input need not involve a specific amount of hard work and diligence at all. Even works created independently at the spur of the moment, or even by mistake, may be protected.<sup>29</sup> The term “skill and labor” used to describe the original input of the author is therefore a misnomer.<sup>30</sup>

In this context, we see that originality does not require novelty of thought, ingenuity of expression, or aesthetic merit.<sup>31</sup> The term “originality” in

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could also claim copyright over the expression. Naturally, if the protected work is only one line long, it will be easier for another person to prove that he created the expression independently. See I NIMMER & NIMMER, *supra* note 21, at § 2.01[B].

<sup>25</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 251.

<sup>28</sup> *Id.* Two judges dissented from this opinion, but only on the ground that works for advertising purposes should not be permitted copyright, as providing copyright for advertisements would not promote “useful arts” as mandated by the U.S. Constitution. *Id.* at 252 (Harlan, J., dissenting).

<sup>29</sup> See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936). Arguably, even works created due to an error in typewriting would be protected if this typewriting error amounts to an independent or original contribution. There need not be intention to create a work for copyright to arise in the work. Again, nor is the time spent in the creation of a work a test of whether the author put adequate input into the work. *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.*, [1916] 2 Ch. 601 (Eng.).

<sup>30</sup> However, we will continue using the term throughout the article; not out of acquiescence, but as various courts have adopted the “skill and labor” terminology.

<sup>31</sup> *L. Baitlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976).

copyright, therefore, seems to be a derivative of the term "originate."<sup>32</sup> As long as the work originates from the author, it is treated as being "original." The only requirement for originality then seems to be whether there is some amount of independent effort on the part of the author (whether there is adequate "skill and labor").<sup>33</sup>

### III. THE CONTROVERSY OVER "CREATIVITY"

While courts in different jurisdictions seem to agree on the law up to this point, they diverge on the crucial question of creativity. Is there any other requirement besides "skill and labor" in creating expression needed for the expression to be original and therefore copyrightable?

The traditional English approach has been that all independent expression derived through "skill and labor" is protected by copyright.<sup>34</sup> As a result, this approach has been followed in most common law countries, such as Australia, New Zealand, and previously in India.<sup>35</sup> In the United States, some federal appeals courts have included within the definition of originality an element of creativity.<sup>36</sup> Other courts in the U.S. followed the old English test, until a recent decision by the U.S. Supreme Court clarified that creativity was in fact a part of originality standard.<sup>37</sup> The civil law system, on the other hand, has traditionally accepted that to be "original," a work must reflect the intellectual personality of the author (i.e., it must involve "intellectual creation").<sup>38</sup> The position of the law in each of these jurisdictions is examined in more detail below.

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<sup>32</sup> DEBORAH E. BOUCHOUX, *INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS AND TRADE SECRETS* 140 (2000).

<sup>33</sup> *Id.* at 140.

<sup>34</sup> I KEVIN GARNETT, GILLIAN DAVIES & GWILYM HARBOTTLE, *COPINGER & SKONE JAMES ON COPYRIGHT* 141–42 (16th ed. 2011).

<sup>35</sup> *Desktop Mktg Sys. Pty. Ltd. v. Telstra Corp. Ltd.*, (2002) 119 F.C.R. 491 (Austl.); *Indian Express Newspaper (Bombay) Private Ltd. v Jagmohan*, (1985) A.I.R. Bom. 229 (Ind.); *Univ. of Waikato v. Benchmarking Servs. Ltd.*, (2004) 8 N.Z.B.L.C. 101 (N.Z.).

<sup>36</sup> Tracy Lea Meade, *Ex-Post Feist: Applications of a Landmark Copyright Decision*, 2 J. INTELL. PROP. L., 245, 245 (1994); *see infra* Part III.B.

<sup>37</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)

<sup>38</sup> *See* Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A., 949, 968–69 (2002), *see also infra* Part III.B.

A. *The Sweat of the Brow Test*—“Creativity takes [C]ourage”<sup>39</sup>

The “sweat of the brow” standard uses skill and labor as the only requirements of originality, and creativity is not a criterion. In the U.K., this standard was first adopted in *Walter v. Lane*,<sup>40</sup> which involved the copyrightability of a verbatim reproduction of an oral speech in a newspaper report.<sup>41</sup> Taking into account the amount of labor undertaken by the reporter in taking down and recording the speech, the court held that the work was copyrightable as a result of (and as a reward for) such skill and labor.<sup>42</sup>

That case, however, was decided under the old English Literary Copyright Act of 1842, which did not contain an express requirement of originality for copyright.<sup>43</sup> Nonetheless, even after the enactment of the 1909 Copyright Act and all other future acts protecting copyright in the U.K. (which required originality), the test adopted by courts remained one of “skill and labor” or “sweat of the brow,”<sup>44</sup> with no element of creativity required to make the work original. U.K. courts have consistently reiterated that this is the approach they follow.<sup>45</sup>

For example, in *Express Newspapers v. News (U.K.) Ltd.*,<sup>46</sup> the court determined that in 1990, long after the passing of the 1909 English Copyright Act and its originality requirement, that *Walter v. Lane* was still good law, and held that verbatim quotes taken down during an interview could not be copied by a rival newspaper without violating the copyright held by the interviewer.<sup>47</sup> Thus, the U.K. approach remains the same as the early 1900s: where a person has been very industrious and collected even factual information, and then ex-

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<sup>39</sup> CLINT BROWN, ARTIST TO ARTIST: INSPIRATION & ADVICE FROM VISUAL ARTISTS PAST & PRESENT 62 (1998) (quoting Henri Matisse).

<sup>40</sup> [1900] A.C. 539.

<sup>41</sup> *Id.* at 539–40.

<sup>42</sup> *Id.* at 554–55.

<sup>43</sup> Nigel P. Gravells, *Authorship and Originality: The Persistent Influence of Walter v. Lane*, 3 INTELL. PROP. Q. 267, 267–69 (2007). The express originality requirement was introduced by the Copyright Act 1911.

<sup>44</sup> Also known as the “industrious collection” approach. *CCH Canadian Ltd. v. Law Soc. of Upper Canada*, 2002 FCA 187, [2002] 4 F.C. 213, para. 215 (Can.).

<sup>45</sup> *Sawkins v. Hyperion Records Ltd.*, [2004] EWHC (Ch.) 1530, [2004] 4 All E.R. 418 (HC) (Eng.) at paras. 48–56; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273 (Eng.) at 471; *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.*, [1916] 2 Ch. 601 (Eng.) at 611–14.

<sup>46</sup> [1990] 1 W.L.R. 1320 (Eng.).

<sup>47</sup> *Id.* at 1326.

pressed this information in some manner, the expression is then considered original and is protected under the copyright law.

Recent decisions of the Australian Full Federal Court in *Desktop Marketing Systems Pty. Ltd. v. Telstra Corp. Ltd.*,<sup>48</sup> and the New Zealand Court of Appeal in *The University of Waikato v. Benchmarking Services Ltd.*,<sup>49</sup> both allowed copyright protection for works of "low creativity."<sup>50</sup> The Australian case involved the question of whether copyright of white and yellow page telephone directories should be allowed.<sup>51</sup> The protection was allowed, not only for the form of the directories, but for the information contained in the directories as well.<sup>52</sup> Similarly, the New Zealand decision allowed copyright for a purely functional selection and arrangement of headings and captions in a benchmarking survey because of the effort involved in the collection of the data.<sup>53</sup> Thus, the fact that the authors had used labor to collect the information was enough to fulfill the originality requirement of copyright.

The "sweat of the brow" theory thus means that if a work is created through the effort of an individual, irrespective of the fact that the work contains only statement of facts and no creative input at all by an author, copyright can be granted to the work. While the contents of the work may not be copyrighted, the second person will not be permitted to take them out of the work of the first person without his permission. Any person wishing to state the same facts again will have to obtain them independently by going to the source from which the first person derived the facts originally.

### ***B. The Modicum of "Creativity" Test—Creativity in Addition to Skill and Labor***

The United States standard for originality does not afford the same rights as the "sweat of the brow" standard. The U.S. test for originality requires not only that there be some amount of independent input by the author, but that the work have a "creative spark" as well.<sup>54</sup> For a time, the federal circuit courts

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<sup>48</sup> (2002) 119 F.C.R. 491 (Austl.).

<sup>49</sup> (2004) 8 N.Z.B.L.C. 101.

<sup>50</sup> *Desktop Mktg Sys.*, (2002) 119 F.C.R. at 492; *Benchmarking Servs.*, (2004) 8 N.Z.B.L.C. at paras 59–60.

<sup>51</sup> *Desktop Mktg Sys.*, (2002) 119 F.C.R. at 491.

<sup>52</sup> *Id.* at 535–36.

<sup>53</sup> *Benchmarking Servs.*, (2004) 8 N.Z.B.L.C. at 101–02.

<sup>54</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). The person making the work must therefore be an "author" in the commonly understood sense of the word—he ex-

were split on the issue of whether creativity was an element of originality.<sup>55</sup> This question was cleared up in 1991 by the Supreme Court in *Feist Publications Inc. v. Rural Telephone Service Co.* There, the Court stated that the originality requirement for copyright protection cannot be satisfied by simply demonstrating that a work could have been put together in different ways, and that there must be “at least some minimal degree of creativity” for a work to be copyrightable.<sup>56</sup> The Court therefore held that the white pages telephone directory belonging to the plaintiff (who had alleged infringement), were not copyrightable, and, as a result, there was no infringement.<sup>57</sup>

The *Feist* test has subsequently been applied in a number of cases in the U.S.; a work will not be treated as original or receive copyright protection, unless there is some creativity involved in the expression.<sup>58</sup> It is of course possible for a statement of facts to be copyright protected, but this protection is only given to the *form* of the expression of the facts.<sup>59</sup> The expression necessarily has to be creative to an extent, otherwise the form of the statement of facts would be in the public domain already and not copyrightable. The sum of the expression may be copyrightable as there is some creativity required in determining how to arrange facts.<sup>60</sup> However, this is only if the arrangement of the facts is not influenced by considerations of standardization, convention, necessity, or improv-

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presses something he has thought of himself—rather than being an “author” in the sense that he expresses a fact.

<sup>55</sup> The Second, Fifth, Ninth and Eleventh Circuits had espoused a “creative selection” theory, which required an author to show a small amount of creativity in order to receive copyright protection. Meade, *supra* note 36, at 245.

<sup>56</sup> *Feist*, 499 U.S. at 345.

<sup>57</sup> *Id.* at 363–64.

<sup>58</sup> *Matthew Bender & Co. v. West Pub’g Co.*, 158 F.3d 674, 680 (2d Cir. 1998); *CCC Information Servs, Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995); *BellSouth Adver. & Publ’g Co. v. Donnelley Info. Publ’g*, 999 F.2d 1436 (11th Cir. 1993); *Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters, Inc.* 945 F.2d 509, 511 (2d Cir. 1991). *See also* Joseph P. Hart, *From Facts to Form: Extension and Application of the Feist “Practical Inevitability” Test and Creativity Standard*, 22 GOLDEN GATE U. L. REV. 549, 553 (1992).

<sup>59</sup> This is described as “thin” copyright protection. *See* David E. Shipley, *Thin But Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91 (2007).

<sup>60</sup> Brad Bedingfield, *Copyrighting Medieval Literature: Editing and Publishing the Pre-Modern Public Domain*, 28 COLUM. J.L. & ARTS 213, 217–19 (2005). The required amount of input remains as minimal as before, so that the “thin” protection does not become “anorexic” protection. *Key Publ’ns*, 945 F.2d at 515 (“While . . . the ‘copyright in a factual compilation is thin,’ we do not believe it is anorexic;”) (quoting *Feist*, 499 U.S. at 349).

ing the functionality of the work.<sup>61</sup> In sum, the U.S. position is that, to be original, works must be both the product of the skill and labor of the author, and at least to some extent, the creation of the author.

The Canadian position on originality was only recently settled.<sup>62</sup> As late as 1997, the Federal Court of Appeal in *Tele-Direct (Publications) Inc. v. American Business Information Inc.*<sup>63</sup> held that as a result of the North American Free Trade Agreement ("NAFTA"), Canadian courts could not accept a mere "sweat of the brow" test, and should adopt the "creative spark" test from *Feist*.<sup>64</sup> However, in 2002, this decision was partially disagreed with by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Soc. of Upper Canada*,<sup>65</sup> where the court decided to seek a "middle path" between the tests of creativity and of labor or industrial collection.<sup>66</sup> The court observed that while the U.K. test set "too low" a standard, the U.S. test set the standard "too high."<sup>67</sup> Instead, the court advocated a test requiring the exercise of enough skill and judgment so as not to make the expression a purely mechanical exercise.<sup>68</sup> If viewed carefully, this middle path seems to be a "middle path" in name alone, and appears almost identical to the U.S. creativity-based approach. The Canadian test is functionally the same as the U.S. test because both require that the author be creative only to an extent, and exercise his own judgment, uninfluenced by considerations of the eventual function of the work or by the applicable standards or practices.<sup>69</sup>

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<sup>61</sup> Brad Bedingfield, *Copyrighting Medieval Literature: Editing and Publishing the Pre-Modern Public Domain*, 28 COLUM. J.L. & ARTS 213, 221 (2005). Thus, the author must make *unforced non-obvious* choices—choices not influenced by extrinsic considerations of function—in order for the work to be original. *Matthew Bender & Co.*, 158 F.3d at 682. For instance, an alphabetical arrangement of facts would not be copyrightable because it would be unoriginal. This is based on two-fold reasoning: (1) copyright protects expression, not the function served by the subject matter; and (2) the arrangement is obviously not a product of any original input by the author at all.

<sup>62</sup> Louise Longdin, *Copyright Protection for Business Systems and Surveys: Disentangling Fact, Form and Function*, 11 N.Z. BUS. L. Q. 161, 175 (2005).

<sup>63</sup> [1998] 2 F.C. 22 (Can.).

<sup>64</sup> *Id.* at paras. 29–38; see also David Vaver, *Canada's Intellectual Property Framework: A Comparative Overview*, 17 INTELL. PROP. J. 125, 144–46 (2004).

<sup>65</sup> [2004] SCC 13 (Can.).

<sup>66</sup> *Id.* at para. 16.

<sup>67</sup> *Id.* at para. 24.

<sup>68</sup> *Id.* at para. 25.

<sup>69</sup> The U.S. Supreme Court was quite clear in *Feist* that the standard of creativity required was *not* high, and that all that was required was that the work should involve *some* creative process on the part of the author. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345

The U.S. standard for originality is somewhat similar to the standard in civil law countries like France<sup>70</sup> and Germany.<sup>71</sup> The traditional originality test in these countries is that the work “must express or reflect the author’s personality,” the internal turmoil “”of the author.<sup>72</sup> For works not inherently requiring some creativity (such as novels, plays, sketches, etc.), a test very similar to the U.S. test has been adopted by French courts —labor itself is insufficient for originality; there must be *something* in the work that shows the personality of the author.<sup>73</sup> Thus, the question is all about making creative choices. The German law, for instance, requires a work to be the “personal intellectual creation” of the author,<sup>74</sup> while European Community law on protection for computer programs requires that a program be an “intellectual creation” to be copyrightable.<sup>75</sup>

It is currently unclear what standard of originality is followed in India, as Indian courts have not made any clear pronouncements on the concept of originality.<sup>76</sup> However, in various cases, the Indian judiciary has emphasized the fact that India also follows the “sweat of the brow” test.<sup>77</sup> Courts have persistently stated that the condition of originality requires that skill, labor or judgment be exerted by the author, as it would be unfair to deprive an author of the

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(1991). This is substantially the same as the “half-way house” approach laid down by the Canadian Supreme Court. *CCH Canadian Ltd.*, [2002] 4 F.C. 213, at para. 16–25.

<sup>70</sup> Gervais, *supra* note 38, at 968–69.

<sup>71</sup> See Bundesgerichtshof [BGH] [Federal Court of Justice] May 9, 1985, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 94 (F.R.G.).

<sup>72</sup> Gervais, *supra* note 38, at 968.

<sup>73</sup> *Id.* at 969; see Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Jan. 18, 1999, *Juris-Data* 043760; Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., May 22, 1990, *Légipresse* 1990, I, at 67; Cour d’appel [CA] [regional court of appeal] Paris, Dec. 18, 1924, D.H. 1925, 30; Cour d’appel [CA] [regional court of appeal] Paris, 4e ch., Mar. 21, 1989, 142 RIDA 333, 338–39 (“Harrap’s” case”).

<sup>74</sup> Copyright Act, § 2 (2), contains the provision that a copyright work must be a “personal individual creation” (“eine persönliche geistige Schöpfung”); “Personal intellectual creations alone shall constitute works within the meaning of this Law”. Copyright Act, § 2 (2) (F.R.G.).

<sup>75</sup> Council Directive 91/250 of 14 May 1991 on the Legal Protection of Computer Programs, art. 1(3), 1991 O.J. (L122).

<sup>76</sup> Ranjit Kumar, *Database Protection: The European Way and the Impact on India*, 45 IDEA 97, 115 (2004).

<sup>77</sup> *Indian Express Newspaper (Bombay) Private Ltd. v Jagmohan*, A.I.R. 1985 Bom. 229; *E. Book Co. v. D.B. Modak*, (2008) 1 SCC; *Dr. Reckeweg & Co. GmbH. & Anr. v. Adven Biotech Private Ltd.*, MANU/DE/0961/2008; *Mohini Lohan Singh v. Sita Nath Basak*, A.I.R. 1931 Cal. 233.

fruits of his labor.<sup>78</sup> Thus, it would seem that in India, no creativity is necessary for originality to exist. Interestingly however, a number of Indian cases refer to not only "skill and labor," but "*original* skill and labor,"<sup>79</sup> seemingly indicating that originality requires something more than merely exertion of skill and labor. In a recent case, the Delhi High Court, while considering the question of whether the head notes of reported cases constituted original expression, referred expressly to the *Feist* decision, and adopted a "modicum of creativity" standard, along with the standard of skill and labor.<sup>80</sup> While certain writers argue that this means that the court has adopted a "middle path,"<sup>81</sup> we feel that because the U.S. position naturally requires a certain amount of input (skill and labor) along with a "creative spark," the decision is actually in keeping with the U.S. position on originality.

#### IV. THE CONCEPT OF COPYRIGHT RELATED TO ORIGINALITY: UNDERSTANDING ORIGINALITY BASED ON THE MEANING OF COPYRIGHT

It is obvious that copyright law must strike a balance between protection of copyright, which provides an incentive for creation, and overprotection, which creates monopolies and deprives the world of the benefits of a new creation.<sup>82</sup> Many authors seek to understand the how courts in different jurisdictions differ with respect to how much creativity is required in originality, and the policy considerations they feel obliged to protect.<sup>83</sup> However, we submit that courts ought not to consider policy considerations at all because there are other

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<sup>78</sup> Govindan v. Gopalakrishna, 1955 A.I.R. Mad. 391, paras. 8–10; see Burlington Home Shopping v. Rajnish Chibber, 1995 P.T.C. (15) 278; McMillan v. Suresh Chunder Deb, I.L.R. 17 (Cal.) 951, 961.

<sup>79</sup> LAL, *supra* note 13, at 110 (emphasis added).

<sup>80</sup> E. Book Co. & Ors. v. Navin J. Desai & Anr., A.I.R. 2001 Del. 185, paras. 30, 36, & 38. This was affirmed in an appeal to the Supreme Court in *Eastern Book Co. v. D.B. Modak*, (2008) 1 S.C.C., at paras. 26, 27, 55–58 & 60.

<sup>81</sup> See Kumar, *supra* note 76, at 116.

<sup>82</sup> Alexandra Sims, *Copyright's Protection of Facts and Information*, 12 N.Z. BUS. L. Q. 358, 366 (2006) ("[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The challenge facing this Court, and copyright law generally, is to find a fair and appropriate equilibrium that achieves both goals.").

<sup>83</sup> Daniel J. Gervais, *The Compatibility of the "Skill and Labour" Originality Standard with the Berne Convention and the TRIPS Agreement*, 26:2 EUR. INT. PROP. REV. 75, 77–78 (2004).

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mechanisms to fulfill whichever policy objectives countries deem important (as shall be highlighted subsequently). The question of which policy objective is better is less important than the question of what exactly copyright is supposed to be protecting.<sup>84</sup> Is copyright meant as a general protection for anything that a person writes in order to incentivize labor and creation of work not involving any creativity? Or is it a protection for only that which is creative in form or on the surface?<sup>85</sup>

### A. *Copyright in International Instruments*

International agreements on copyright seem to suggest that copyright is given only with respect to the form of expression. The foremost international treaty on copyright is the Berne Convention for the Protection of Literary and Artistic Works.<sup>86</sup> While the Convention does not itself define the term “originality,” and does not even expressly state the requirement of originality for copyrightability, there are indications in the Convention and in the preparatory works to the Convention that the works protected by copyright should be original, and also indications on what originality means. Based on these indications, the term “originality,” as it is understood by the Convention, is closely linked to the author’s creativity.<sup>87</sup>

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<sup>84</sup> In other words, copyright involves a specific category of rights in a specific subject matter. We believe that what these rights are—what copyright actually *is*—cannot be changed merely for the purpose of fulfilling a policy objective, such as greater protection of the fruits of labor.

<sup>85</sup> One author argues that the fact that *Feist* was decided based on an interpretation of the U.S. Constitution as requiring creativity is proof that the question of creativity is one of policy. George Wei, *Telephone Directories and Databases: The Policy at the Helm of Copyright Law and a Tale of Two Cities*, INTELL. PROP. Q. 316, 317–20 (2004). We are of the opinion that this in fact shows that the basic question is of what a copyright seeks to protect.

<sup>86</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9 1886, S. TREATY DOC. NO. 99-27 [hereinafter Berne Convention], available at [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf). The Convention establishes “national treatment” for foreign nationals of member countries as well as setting certain minimum standards of copyright protection. *Id.* at art. 5 & 7.

<sup>87</sup> Article 14bis contains the sole reference to the term “original” in the context in which we are examining it. *Id.* at art. 14bis(1). This section refers to cinematographic work. *See id.* (“Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the *same rights as the author of an original work*, including the rights referred to in the preceding Article.”) (emphasis added). This clearly shows that works protected under the Berne Convention must be “original.” The term “original” from this section has been described in the preparatory materials to the Convention

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The Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPS Agreement")<sup>88</sup> signed by the signatories to the WTO Agreement,<sup>89</sup> incorporates within it the substantive provisions of the Berne Convention.<sup>90</sup> This means that the preparatory material of the Berne Convention is also incorporated by inference into the TRIPS Agreement.<sup>91</sup> It follows that the requirement of creativity in originality can be imputed into the TRIPS Agreement as well. Thus, this concept of the term "originality" and of copyright law in general is now applicable not only to signatories of the Berne Convention, but to all members of the WTO.

In addition, the TRIPS Agreement itself provides that WTO member states protect as literary works such data compilations that, by virtue of their selection or arrangement, constitute "intellectual creations."<sup>92</sup> This implies that purely factual works, which are *not* or do *not* contain "intellectual creations," do not receive copyright protection. In this manner, both the Berne Convention and the TRIPS agreement seem to require creativity in originality for copyright to subsist.<sup>93</sup>

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as having a meaning akin to "personal and original." Gervais, *supra* note 38, at 962. Therefore, the natural inference is that the term "original" involves a degree of personal creativity.

<sup>88</sup> Agreement on Trade-Related Aspects of Intellectual Property, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter TRIPS Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>89</sup> The Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 299, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

<sup>90</sup> TRIPS Agreement, *supra* note 88, at art. 9(1).

<sup>91</sup> The Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331, allows preparatory work of an international instrument to be considered in the interpretation of the instrument. Also, the WTO Panel has specifically declared that the preparatory material of the Berne Convention is incorporated into the TRIPS Agreement along with the substantive provisions of the Convention. See Gervais, *supra* note 38, at 961.

<sup>92</sup> TRIPS Agreement, *supra* note 88, at art. 10(2); ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 279 (2003).

<sup>93</sup> The North American Free Trade Agreement (NAFTA), signed between Canada, the United States and Mexico in 1993, also has for a standard of "intellectual creation" for copyright to be granted in factual works. North American Free Trade Agreement art. 1705, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), available at <http://www.nafta-sec-alena.org/en/view.aspx?x=343>. It was on the basis of this provision that the Canadian court in *Tele-Direct* applied standards of intellect and creativity when determining whether a particular work was original. *Tele-Direct (Publ'ns) Inc. v. Am. Bus. Info. Inc.*, [1998] 2 F.C. 22, paras. 29–38 (Can.). Though this case was subsequently overruled by *CCH*, and the NAFTA standard was not applied, it remains evident that the standard actually specified in NAFTA requires a level of creativity within the requirement of originality. *CCH Canadian Ltd. v. Law Soc. of Upper Can.*, [2002] 4 F.C. 213, paras. 25–28 (Can.).

It may be argued that the TRIPS Agreement and the Berne Convention do not prohibit the adoption of more protective measures by individual countries and only lay down *minimum* standards for copyright protection, so that countries are therefore free to increase protection to individual effort through the “sweat of the brow” test. Notwithstanding this, the point that we are trying to make involves the nature of copyright itself—that copyright means protection of form of expression.

### **B. Theory of Copyright**

A logical examination of the conventionally accepted definition of copyright also supports this theory. Copyright, it is widely agreed, protects the expression of an idea in a particular way, not the idea itself.<sup>94</sup> From this central concept, two derivative principles follow. First, there is a clear difference between form and function, and second, there is a difference between form and fact.<sup>95</sup> Copyright is thus intended to protect form and not function or fact. It is well-established therefore, that with respect to the first principle, copyright does not protect artistic or literary techniques, or industrial, financial, or economic processes.<sup>96</sup> The Australian case of *Victoria Park Racing & Recreation Grounds Company Ltd. v. Taylor*<sup>97</sup> is a classic illustration of the second principle. In this case, the plaintiff sought copyright protection for an expression of events recorded in a race book, but the court was quick to point out that copyright does not “give any person an exclusive right to state or to describe particular facts.”<sup>98</sup> There can be no monopoly over facts created by first expression of such facts.<sup>99</sup> “A person cannot by first announcing that a man fell off a bus or

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<sup>94</sup> See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985); *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Baker v Selden*, 101 U.S. 99 (1879). Though this distinction may not be made expressly in statute in many jurisdictions, the distinction is now widely regarded as settled law.

<sup>95</sup> Longdin, *supra* note 62, at 166.

<sup>96</sup> *Affiliated Enters., Inc. v. Gruber*, 86 F.2d 958 (1st Cir. 1936); *Drugtax, Inc. v. Systems Programming Corp.*, 147 U.S.P.Q. 313 (M.D. Pa. 1965); *Briggs v. N.H. Trotting & Breeding Ass’n, Inc.*, 191 F. Supp. 234 (D.N.H. 1960); see *Baker v. Selden*, 101 U.S. 99 (1879); *Norowzian v. Arks Ltd.*, (No. 2) [2000] F.S.R. 363.

<sup>97</sup> (1937) 58 C.L.R. 479 (Austl.).

<sup>98</sup> *Id.*, para. 16 of the Judgment delivered by Latham, C.J.

<sup>99</sup> RALPH S. BROWN & ROBERT C. DENICOLA, *CASES ON COPYRIGHT UNFAIR COMPETITION AND RELATED TOPICS BEARING ON THE PROTECTION OF AUTHORSHIP* 86 (2002).

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that a particular horse won a race prevent other people from stating those facts.”<sup>100</sup>

It is understood that a person cannot have monopoly over facts even if he had expended a large amount of labor to obtain those facts.<sup>101</sup> Thus, to allow copyright for a statement of fact (not for the expression of the statement) would violate this basic principle. Yet, this is precisely what courts have done by applying the “industrious collection” or “sweat of the brow” test of originality.

Another way to examine the inconsistency of the “sweat of the brow” test with the rest of copyright law is to look at whether copying another work would give the copier a copyright for the reproduction. It has been stated time and again that copying a work (even one not protected by copyright) does not give the copier any rights in copyright,<sup>102</sup> despite any skill or labor the copier may have used in executing the copy. This principle has been widely accepted by courts across jurisdictions, including the same English courts that have laid down the “skill and labor” test.

In *Interlego A.G. v. Tyco Industries Inc.*,<sup>103</sup> for instance, the Privy Council was of the opinion that:

If in copying something is added, it is a question of degree whether that makes it an original artistic work or not. The skill and labor in doing the copying is irrelevant. There must be sufficient new material in a derivative work to give rise to copyright . . . In the case of a redrawing the skill in copying is not relevant, because it is not creative skill.<sup>104</sup>

“There must,” the court stated, “be original creative input by the author.”<sup>105</sup> If this is so, how can a rule that requires only skill and labor for originality be con-

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<sup>100</sup> *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor*, (1937) 58 C.L.R. 479 (Austl.), para. 16 of the Judgment delivered by Latham C.J.

<sup>101</sup> *E.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Fin. Info., Inc. v. Moody’s Investors Serv. Inc.*, 751 F.2d 501 (2d Cir. 1984); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981); *Hoehling v. Universal City Studio, Inc.*, 618 F.2d 972 (2d Cir. 1980); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957).

<sup>102</sup> *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 58 (1884); *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 753 F.2d 1565 (11th Cir. 1985); *L. Baitlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976).

<sup>103</sup> [1989] 1 A.C. 217 (P.C.) (Eng.).

<sup>104</sup> *Id.* at 232–33.

<sup>105</sup> *Id.* at 232.

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sistent with this principle? A reproduction of fact, however assiduously and painstakingly collected, is but a copy of those facts.<sup>106</sup>

### C. *Originality Defined to Fulfill Policy: Fallacy in Logic*

Rather than an actual test of copyrightability, the “skill and labor” test of originality thus appears to be used as a measure to protect persons who take pains to produce or collect information from theft of such information.<sup>107</sup> The courts constantly give effect to this test because it would not be fitting for the law to allow the appropriation of the effort of one person by another person.<sup>108</sup> In other words, through the use of copyright law, courts are looking to implement the principle of “thou shall not steal” with respect to a person’s effort to collect facts and express them.<sup>109</sup> However, it is not the mandate of copyright to protect all effort.<sup>110</sup> Copyright exists only to protect form of expression, and this

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<sup>106</sup> To argue that the facts serve a different function here due to the fact that they have been collected would not allow the grant of copyright either, due to the principle that function can never be protected by copyright, as explained previously.

<sup>107</sup> Gervais, *supra* note 38, at 950.

<sup>108</sup> *See* *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 W.L.R. 273 (Eng.) at 291–92; *Blacklock & Co. Ltd. v. C. Arthur Pearson Ltd.*, [1915] 2 Ch. 376 (Eng.) at 383; T. R. SRINIVASA IYENGAR, *THE COPYRIGHT ACT*, 1957 102 (6th ed. 2000).

<sup>109</sup> This need to protect and reward all useful efforts of a person is based on Lockean natural rights theory, which states that when, a person mixes her labor with something in the commons (here facts or information), she makes those facts or pieces of information her property. *See* Sims, *supra* note 82, at 369.

<sup>110</sup> There are a number of other legal mechanisms that can be put into place for such protection. These include: (1) remedies against theft of information based on contract, such as confidentiality clauses; (2) legislation against unfair competition and for trade secret protection; (3) sui generis legislation with regard to the protection of effort involved in the collection of information; and (4) torts based liability for misappropriation. While the first two mechanisms may not provide the level of protection copyright does, as the first involves rights against particular persons (*rights in personam*) while copyright gives rise to rights against the whole world (*rights in rem*), and the second only provides protection against competitors, the last two mechanisms can be adequately developed to protect the labor which copyright cannot protect. *See* Sims, *supra* note 82, at 367–69; Wei, *supra* note 85 at 350–56. In fact, there are examples of effective sui generis protection of labor of this kind in today’s world, such as the European Union’s Database Directive, adopted in 1996, which directed member states to have two levels of protection for databases. Under this directive, any original form of arrangement or selection of data is protected by copyright, and the data itself is given sui generis protection. Longdin, *supra* note 62, at 177–79. A database treaty along the same lines was tabled before the World Intellectual Property Organization (WIPO) at the 1996 WIPO Diplomatic Conference, but was not considered. *See* World Intellectual Property Organization, Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to Be Considered by the Diplomatic Conference, CRNR/DC/6, 6 (Aug.

means that it must protect the creative input of authors with respect to such form.

#### ***D. A Slight Change in Terminology***

The U.S. perception of originality therefore seems to be the correct perception, as far as the meaning of copyright is concerned. We feel, however, that a slight change in terminology would be beneficial to better understand the creativity requirement for copyrightability.

In order for a work to be copyrightable, it must be an original expression. The inclusion of the requirement of creativity within the condition of originality, in our opinion, is what creates a large part of the uncertainty as to the level of inventiveness required for a work to be copyrightable. The idea that a modicum of creativity is needed for a work to be original may cause the creativity requirement to be confused with, or understood as, a requirement of novelty, of the sort present in patent law.

In actuality, the very expression that is protected must be created, because the term "expression" means "form," and form by itself implies an amount of creative input. Thus, it might be beneficial to classify the creativity requirement as a part of the expression requirement, which might then be interpreted only as independent input, instead of classifying it as a part of originality. Nimmer puts forth a similar proposition when he says: "a greater clarity of expression is perhaps achieved by regarding originality and creativity as separate elements," with creativity being a "necessary adjunct" to originality, rather than an element of originality.<sup>111</sup> We therefore submit that to classify creativity as a necessary part of the "expression" of a work rather than as a part of originality would make the term more comprehensible and less ambiguous.

#### **V. CONCLUSION**

The purpose of copyright law is to reward those who produce new works and new expressions of ideas. However, this does not mean that copyright should be granted in all circumstances where there has been labor involved

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30, 1996). The United States has also, time and again, considered the possibility of such sui generis protection. See Julie Wald, *Legislating the Golden Rule: Achieving Comparable Protection under the European Union Database Directive*, 25 *FORDHAM INT'L L.J.* 987 (2002). The tort of misappropriation has also been applied by courts to protect the labor of individuals in uncopyrightable works. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231–32 (1918).

<sup>111</sup> I NIMMER & NIMMER, *supra* note 21, at § 2.01.

in the creation of some sort of expression. Only expression that is creative is the proper subject matter for the protection of copyright.

To argue otherwise would be akin to saying that because the purpose of having a burglary law is to protect the actual property of persons, even in cases where a person's property was taken as a result of fraud, the perpetrator of the crime should be punished under the law prohibiting burglary. Some courts have done precisely this by applying a test of merely skill and labor to determine whether works are copyrightable, and ignoring the requirement that there must be some creativity involved to make it copyrightable.

This Article has considered the sum of the law of originality in various jurisdictions, pointing out that originality is a well-established element of copyrightability and that it requires not novelty of thought or even inventiveness of expression, but only some independent input of the author.<sup>112</sup> The input is all that acquires copyright protection. The Article then considered the question of whether creativity is necessary for establishing originality. Having examined the positions of courts in various jurisdictions, it analyzed whether a modicum of creativity is required in originality based on the meaning of copyright itself, understood through both international agreements as well as logical scrutiny. In conclusion, in order for copyright to exist, some creativity is required in the work. By creativity, we mean that the work protected cannot be merely factual representations, no matter how much effort has gone into putting them together. Only a creative form of any work can be protected by copyright.

This Article has suggested, however, that courts should delineate the requirement of creativity as a separate requirement from that of originality. Perhaps including it within the requirement that expressions and not ideas (or facts) are protected might give greater clarity to the concept of creativity.

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<sup>112</sup> See *supra* Part II.